North Carolina Employment Law Guide

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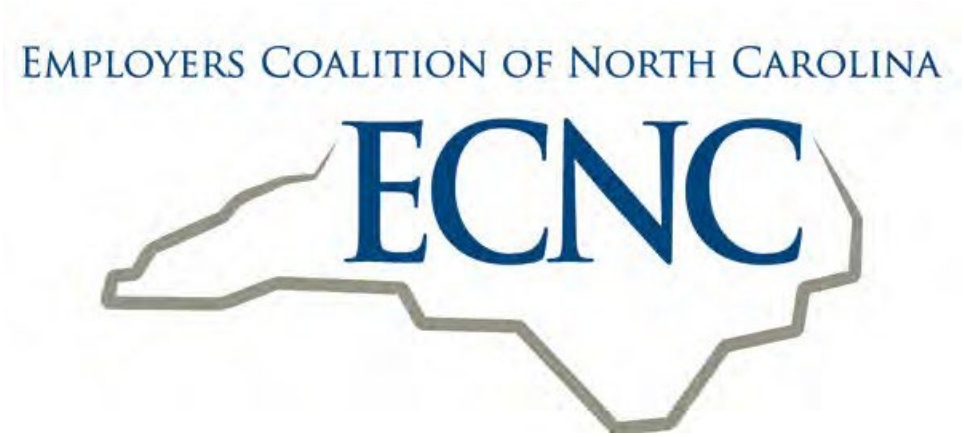
This North Carolina Employers' Law Guide was prepared as a reference manual for North Carolina employers through a joint cooperative effort of **ECNC** *(Employers Coalition of North Carolina)* which is comprised of **Catapult** *(formerly CAI and TEA)* and **WCI, Inc.** *(Western Carolina Industries, Inc.)*. This guide provides an overview of the employment laws affecting North Carolina employers and is intended to help employers comply with the numerous laws affecting the workplace and to prevent costly and unnecessary litigation.

This publication is designed to provide accurate and authoritative information in regards to the subject matter covered. It is not intended nor designed to render legal advice to its readers. If legal advice or other expert assistance is required, the services of a competent professional should be sought.



Use of This Guide

All sections of the guide are in the same format.

A.

BACKGROUND - Section A is always background for the law or laws covered.

B.

HOW THE LAW WORKS - Section B outlines the provisions of each law and coverage.

C.

ACTION REQUIRED BY EMPLOYERS - If there are posters, forms, reports, affirmative action, etc, they are outlined in Section C.

D.

TIPS - Section D is editorial comment, suggestions for compliance and ideas to avoid problems.

A Topical Index is included for your convenience.

Acknowledgements

The North Carolina Employment Law Guide was written and edited by the law firm of Ogletree, Deakins, Nash, Smoak and Stewart, P.C. Ogletree Deakins represents management in every area of labor and employment law. The firm has more than 800 attorneys focusing on labor and employment law in 53 offices across 31 states and across the globe. From Los Angeles to Miami, Ogletree Deakins represents employers of all sizes, from small and medium size companies to Fortune 50 corporations.

Ogletree Deakins' primary areas of practice include:

Labor and Employment Law
Litigation
Immigration
Class Action Defense
Workplace Safety and Health
Employee Benefits
Governmental Affairs
Workplace Diversity
Client Training

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Major Federal Laws Affecting the Employment Relationship

Law	Regulates	Agency	Employers Covered	Potential Fines
Employers with 1+ Employees				
Employee Polygraph Protection Act (EPPA)	• Generally prohibits administering polygraphs to applicants & current employees	US DOL	• All employers except: -public employers -certain limited other industry exceptions	• Up to $10,000 per violation. • An employer who violates the law may be liable to the employee or prospective employee for legal and equitable relief, including employment, reinstatement, promotion and payment of lost wages and benefits.
Fair Labor Standards Act (FLSA)	• Established wage and hour stands for most public and private employers • Basic requirements include: -**minimum wage** for each hour worked by nonexempt employees (currently $7.25 per hour) -**overtime** pay at a rate of 1.5 times the employee's regular rate for all hours worked by nonexempt employees over 40 hours in any workweek -special rules for tipped employees -payment of wages on regular paydays and restrictions on wage deductions -employer recordkeeping -equal pay -break time requirements for nursing mothers -special rules for child labor -special rules for state and local government employment	US DOL	• Employers are covered regardless of the number of employees if they are **engaged in interstate commerce or in the production of goods for commerce** at organizations with at least $500,000 in annual business or sales • Employees may be covered if they are employed by an enterprise engaged in commerce or the production of goods for commerce • Regardless of business or sales, the FLSA also covers hospitals, residential medical care providers, schools, preschools and governments.	• Up to $1,100 for general wage payment violations, minimum wage. The Department of Labor may recover back wages either administratively or through court action, for the employees that have been underpaid in violation of the law. Violations may result in civil or criminal action Employment, reinstatement, promotion, lost wages and an additional equal amount as liquidated damages • Up to $11,000 per child labor violation and $50,000 per child death or serious injury.

Law	Regulates	Agency	Employers Covered	Potential Fines
Equal Pay Act (EPA)	• Amends the FLSA and prohibits wage discrimination based on sex	EEOC	• Employers covered by the FLSA are covered	• Willful violations are subject to a fine of up to $10,000 per violation, imprisonment, liquidated damages, attorney's fees and costs.
Fair Credit Reporting Act (FCRA)	• Disclosure requirements for employers who use consumer reporting agencies for information (such as background & credit checks) when evaluating applicants or employees.	US Federal Trade Commission and CFPB	• All employers regardless of the number of employees *Also impacted by state and local laws (ex "Ban the Box", "Second Chance", etc)	• Actual damages, punitive damages, costs and attorney's fees. • Risk for class action
Uniformed Services Employment & Reemployment Rights Act (USERRA)	• Governs employee's rights when returning to work after serving in the uniformed services for, in most cases, less than 5 years. • Prohibits discrimination based on military service or military status	US DOL	• All employers regardless of the number of employees.	• Pay for lost wages/benefits resulting from noncompliance; and for willful violations. • Pay an additional amount (equal to lost wages or benefits) as liquidated damages.
The Immigration Reform & Control Act (IRCA)	• Requires employers to verify the identity and employment eligibility of their employees	US Citizen & Immigration Services	• All employers: -are prohibited from hiring or continuing to employee any foreign worker who is not authorized for employment -must complete a Form I-9, the employment eligibility verification form, for all individuals hired to work in the US -are prohibited from discriminating by requiring employees to present more or different documents during the Form I-9 process -are prohibited from retaliating against any employees asserting their rights under IRCA	• Civil fines and/or Criminal penalties (when there is a pattern or practice of violations). For more information on the current amounts please refer to the Civil Monetary Penalties Inflation Adjustment for 2017. • Debarment from government contracts • A court order requiring the payment of back pay to the individual discriminated against • A court order requiring the employer to hire the individual discriminated against

Law	Regulates	Agency	Employers Covered	Potential Fines
Occupational Safety and Health Act (OSHA)	• Regulates workplace health and safety, including ensuring that work environments are free of recognized health hazards. • Requires employers to records certain work-related injuries and illnesses unless they: -had ten or fewer employees (company wide) at all times during the previous calendar year; or -operate in one of the specific low-hazard industries identified by OSHA	N.C. Dept. of Labor, OSHA	• Employers with at least one employee are covered, including nonprofit organizations (except for certain recordkeeping requirements only apply to employers with more than ten employees) • NCOSH: covered employers as "any person engaged in a business who has employees, including any state or political subdivision of a state, but does not include the employment of domestic workers in the place of residence of his or her employer". Some classes of employees are exempted from coverage including employees of the federal government and certain railroad, maritime, and mining employees.	• Fines up to $7,000 for nonserious and serious violations. • Fines up to $14,000 for injuries to children under 18. • Fines up to $70,000 for repeat and/or willful violations. • Willful violations causing death bring potential imprisonment up to six months and additional fine up to $10,000 or $20,000 for children under 18. • Fines up to $7,000 per day for failing to abate safety violation and/or failing to post appropriate notices.
Section 1981 of the Civil Rights Act	• Prohibits discrimination based on race	Courts	• Employers are covered regardless of the number of employees, except the federal government is not liable as an employer under Section 1981	• Penalties and fines
National Labor Relations Act (NLRA)	• Defines and protects the rights of employees and employers • Encourages collective bargaining • Eliminates certain labor and management practices that are harmful to the general welfare	NLRB	• Most private employers are covered, but specifically excluded are: -agricultural laborers -domestic servants -individuals employed by parents or spouse -independent contractors -supervisors -employees covered by the Railway Labor Act -individuals working for federal, state or local governments	• Cease and desist orders for unfair labor practices. • Posting notice of violation for 60 days. • Orders to bargain. • Reinstatement and back pay for employees discriminated against due to union affiliation.
Nursing Mothers Amendment (NMA)	• Requires employers to provide for unpaid breaks to nursing mothers so they can express milk for the 1st year of their child's life • Employers must provide a room other than a bathroom for expressing milk	US DOL	Covered employers with less than 50 employees are exempted from this provision if they can prove that these breaks would impose an "undue hardship" on the employer meaning that it would cause the employer significant difficulty or expense, however we would caution that claiming undue hardship in this area would be a difficult case to make, thus all efforts should be made to comply with the amendment	• Penalties and fines

Law	Regulates	Agency	Employers Covered	Potential Fines
Employers with 2+ Employees				
• Health Insurance Portability Accountability Act (HIPAA)	• Portability and nondiscrimination provisions which apply to any employer-sponsored group medical plan that provides medical care for employees and their dependents through insurance, reimbursement or otherwise. Also provides national standards to protect individuals personal health information and give patients increased access to their medical records. The privacy regulations apply to covered entities	HHS	• All employers may be required to protect certain personal health information, however certain "covered entities" may have additional compliance requirements.	• Fine of up to $5,000 or imprisonment for any person who willfully violates notice and disclosure requirements • Penalties for a corporation can be as high as $100,000 • Additional taxes and fines

Law	Regulates	Agency	Employers Covered	Potential Fines
Employers with 15+ Employees				
Title VII of the Civil Rights Act of 1964 (Title VII)	• Prohibits employment discrimination against individuals based on their: -race -color -national origin -religion and -sex (including gender and pregnancy)	EEOC	• Employers with at least 15 employers are covered. • Also covered are: -agents of covered employers; -joint labor-management committees on training or apprenticeship; and -US companies operating overseas (for US employees) unless it violates the foreign nation's law • Specifically excluded from coverage: -the US government -corporations owned by the US government -Indian tribes -designated District of Columbia departments and agencies -bona fide tax-exempt private membership clubs -religious groups (for religious discrimination only)	• Up to $300,000 per person affected. • Injunctions, reinstatement or hiring, with or without back pay, other equitable relief deemed appropriate by the court, reasonable attorney's fees (including expert fees). • $100 per day fine for not posting requirements. • $500 fine and potential imprisonment for resisting or interfering with EEOC investigation.
Pregnancy Discrimination Act (PDA)	• Prohibits discrimination based on pregnancy, childbirth or related medical conditions with any aspect of employment including pay, job assignments, promotions, trainings, layoff, fringe benefits, firing or any other term or condition of employment	EEOC	• Employers with at least 15 employees are covered • Nearly identical to Title VII employer coverage	• Penalties and fines
Americans with Disabilities Act (ADA)	• Prohibits employment discrimination based on qualified individuals with a disability and individuals who are regarded as having a disability	EEOC	• Employers with at least 15 employees are covered • Nearly identical to Title VII employer coverage	• Maximum civil penalty for a first violation $75,000; for a subsequent violation maximum is $150,000 • Injunctions, reinstatement or hiring, with or without back pay, other equitable relief deemed appropriate by the court, reasonable attorney's fees (including expert fees).
	• Requires employers to reasonably accommodate qualified individuals with a disability unless it causes an undue hardship		• The Rehabilitation Act offers parallel protections for federal employees and entities receiving federal funds	• $500 fine and potential imprisonment for resisting or interfering with EEOC investigation.
Genetic Information Nondiscrimination Act (GINA)	• Prohibits discrimination against applicants and employees based on genetic information including: -family medical history -family members' genetic tests	EEOC	• Employers with at least 15 employees are covered • Identical to employer coverage under Title VII	• Penalties and fines

Law	Regulates	Agency	Employers Covered	Potential Fines
Employers with 20+ Employees				
Age Discrimination in Employment (ADEA)	• Prohibits employment discrimination against employees and applicants age 40 or older • Bona fide occupational qualification is an exception to ADEA	EEOC	• Employers with at least 20 employees are covered • Nearly identical to Title VII employer coverage, except for a minimum of 20 employees	• Up to $300,000 per person affected. • Injunctions, reinstatement or hiring, with or without back pay, other equitable relief deemed appropriate by the court, reasonable attorney's fees (including expert fees). • $100 per day fine for not posting requirements. • $500 fine and potential imprisonment for resisting or interfering with EEOC investigation.
Consolidated Omnibus Budget Reconciliation Act (COBRA)	• Provides Group Health Insurance Continuation for employees and qualified beneficiaries after a qualifying event	US DOL IRS HHS	Employers with at least 20 employees that have a group health plan	• Excise tax of $100 per day per qualified beneficiary for non-compliance. • Up to $100 per day for failing to provide notice. • Private lawsuits.

Law	Regulates	Agency	Employers Covered	Potential Fines
Employers with 50+ Employees				
Family Medical Leave Act (FMLA)	• Requires covered employers to provide covered employees with up to 12 weeks unpaid protected leave during a 12-month period for a qualifying reason.	US DOL	• Employers with at least 50 employees are covered • Employees are covered only if they have worked for a covered employer at least: -12 months (not necessarily consecutive) & -1,250 hours during the 12 months before the first day of requested leave • Distinct rules apply for airline flight crew employees and military-related leave • Employees are specifically excluded from coverage if: -they work at a facility with fewer than 50 employees and -the employer has fewer than 50 employees within a 75 mile radius	• Damages equal to wages, salary, employment benefits, or other compensation denied or lost; any actual monetary losses, interest calculated at the prevailing rate. • Liquidated damages; and appropriate equitable relief, including employment, reinstatement and promotion, reasonable attorney's fees, reasonable expert witness fees, and other costs of the action.
Patient Protection an Affordable Care Act (PPACA)	• PPACA regulates the U.S. healthcare system through market reforms and consumer protections	US DOL IRS HHS	• All employer-sponsored group health plans, regardless of size; and • Employers with 50 or more full-time equivalent employees (Employees working 30 or more hours per week are generally treated as full-time employees for this purpose).	**All Employer-Sponsored Group Health Plans** • Employer-sponsored group health plans that fail to comply with PPACA's market reforms (ex. Out of pocket limits, coverage of preventive care at no cost, no pre-existing condition exclusions, and others) may be required to pay an excise tax of up to $100 per person per day of non-compliance. • If the failure is discovered during an IRS audit, minimum excise tax thresholds will apply. **Employers with 50 or more full-time equivalent employees** • For employers who don't provide coverage, the fee is $2,000 per full-time employee (minus first 30 full-time employees). • For employers who do provide coverage but don't provide coverage meeting minimum-value and affordability requirements, the fee is **the lesser of**: $3,000 per full-time employee receiving subsidies, or $2,000 per full-time employee (minus the first 30). • In general, the fee is only "triggered" if at least one employee shops on the marketplace, and is eligible for a federal premium subsidy.

Law	Regulates	Agency	Employers Covered	Potential Fines
Employers with 100+ Employees				
Worker Adjustment and Retraining Notification Act (WARN Act)	• Requires covered employers to provide 60 days advance notice of a plant closing or mass layoff (as defined in the statute), subject to limited exceptions	Courts	• Employers are covered when they are business enterprises employing: -100 or more employees excluding part-time employees; or -100 or more employees, excluding part-time employees who collectively work 4000 hours each week, excluding overtime	• Back pay for each day of violation • Employee benefits, including medical expenses occurred • Employers that violate the notice requirements to local government units are subject to a civil penalty of up to $500 for each day of violation

Major Federal Laws Affecting the Employment Relationship for Federal Contractors

COVERAGE	LAW	REGULATES	AGENCY	POTENTIAL FINES
Government or District of Columbia construction contracts of $2,000 or more	Davis-Bacon Act	Must pay "prevailing wages" and certain "prevailing" fringe benefits for laborers and mechanics working on public projects.	Department of Labor	• Contract payments may be withheld in sufficient amounts to satisfy liabilities for underpayment of wages and for liquidated damages for overtime violations under the Contract Work Hours and Safety Standards Act (CWHSSA). • Contract termination. • Contractor liability for any costs to the government. • Debarment from future contracts for up to 3 years.
Government contracts of $100,000 or more and all Grant recipients	Drug Free Workplace Act of 1988	Provide drug-free workplaces as a condition of receiving a contract or grant from a Federal agency. The Act proscribes certain steps the employer must take in furtherance of providing a drug-free workplace.	Department of Labor	• Suspension of payments. • Contract termination. • Debarment.from future contracts •
Government contracts or subcontracts of $10,000 or more and $50,000/50 employees	Executive Order 11246	Prohibits covered contractors and federally assisted construction contractors and subcontractors from discriminating in employment against minorities and females. $50,000/50 employees: written affirmative action plan also is required.	OFCCP	• Criminal actions for furnishing false information to any contracting agency or to the Secretary of Labor. • • Cancelling contracts. • Debarment from future contracts • Litigation • Reinstatement and payment of lost wages and benefits.
Prime contracts worth $100,000 or more and subcontracts worth $10,000 or more	Executive Order 13496	Post a required notice informing employees of their rights under the National Labor Relations Act. The requirement to post the employee notice must be included in Federal contracts and subcontracts.	OFCCP	• Cancellation or suspension of existing contracts. • Debarment.
Government contracts or subcontracts of $15,000 or more and $50,000/50 employees	Rehabilitation Act of 1973	Prohibits covered contractors and subcontractors from discriminating in employment against qualified individuals with disabilities. $50,000/50 employees: written affirmative action plan.	OFCCP	• Criminal actions for furnishing false information to any contracting agency or to the Secretary of Labor. • • Cancelling contracts. • Debarment from future contracts • Litigation • Reinstatement and payment of lost wages and benefits.
Government or District of Columbia contracts for certain services of $2,500 or more	Service Contracts Act	Must pay "prevailing wages" and certain fringe benefits to employees who perform work under covered contracts. Examples of covered service contracts include contracts for laundry and dry cleaning, custodial and janitorial work, packing and crating, guard duty, food and cafeteria service and miscellaneous housekeeping work.	Department of Labor	• Contract termination. • Liability for any resulting costs to the government. • Withholding of contract payments in sufficient amounts to cover wage and fringe benefit underpayments owed to employees • Legal action to recover the underpayments. • Debarment from future contracts for up to three years.

Major Federal Laws Affecting the Employment Relationship

COVERAGE	LAW	REGULATES	AGENCY	POTENTIAL FINES
Government contracts or subcontracts of $150,000 or moreand $150,000/50 employees	Vietnam Era Veteran's Readjustment Assistance Act of1974	Prohibits covered contractors and subcontractors from discriminating against protected veterans. $150,000/50: Must take affirmative action to employ protected veterans and prepare written affirmative action plan.	OFCCP	• Criminal actions for furnishing false information to any contracting agency or to the Secretary of Labor.. • • Cancelling contracts • Debarment from future contracts • Litigation. • Reinstatement and payment of lost wages and benefits.
Government orDistrict of Columbia contracts of $10,000 or moreto manufacture or furnishing of materials or goods	Walsh-Healey Public Contracts Act	Must pay covered employees not less than the Fair Labor Standards Act federal minimum wage and overtime pay of at least one and one-half times the worker's regular rate of pay for all hours worked in excess of 40 in a workweek. Employees are covered only if they spend any part of a workweek producing the actual goods to be provided under the federal contract. The Act does not apply to executive, administrative and professional employees, outside salespersons, and certain office and custodial workers.	Department of Labor	• Withholding of contract payments in amounts sufficient to reimburse the underpayment. • Contract cancellation • Debarment from future contracts • • May bring legal action to collect wage underpayment and fines for illegally employing minors and convicts. • .
Government construction contracts of $2,000 or more; Government contracts for certain services of $2,500 or more	EO 13658: Minimum Wage	Establishes new Minimum Wage Rate for certain federal contractors. Current minimum wage for covered federal contractors $10.20. Contracts covered include: Davis Bacon Act, Service Contract Act, Concessions not covered by SCA and contracts in connection with federal property, lands & offering services for federal employees.	Department of Labor	• Payment of wages due • Withholding contract payments • Debarment from future contracts
Government construction contracts of $2,000 or more; Government contracts for certain services of $2,500 or more, concession contracts and contracts in connection with Federal property or lands and	EO 13706: Paid Sick Leave	Establishes Paid Sick Leave for certain Contracts.	Department of Labor	*Payment of wages due *Withholding of contract payments *Contract termination *Debarment from future contracts

COVERAGE	LAW	REGULATES	AGENCY	POTENTIAL FINES
related to offering services for federal employees, their dependents, or the general public. This Executive Order only applies to contracts entered into on or after January 1, 2017				
Government contracts of $10,000 or more	Executive Order No. 13665 : Pay Transparency	Contractors must post the Pay Transparency Nondiscrimination Provision and include it in employee manuals and handbooks. Prohibits retaliation against employees or applicants who inquire about, discuss, or disclose details of their own or other employees' or applicants' compensation	OFCCP	• Requirement to post the mandated notices • While it is not entirely clear, the OFCCP may seek back pay and reinstatement for employees who are discharged in violation of this Executive Order
All federal contractors and subcontractors	Ending Trafficking in Persons	Contractors/subcontractors must adopt a policy prohibiting human trafficking, as defined in the Act. If the contractor/subcontractor has a contract worth in excess of $500,000 or more and a portion of the work is performed overseas, the contractor/subcontractor must develop a compliance plan to prevent human trafficking and must complete a compliance certification.	Unclear, but probably the U.S. Department of Justice	Requiring the contractor to remove an employee or employees from the performance of a contract *Suspension of contract payments *Contract cancellation *Debarment from future contracts
Government contracts or subcontracts of $10,000 or more	Sexual Orientation and Gender Identity Protection, Executive Order 13672	Covered contractors and subcontractors are prohibited from discriminating in employment based upon sexual orientation and gender identity. EEO Policy must be updated to include the prohibition against sexual orientation and gender identity.	OFCCP	*Requiring the contractor to adopt the required non-discrimination language. *Reinstatement and back pay, if applicable, for employees who have experienced discrimination based upon sexual orientation and gender identity.

COVERAGE	LAW	REGULATES	AGENCY	POTENTIAL FINES
Contracts containing the E-Verify clause that are worth at least $150,000 and will tast for at least 120.	Requirement to use E-Verify	Covered contractors/subcontractors must use E-Verify when hiring all employees during the contract term and all employees performing work in the U.S. on the contract.	U.S. Citizenship and Immigration Services	Requirement to use E-Verify as required by the Executive Order.

Major North Carolina Laws Affecting the Employment Relationship

Law	Regulates	Agency	Employers Covered	Potential Fines
Employers with 1+ Employees				
Communicable Disease Law	• Protects persons with communicable diseases (AIDS, HIV, etc) from employment discrimination	NC DOL	• All Employers	• Any person releases employee records relating to communicable diseases in violation of the provisions is guilty of a misdemeanor.
Immunity from Civil Liability for Employers Disclosing Information	• Provides protection for employers that disclose information about a current or formers employee's job history or job performance to the employee's perspective employers on request of either the prospective employer or employee		• All Employers	• Immunity from civil action does not apply when claimant shows preponderance of evidence of both the following: -the information provided from employer was false -the employer providing the information knew or reasonably should have known that the information was false
Controlled Substance Examination Regulation Act (CSERA)	• Regulates employee drug testing	NC DOL	• All Employers that test employees or applicants for drugs or alcohol	• Civil penalty of up to $250.00 per affected examinee with the maximum up to $1,000 per investigation.
Genetic Discrimination (also applies to insurers)	• Protects employees or applicants from genetic discrimination	NC DOL	• All Employers	• No relevant statutory provisions.
Identity Theft Protection Act	• Requires employers to implement security measures (policies & procedures) regarding access to and the disposal of employee personal identifying information.	NC DOJ	• All Employers	• Civil penalty up to $5,000 for each violation, plus reasonable attorney fees.
Juror Protection	• Protects employees serving on juries from adverse employment actions	Courts	• All Employers	• Reasonable damages suffered by an employee and reinstatement.
Interception and Disclosure of Wire, Oral, or Electronic Communication Prohibited	• Requires one-party consent for interception or procurement for any wire, oral or electronic communication	Courts	• All Employers	• Liquidated damages up to the higher of $1000 or $100 per day for each day of violation • Punitive damages • Associated attorney's fees and costs

Law	Regulates	Agency	Employers Covered	Potential Fines
Military Leave	• Protects citizens who serve in national guard or other enlisted persons of the US military forces from discrimination or retaliatory action from their employer or prospective employer on the basis of that membership, application for membership, performance of service, application for service, or obligation	NC DOL	• All Employers	• Reinstatement. • Compensation for lost wages, lost benefits and other economic losses. • Lost wages, benefits and other economic losses may be trebled if it is found that the violation was "willful.
Leave to Seek Order for Domestic Violence	• Employees can seek time off to handle matters concerning domestic violence without retaliation or discrimination	NC DOL	• All Employers	• Civil suit under REDA
New Hire Reporting	• Provide information to the State on all new hires	DHHS	• All Employers	• Standard non-reporting penalty of $25, up to $500 for willful violations.
NC Parent Involvement Act	• School visitations by legal guardians; 4 hrs per year	NC DOL	• All Employers	• Any wages or benefits lost as a result of the violation and reinstatement with full benefits and lost wages.
NC Wage Payment Act	• Time and manner wages must be paid in North Carolina	NC DOL	• All private employers	• Up to $250 per child labor violation. • Amount of unpaid wages, plus interest. The court may also award liquidated damages equal to the amount found to be due, plus costs & reasonable attorney's fees.
Retaliatory Employment Discrimination Act	• Discrimination against employees who in good faith engage in one of the "protected activities" under the law. REDA protects a wide number of areas and individuals including wage and hour issues, workplace safety rights, mine safety / health, and sickle cell and hemoglobin C carriers. REDA also covers genetic testing, national Guard service, juvenile justice system, domestic violence, and pesticide exposure.	NC DOL	• All Employers	• Reinstatement with back pay and attorney's fees. • Triple damages are available in cases of willful violation.
Sickle-Cell Discrimination	• Protects persons with sickle trait from employment discrimination	NC DOL	• All Employers	• No relevant statutory provisions.
Trade Secrets	• Protects employer's trade secrets.	Courts	• All Employers	• n/a
Wage Garnishments	• Prohibits employment discrimination for persons issued covered wage garnishments.	Courts	• All Employers	• Up to $1,000 for discharging, disciplining, or refusing to employ a person solely because of a withholding order.

Law	Regulates	Agency	Employers Covered	Potential Fines
Unemployment Insurance	• Unemployment benefits for employees separated from employment	NC DES	• All Employers	• Back taxes. The DES has the authority to garnish and employer's credit card receipts to collect unpaid unemployment taxes.
Payment for Medical Exams	• Unlawful to require applicants to pay for pre-employment medical exams	NC DOL	• All Employers	• Fines of up to $100.
Continuation & Conversion Law	• Continuation of coverage under group health plan if covered for 3 prior consecutive months and when qualifying event occurs.	NC DOI	• Continuation is available for any employee or covered individual who has been continuously insured for three consecutive months (immediately preceding the date of termination from the employer's group policy) under that same employer's group policy, or under a combination of the employer's group policy and any other group policy that the employer's policy replaced. Continuation is not available to anyone who is or could be covered by any similar employer or governmental plan for hospital, surgical, or medical coverage within 31 days immediately following the date of termination, regardless of whether or not the new coverage is elected.	• No relevant statutory provisions.
Employers with 3+ Employees				
Workers Compensation	• Injury or illness directly attributable to the workplace	NC IC	• All employers with 3+ employees must carry worker's compensation insurance -limited exclusions for certain industries or occupations	• Reinstatement, back pay, and attorney's fees for anyone discriminated against in employment for filing a claim or testifying in hearing. • Failure to provide WC insurance may result in fine up to $100 per employee per day coverage not provided, misdemeanor or felony charges •
Lawful use of Lawful Products	• Prohibits employment discrimination for persons using lawful products	NC DOL	• All private employers with 3 or more regularly employed employees	• Recovery of wages or benefits lost. • Reinstatement. • An order directing the employer to offer employment to the prospective employee. • Court may also award costs, including court costs and attorneys' fees, to the prevailing party.

Employers with 15+ Employees				
Persons with Disability Protection Act	• Employers and employment agencies cannot require an applicant to identify himself as a person with a disability before a conditional offer of employment. However, any employer may invite an applicant to self-identify as a persona with a disability to act affirmatively on the applicant's behalf.		• Employers with 15+ full time employees	• Reinstatement, back pay, and attorney's fees for anyone discriminated against in employment
Equal Employment Practices Act (EEPA)	• Prohibits discrimination based on the following protected classes: -Race -Religion -Color -National Origin -Age -Sex -Handicap	Human Relations Commission	• Employers with 15+ employees	
Employers with 25+ Employees				
NC E-Verify	• Employers are required to use the federal E-Verify system to authenticate new hire employment eligibility.	NC DOL	• All employers with 25+ employees	• Failure to file affidavit attesting to compliance after first violation results in a $10,000 fine • Subsequent violations can result in fines of $2,000 depending upon circumstances

1. N.C. Department of Labor

A. BACKGROUND

The North Carolina Department of Labor is charged by statute with responsibility for promoting the "health, safety, and general well-being" of North Carolina's working people. Most of North Carolina's labor laws are administered and enforced by the Commissioner of Labor who is an elected official with a four-year term of office.

The principal regulatory and enforcement programs of the Department of Labor are carried out by two divisions within the Department. The Standards and Inspections Division includes: The Apprenticeship and Training Bureau, the Boiler Safety Bureau, the Elevator and Amusement Device Bureau, the Employment Discrimination Bureau, the Mine and Quarry Bureau, and the Wage and Hour Bureau. The second division is the Occupational Safety and Health Division. A brief description of the Bureaus within the Department of Labor follows.

1. STANDARDS AND INSPECTIONS DIVISION

a. Boiler Safety Bureau

The Boiler Safety Bureau enforces the Uniform Boiler and Pressure Vessel Act of North Carolina. The Bureau regulates construction, repair, alteration, inspection, use and operation of vessels subject to the law. The Bureau issues operating certificates and conducts periodic inspections of vessels under its jurisdiction.

b. The Elevator and Amusement Device Bureau

The Elevator and Amusement Device Bureau is responsible for the proper installation and safe operation of all elevators, escalators, worker's hoists, dumbwaiters, moving walks, aerial passenger tramways, amusement rides, incline railways and lifting devices for persons with disabilities that operate in public establishments (except federal buildings) and private places of employment. Any company or person wanting to erect equipment of this nature must obtain an installation permit from this Bureau. Additionally, the Bureau conducts regular inspections of all such operating equipment in the state. Employers, institutions such as churches, and private individuals who desire technical assistance in selecting and installing safe lifting devices may request assistance from this Bureau.

c. Employment Discrimination Bureau

The North Carolina Department of Labor is charged by statute with enforcing the North Carolina Retaliatory Employment Discrimination Act ["REDA"] (See Chapter 9).

d. Mine and Quarry Bureau

The Mine and Quarry Bureau enforces the 1976 Mine Safety and Health Act of North Carolina and assists employers in complying with the Federal Mine

Safety and Health Act. Some 460 private sector mines, quarries, and sand and gravel pit operations employing more than 4,500 persons are under the Bureau's jurisdiction.

e. Wage and Hour Bureau

The Wage and Hour Bureau administers and enforces the North Carolina Wage and Hour Act (see Chapter 4) and the Controlled Substance Examination Regulation Act (see Chapter 9). The Bureau uses a combination of education and outreach efforts and regulatory investigations to assure compliance with these laws.

2. OCCUPATIONAL SAFETY AND HEALTH DIVISION

See Chapter 2 for more detailed OSHA information. The Occupational Safety and Health Division, through its five bureaus, administers and enforces the Occupational Safety and Health Act of North Carolina. This law applies to most private-sector employment in the state and to all agencies of state and local government. Through its Compliance Bureau, the state OSHA Division conducts more than 5,500 inspections a year. Inspection schedules are coordinated through the Planning, Statistics and Information Management Bureau. In addition to enforcing state OSHA safety and health standards, the North Carolina program offers free services to private and public employers under its jurisdiction through its Consultative Services Bureau, and educational and engineering assistance through its Education, Training, and Technical Assistance Bureau.

3. COMMISSIONER OF LABOR'S OFFICE

The Commissioner of Labor's Office is the body charged with investigating complaints for violations of North Carolina's E-Verify law. The NCDOL has adopted administrative rules to clarify how complaints will be handled against companies for failure to E-Verify their employees. For North Carolina's E-Verify requirements see Chapter 9, Other N.C. Employment Laws.

B. ENFORCEMENT POWERS

The Bureaus within the Department of Labor generally have the power to conduct inspections, perform investigations, subpoena information, compel answers to interrogatories and seek enforcement of the statutes within their jurisdiction.

C. ACTIONS REQUIRED BY EMPLOYERS

North Carolina record keeping and posting requirements are listed in Chapter 17.

D. TIPS FOR EMPLOYERS

The various Bureaus within the North Carolina Department of Labor will provide employers with information concerning the coverage and administration of laws within their jurisdiction. However, since these divisions are also responsible for enforcement of these laws, it is usually in an employer's best interest to seek the advice of its employer association or labor council before contacting the Department of Labor for anything other than routine information.

2. Occupational Safety & Health Act of North Carolina

A. BACKGROUND

In 1970, Congress passed the Occupational Safety and Health Act to promote safety and health in the workplace. The Act is generally administered by the Occupational Safety and Health Administration, a federal agency within the U.S. Department of Labor. However, the Act provides that states with approved plans may administer the law in place of the federal government. In 1976, an OSHA plan for North Carolina was approved by federal OSHA authorities. [N.C. Gen. Stat. § 95-126 et. seq.] As a result, the Occupational Safety and Health Division of the North Carolina Department of Labor (OSHA Division) has primary authority for enforcing OSHA standards and regulations in most industries in the State.

B. HOW THE LAW WORKS

1. COVERAGE

Virtually all private and public employers are covered by the Occupational Safety and Health Act of North Carolina (OSHANC). The Act defines covered employers as any "person engaged in a business who has employees, including any state or political subdivision of a state, but does not include the employment of domestic workers in the place of residence of his or her employer." Some classes of employees are exempted from coverage including employees of the federal government and certain railroad, maritime, and mining employees.

2. OCCUPATIONAL SAFETY AND HEALTH STANDARDS

In general, the Act requires that employers: (1) comply with all applicable occupational safety and health standards; and (2) comply with the "general duty clause".

a. *Standards:* There are many specific safety and health requirements contained in dozens of standards that apply to various industries. Employers should obtain a copy of the General Industry Standards and review them to ensure compliance with applicable standards. Some areas that deserve special emphasis in manufacturing facilities include wiring and electrical equipment, fire protection equipment, material handling equipment, machine guarding, storage of flammable liquids, accumulation of hazardous fumes, use of personal protective equipment, toilet and washroom facilities, and general housekeeping. A current copy of the General Industry Standards may be ordered by writing to the following address: Division of Occupational Safety and Health, Bureau of Education, Training and Technical Assistance, North Carolina Department of Labor, 1101 Mail Service Center, Raleigh, North Carolina 27699-1101 or through the N.C. Department of Labor's website at http://www.dol.state.nc.us.

b. *General Duty:* In addition to the standards, OSHANC contains a "general duty clause." The general duty clause is a catch-all provision which requires employers to furnish "conditions of employment and a place of employment free from recognized hazards" that are likely to cause or have caused "death or serious physical harm" to employees. A violation of the general duty clause will be found if a situation exists that is generally recognized as hazardous in a particular industry or if the employer has knowledge of a situation that presents a potential hazard of death or serious injury to employees, and which is not the subject of an OSHA standard.

c. *North Carolina Standards:* The OSHA Division has enacted several standards over and above the federal standards. In addition to the Safety Committee standards described in Section 6 below, these include variations on permissible limits for air contaminants, work performed at firms fabricating steel and steel plate, and communication tower standards. The OSHA Division has also adopted an additional level of training for hazardous waste operations and emergency response known as "first responder operations plus level."

3. CITATIONS AND PENALTIES

If an inspector discovers a suspected violation of a specific standard or the general duty clause, a citation will normally be issued. Citations must be issued within six months following the occurrence of any violation. Citations are classified as follows:

a. *Nonserious:* The cited condition has a direct or immediate relationship to safety or health, but does not raise a substantial probability that death or serious physical harm would result from an accident. Fines up to $7,000 are possible for nonserious violations.

b. *Serious:* The cited conditions raise a substantial probability that death or serious physical harm could result from a condition. Fines up to $7,000 are possible. A penalty of up to $14,000 may be assessed for each serious violation that involves injury to an employee under 18 years of age.

c. *Repeat Violation:* A repeat violation occurs when a final order has been issued within the past three years for substantially similar violations. A "substantially similar violation" refers to the facts underlying the issuance of the citation and specifically refers to the hazards involved. A fine of up to $70,000 and not less than $5,000 may be assessed for repeat violations.

d. *Willful Violation:* A willful violation occurs when the employer shows conscious disregard for requirements of OSHANC or a standard or plain indifference to employee safety and health. The most common way for the government to prove this type of violation is to show that the employer was aware of applicable requirements and made a purposeful decision not to comply. A fine of up to $70,000 and not less than $5,000 may be assessed for willful violations.

e. *Criminal:* If a willful violation causes the death of an employee, the statute provides for a fine of not more than $10,000 and/or imprisonment for not more than six months. A willful violation that causes the death of an

employee under age 18 may be fined up to $20,000. These penalties may be doubled for second offenses.

f. *Notice of Failure to Abate:* A notice of failure to abate is issued when an employer fails to take abatement measures within the time allowed in a previous uncontested citation or final order. Fines of up to $7,000 per day can be assessed for failure to abate.

g. *Posting Violations:* A fine of up to $7,000 may be assessed for violating the posting requirements of OSHANC.

4. ENFORCEMENT

a. *Inspections:* OSHANC inspections are conducted by compliance officers or industrial hygienists from the Division of Occupational Safety and Health. There are several types of inspections including: (1) general administrative inspections designed to check randomly selected employers for compliance on a periodic basis; (2) inspections prompted by an employee complaint; (3) "special emphasis inspections" based on an industry's high frequency of violations or high rate of work-related injuries; and (4) inspections prompted by an occupational fatality, hospitalization of one or more employees, or an employee's amputation or loss of an eye as a result of a work-related incident. In addition, the Division conducts reviews of employers' log of occupational injuries and illnesses (OSHA Form 300) and sometimes attempts unscheduled inspections when they are already in a locale and have time available.

Inspections usually begin when a compliance officer arrives at a facility, presents official credentials and requests entry. Employers have a constitutional right to demand that the inspector obtain a search warrant prior to allowing an inspection. If such a demand is made, OSHA Division must go to a judge and show that the inspection is being conducted in accordance with an established OSHA Division plan. Warrants can also be obtained based on employee complaints or a report of a fatality or accident that resulted in the hospitalization of three or more employees.

Whether an employer should require a warrant is an important question that should be considered in advance of an inspection. Additional information on the question of whether to require a search warrant is presented in Section D of this Chapter.

b. *Contesting Citations:* An employer has 15 working days from receipt of a citation to notify the Director of the North Carolina Division of Occupational Safety and Health that the employer wishes to either contest the citation or request an informal conference. Failure to timely contest the citation or seek an informal conference will result in a final order that cannot be appealed.

If an informal conference is requested, the Director will attempt to schedule a conference within the 15 working day contest period (or within 5 days of the request if the 15 days is expiring soon). Normally, no more than 20 working days from the receipt of the citation will be allowed for the informal conference. The result of an informal conference will be a revised or withdrawn citation, a notice of no change, or a settlement agreement.

If the citation is contested, a hearing will be scheduled before a hearing examiner appointed by the North Carolina Safety and Health Review Commission. In these hearings, the State has the burden of proving that the employer knowingly exposed its employees to hazardous conditions. In cases under the General Duty Clause, the State must also show what actions the employer could have taken to abate the hazard and the feasibility of such abatement measures.

After the hearing, the hearing examiner will make an initial determination. The hearing examiner's determination will become a final order of the Commission unless an interested party appeals or a member of the Commission directs review of the determination. If the determination is appealed or directed for review, it is considered and decided by the entire Commission. The Commission's decision may then be appealed through the state courts.

c. *Hazard Abatement Rule:* This rule requires employers to notify the OSHA Division and inform employees when they have abated workplace hazards identified by state inspectors. Abatement is the term used by the Division which means to eliminate hazards in the workplace. Major provisions of the abatement certification rule are: (1) violations that are abated immediately during an inspection require no certification; (2) for violations, other than serious violations, no abatement letter is required unless specifically noted on the citation issued; (3) additional documentation proving abatement will be required involving more serious violations, repeat violations and willful violations; (4) progress reports and abatement plans may be required when abatement periods for serious violations exceed 90 days; (5) employers must inform all affected employees about abatement activities; (6) copies of OSHA citations and warning tags must be placed on equipment determined by the OSHA Division to be a serious hazard to alert employees of the alleged hazard.

5. NONDISCRIMINATION PROVISIONS

a. *Discrimination for Exercising Rights Under the Act:* North Carolina's Retaliatory Employment Discrimination Act prohibits discrimination against, or discharge of an employee who has filed a complaint, instituted any proceeding or inspection, or testified in any proceeding under the Occupational Safety and Health Act of North Carolina. Employees who believe they have been the subject of such discrimination may file a complaint with the North Carolina Commissioner of Labor (Employment Discrimination Bureau - see Chapter 9-6). The Bureau will investigate the complaint and may institute proceedings in Superior Court if the investigation reveals evidence of discrimination. Employees may bring their own action if the Commissioner determines there is no discrimination or fails to sue on the employee's behalf. The Superior Court is authorized to enjoin the discrimination and give appropriate relief including reinstatement, back pay and attorney's fees. Damages may be tripled if the violation was willful.

b. *Refusal to Perform Dangerous Work:* The OSHA Division, as well as the National Labor Relations Act (Chapter 10), places a number of restrictions

on an employer's right to discipline employees who refuse to perform certain jobs or tasks for safety or health-related reasons. Under OSHANC, an employee may refuse to do a task or job if he maintains a good faith belief that performing the task or job would result in death or serious bodily injury. An employee who refuses to perform assigned tasks for this reason is protected from discrimination and discharge provided that the employee's fear was "reasonable." North Carolina's Hazardous Chemicals Right to Know Act prohibits discrimination against or discharge of employees who assist in effectuating the Act.

c. *Walkaround Pay:* OSHA regulations involving "walkaround pay" (pay for time spent by an employee accompanying a compliance officer during an OSHA inspection) have changed a number of times in recent years. Currently, an employer is not required by OSHA regulations to pay an employee for walkaround time.

6. SAFETY COMMITTEES

Employers with 11 or more employees (not counting temporary employees) and an experience rate modifier of 1.5 or greater must establish a safety committee made up of employer and employee representatives. These employers must also establish and carry out a written safety and health program. The statutes and regulations list specific requirements for the safety committees and safety programs. Civil penalties of up to $25,000 may be assessed for failure to comply with these requirements.

7. PERSONAL PROTECTIVE EQUIPMENT

The OSHA Division's modifications to the federal personal protective equipment standards require employers to provide, at no cost to the employee, all personal protective equipment which the employee does not wear off the worksite for use away from work.

C. ACTIONS REQUIRED BY EMPLOYERS

In addition to complying with specific industry standards and the general duty clause, employers should also be aware of the following requirements.

1. LOG OF WORK-RELATED INJURIES AND ILLNESSES—OSHA FORM 300

Covered employers are required to maintain the OSHA Form 300 Log of Work-Related Injuries and Illnesses for each of their establishments. Injuries and illnesses that are recordable on the log are defined as those that are work related and result in: (1) death; (2) days away from work; (3) restricted work activity or job transfer; (4) medical treatment beyond first aid; (5) loss of consciousness; (6) a significant injury or illness diagnosed by a physician or other licensed health care professional; or (7) certain instances of needlesticks and sharps injuries, medical removal under an OSHA standard, hearing loss,

tuberculosis, and musculoskeletal disorders (MSDs).

Special restrictions apply to the recording of "privacy concern" cases involving injuries to intimate body parts or to the reproductive system, sexual assault, mental illness, HIV infection, hepatitis, tuberculosis, needlesticks and sharps injuries, and other illnesses (except MSDs) upon the request of the affected employee.

Covered employers must enter applicable injuries and illnesses on their log within seven calendar days of receiving information that a recordable case has occurred.

2. INJURY AND ILLNESS INCIDENCE REPORT—OSHA FORM 301

In addition to filling out the log, covered employers must also prepare a separate report on each recordable injury and illness on the OSHA Form 301 Injury and Illness Incidence Report. Employers must also complete this form within seven calendar days of receiving information that a recordable case has occurred. Workers' Compensation, insurance, or other forms can be used as a substitute for OSHA Form 301 if they provide for the entry of all of the information required on Form 301.

Posting of Annual Summary

Employers must also prepare and post by February 1st of each year until April 30th the OSHA Form 300A Summary of Work-Related Injuries and Illnesses applying to the year prior to the posting. A company executive (an officer of the corporation, or the highest ranking official at the establishment or his/her immediate supervisor) must sign the summary, certifying to its accuracy.

Partial Exemptions

Employers having 10 or fewer employees in the company at all times during the last calendar year are exempt from the requirements to complete Forms 300, 301, and 300A. Employers who operate establishments in certain industries may also be exempt from these requirements. A listing of the exempt industries, by NAICS Codes may be found in the OSHA recordkeeping regulation at 29 CFR Part 1904. Neither of these exemptions apply to the requirements for responding to the OSHA or Bureau of Labor Statistics surveys or to reporting a workplace fatality, hospitalization of one or more employees, or an employee's amputation or loss of an eye.

3. FATALITY AND HOSPITALIZATION REPORTS

Any accident or job related incident which results in the death of one or more employees must be reported to the Division of Occupational Safety and Health in Raleigh within eight hours. The eight hours begins to run as soon as any agent or employee of the employer is informed. A death or hospitalization within 30 days of a work-related incident is subject to these requirements.

In addition, the hospitalization of one or more employees, or an employee's amputation or loss of an eye must be reported to OSHA within 24 hours. The report must include the name of the establishment, location, time of incident,

number of fatalities or hospitalized employees, name of a contact person, phone number, and a brief description of the incident.

Employers should document the fact that an oral report was made and the name of the OSHA Division official who took the report (or the fact a tape recorder was in use). A follow-up letter to the Division is optional. In most cases, an on-site investigation will be conducted as a result of the report.

4. ACCESS TO RECORDS

Within four business hours of the request of a governmental representative from a safety and health agency, an employer must make available to that official its OSHA Forms 300, 301, and 300A. When an employee, former employee, or their personal representative request access to these records, the employer must provide the record (except for "privacy concern" information) by the end of the next business day and impose no copying or retrieval charge for the first such request. Special rules apply for requests of an authorized employee representative for copies of the Form 301's for an establishment. Employers should discuss questions concerning access to OSHA records with labor counsel or their employers' association.

5. ELECTRONIC SUBMISSION OF OSHA FORMS

Starting in 2019, by March 2 of each year, employers with establishments of 250 or more employees and employers in certain industries with establishments of between 20 and 249 employees that are deemed "high hazard" industries by OSHA are required to electronically submit their OSHA 300A (Annual Summary) log for the previous calendar year.

Note: The requirement to comply with the electronic recordkeeping requirements is based on the size of each of the employer's establishments, not the overall size of the employer. Accordingly, an employer with 250 or more employees would not be subject to this requirement unless the employer has at least one establishment of 250 or more employees or is in an industry deemed high-hazard by OSHA. A listing of high-hazard industries may be found on OSHA's website at the following address: https://www.osha.gov/recordkeeping/NAICScodesforelectronicsubmission.html

6. FURTHER INFORMATION ABOUT ELECTRONIC RECORDKEEPING REQUIREMENTS MAY BE FOUND ON THE NORTH CAROLINA DEPARTMENT OF LABOR WEBSITE BY SEARCHING FOR "REPORTING AND RECORDING" AND ON THE FEDERAL OSHA WEBSITE AT THE FOLLOWING ADDRESS: HTTPS://WWW.OSHA.GOV/INJURYREPORTING/

7. OTHER REQUIREMENTS

There are hundreds of other requirements contained in individual standards and regulations which may apply to a specific employer. Examples include exposure records for toxic substances and air contaminants, inspection records for fire extinguishers and inventories of flammable and combustible materials. The General Industry, Construction or other applicable standards should

be examined to determine which requirements are applicable. OSHANC standards also require that all employee medical records be kept for the duration of employment plus 30 years. Records of employee exposure to toxic substances must be kept for 30 years from date made or received by the employer. OSHA Forms 300, 300A, and 301 must be kept for 5 years. Forms 200 and 101 prepared in years before the change in recordkeeping regulations must be kept for 5 years from the year to which they relate. There is no requirement to update them.

8. OSHA POSTER

All North Carolina Employers must display the official OSHA poster.

D. TIPS FOR EMPLOYERS

1. OSHA INSPECTION POLICY

All employers should have a comprehensive written OSHA inspection policy in order to be prepared when the OSHA Division inspector arrives. These inspectors are normally courteous and businesslike, but keep in mind that they are charged by law to cite employers for violations noted during the inspection. As an agent of the company, everything that is said by management can, and probably will, be used against the company. OSHA would win fewer cases if they were not assisted by company officials who attempt to "explain away" violations or argue with an inspector about some part of the inspection.

An OSHA inspection policy should designate specific management personnel to greet and accompany the inspector during the inspection. Contacts with other members of management should be limited to the extent possible. In addition, the OSHA inspection policy should:

a. Require the designated company official to record all necessary information concerning the inspector, the areas inspected and any tests or photographs taken. The company official should "shadow" the inspector and take the same photographs, videos, and measurements where feasible. If unsure, he or she should ask the inspector why a photograph, video, or measurement was taken.

b. Instruct the designated official to be courteous and to avoid arguing or admitting the existence of any violation.

c. Instruct the designated official to use a route to the area to be investigated that minimizes contact with other plant operations.

d. Instruct the designated plant official to inform the inspector of any trade secrets the inspector is exposed to and request confidentiality.

In sum, the company representative should (1) be courteous; (2) get the facts; (3) limit the scope of the investigation when possible; (4) avoid making harmful admissions. These steps will help reduce the

possibility of receiving an OSHA citation.

2. **SEARCH WARRANTS**

   As noted above, an employer may lawfully deny access to an OSHA Division inspector who does not have a search warrant. This right may be exercised merely by telling the inspector that the company will not consent to a warrantless inspection. In most cases, however, it is not difficult for an inspector to obtain a warrant and requiring a search warrant may subject an employer to closer scrutiny after the warrant is issued. On the other hand, there may be occasions where there are valid reasons for refusing to consent to a warrantless inspection. Whether to require a search warrant is a business and legal decision which should be discussed with labor counsel prior to the inspector's arrival. This discussion can lead to a general policy regarding search warrants. Exceptions to this general policy can then be made on a case-by-case basis after consulting with legal counsel or your employers' association.

3. **CONTESTING CITATIONS**

   The decision of whether to contest a citation should not be taken lightly. An uncontested citation is, in effect, an admission of a violation which could later lead to "repeat", "willful", or even "criminal" violations. In deciding whether or not to contest a citation, an employer should consider the nature and seriousness of the citation, the proposed penalty, its record of prior citations and the abatement posture of any citations that have not been completely abated. Failing to contest a citation may mean that alleged "hazards" that are the subject of the citation at one location or facility must be corrected at other locations or facilities.

4. **REVIEW STANDARDS**

   Review and audit all standards that may apply to your operations such as forklift training, reporting of power press accidents, requirements relating to hazardous substances, etc. Your employers' association can help you to identify these things for your own audit purposes.

5. **Link to OSHA forms, notices and instructions:**

   https://www.osha.gov/sites/default/files/OSHA-RK-Forms-Package.pdf

OSHA's Form 300 (Rev. 04/2004)

Log of Work-Related Injuries and Illnesses

Attention: This form contains information relating to employee health and must be used in a manner that protects the confidentiality of employees to the extent possible while the information is being used for occupational safety and health purposes.

Year 20__ __

U.S. Department of Labor
Occupational Safety and Health Administration

Form approved OMB no. 1218-0176

You must record information about every work-related death and about every work-related injury or illness that involves loss of consciousness, restricted work activity or job transfer, days away from work, or medical treatment beyond first aid. You must also record significant work-related injuries and illnesses that are diagnosed by a physician or licensed health care professional. You must also record work-related injuries and illnesses that meet any of the specific recording criteria listed in 29 CFR Part 1904.8 through 1904.12. Feel free to use two lines for a single case if you need to. You must complete an Injury and Illness Incident Report (OSHA Form 301) or equivalent form for each injury or illness recorded on this form. If you're not sure whether a case is recordable, call your local OSHA office for help.

Establishment name ____________________

City ____________________ State ____________

Identify the person			Describe the case			Classify the case: CHECK ONLY ONE box for each case based on the most serious outcome for that case:				Enter the number of days the injured or ill worker was:		Check the "Injury" column or choose one type of illness:					
								Remained at Work				(M)					
(A) Case no.	(B) Employee's name	(C) Job title (*e.g., Welder*)	(D) Date of injury or onset of illness	(E) Where the event occurred (*e.g., Loading dock north end*)	(F) Describe injury or illness, parts of body affected, and object/substance that directly injured or made person ill (*e.g., Second degree burns on right forearm from acetylene torch*)	Death (G)	Days away from work (H)	Job transfer or restriction (I)	Other record-able cases (J)	Away from work (K)	On job transfer or restriction (L)	Injury (1)	Skin disorder (2)	Respiratory condition (3)	Poisoning (4)	Hearing loss (5)	All other illnesses (6)
			___/___ month/day			☐	☐	☐	☐	____ days	____ days	☐	☐	☐	☐	☐	☐
			___/___ month/day			☐	☐	☐	☐	____ days	____ days	☐	☐	☐	☐	☐	☐
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			___/___ month/day			☐	☐	☐	☐	____ days	____ days	☐	☐	☐	☐	☐	☐
					Page totals➤	____	____	____	____	____	____	____	____	____	____	____	____
												Injury (1)	Skin disorder (2)	Respiratory condition (3)	Poisoning (4)	Hearing loss (5)	All other illnesses (6)

Be sure to transfer these totals to the Summary page (Form 300A) before you post it.

Page ___ **of** ___

OSHA's Form 300A (Rev. 04/2004)

Summary of Work-Related Injuries and Illnesses

Year 20__ __

U.S. Department of Labor
Occupational Safety and Health Administration

Form approved OMB no. 1218-0176

All establishments covered by Part 1904 must complete this Summary page, even if no work-related injuries or illnesses occurred during the year. Remember to review the Log to verify that the entries are complete and accurate before completing this summary.

Using the Log, count the individual entries you made for each category. Then write the totals below, making sure you've added the entries from every page of the Log. If you had no cases, write "0."

Employees, former employees, and their representatives have the right to review the OSHA Form 300 in its entirety. They also have limited access to the OSHA Form 301 or its equivalent. See 29 CFR Part 1904.35, in OSHA's recordkeeping rule, for further details on the access provisions for these forms.

Number of Cases

Total number of deaths	Total number of cases with days away from work	Total number of cases with job transfer or restriction	Total number of other recordable cases
_____	_____	_____	_____
(G)	(H)	(I)	(J)

Number of Days

Total number of days away from work	Total number of days of job transfer or restriction
_____	_____
(K)	(L)

Injury and Illness Types

Total number of . . .	(M)		
(1) Injuries	_____	(4) Poisonings	_____
		(5) Hearing loss	_____
(2) Skin disorders	_____	(6) All other illnesses	_____
(3) Respiratory conditions	_____		

Post this Summary page from February 1 to April 30 of the year following the year covered by the form.

Establishment information

Your establishment name _____

Street _____

City _____ State _____ ZIP _____

Industry description (*e.g., Manufacture of motor truck trailers*)

_____

Standard Industrial Classification (SIC), if known (*e.g., 3715*)

___ ___ ___ ___

OR

North American Industrial Classification (NAICS), if known (e.g., 336212)

___ ___ ___ ___ ___ ___

Employment information *(If you don't have these figures, see the Worksheet on the back of this page to estimate.)*

Annual average number of employees _____

Total hours worked by all employees last year _____

Sign here

Knowingly falsifying this document may result in a fine.

I certify that I have examined this document and that to the best of my knowledge the entries are true, accurate, and complete.

_____ _____
Company executive Title

( ) - / /
Phone Date

OSHA's Form 301
Injury and Illness Incident Report

Attention: This form contains information relating to employee health and must be used in a manner that protects the confidentiality of employees to the extent possible while the information is being used for occupational safety and health purposes.

U.S. Department of Labor
Occupational Safety and Health Administration

Form approved OMB no. 1218-0176

This *Injury and Illness Incident Report* is one of the first forms you must fill out when a recordable work-related injury or illness has occurred. Together with the *Log of Work-Related Injuries and Illnesses* and the accompanying *Summary,* these forms help the employer and OSHA develop a picture of the extent and severity of work-related incidents.

Within 7 calendar days after you receive information that a recordable work-related injury or illness has occurred, you must fill out this form or an equivalent. Some state workers' compensation, insurance, or other reports may be acceptable substitutes. To be considered an equivalent form, any substitute must contain all the information asked for on this form.

According to Public Law 91-596 and 29 CFR 1904, OSHA's recordkeeping rule, you must keep this form on file for 5 years following the year to which it pertains.

If you need additional copies of this form, you may photocopy and use as many as you need.

Completed by _____

Title _____

Phone (_____)_____-_____ **Date** ____/ ____/____

Information about the employee

1) **Full name** _____

2) **Street** _____

City _____ **State** _____ **ZIP** _____

3) **Date of birth** _____/____/_____

4) **Date hired** _____/____/_____

5) ☐ Male
☐ Female

Information about the physician or other health care professional

6) **Name of physician or other health care professional** _____

_____

7) **If treatment was given away from the worksite, where was it given?**

Facility _____

Street _____

City _____ **State** _____ **ZIP** _____

8) **Was employee treated in an emergency room?**
☐ Yes
☐ No

9) **Was employee hospitalized overnight as an in-patient?**
☐ Yes
☐ No

Information about the case

10) **Case number from the *Log*** _____ *(Transfer the case number from the Log after you record the case.)*

11) **Date of injury or illness** _____/____/_____

12) **Time employee began work** _____ **AM / PM**

13) **Time of event** _____ **AM / PM** ☐ **Check if time cannot be determined**

14) ***What was the employee doing just before the incident occurred?*** **Describe the activity, as well as the tools, equipment, or material the employee was using. Be specific.** *Examples:* **"climbing a ladder while carrying roofing materials"; "spraying chlorine from hand sprayer"; "daily computer key-entry."**

15) ***What happened?*** **Tell us how the injury occurred.** *Examples:* **"When ladder slipped on wet floor, worker fell 20 feet"; "Worker was sprayed with chlorine when gasket broke during replacement"; "Worker developed soreness in wrist over time."**

16) ***What was the injury or illness?*** **Tell us the part of the body that was affected and how it was affected; be more specific than "hurt," "pain," or sore."** *Examples:* **"strained back"; "chemical burn, hand"; "carpal tunnel syndrome."**

17) ***What object or substance directly harmed the employee?*** *Examples:* **"concrete floor"; "chlorine"; "radial arm saw."** *If this question does not apply to the incident, leave it blank.*

18) ***If the employee died, when did death occur?*** **Date of death** _____/____/_____

3. The Fair Labor Standards Act

A. BACKGROUND

Although North Carolina has its own wage and hour laws, these laws are, for the most part, preempted by a federal law known as the Fair Labor Standards Act ("FLSA"). The FLSA establishes minimum wage, overtime pay, recordkeeping and child labor standards for covered employment unless a specific exemption applies. The Wage and Hour Division of the U.S. Department of Labor is responsible for administering and enforcing the FLSA. North Carolina Wage and Hour Laws are discussed in Chapter 4.

B. HOW THE LAW WORKS

1. WHAT IS NOT COVERED

Before looking at what is covered under the FLSA, it is important to understand what is not covered. Under this law, overtime pay for work on Saturdays, Sundays and holidays, as such, is not required. Nor is vacation pay, sick pay, holiday pay, severance pay or a discharge notice. The FLSA does not require time off for vacations or holidays. Under the Act, holidays and Sundays are treated the same as any other day. Whether time off is granted or premium rates are paid for these days is left up to individual employers.

2. COVERAGE

Coverage under the FLSA is limited to employers, not specifically exempt, who are:

Engaged in interstate commerce; or

Engaged in the production of goods for interstate commerce; or

Employed in an "enterprise" engaged in commerce or the production of goods for commerce; or

State and local governments;

The Supreme Court has ruled state and local governments must comply with FLSA minimum wage and overtime provisions. There are special rules which apply to hospitals, police and fire fighters. In order to determine whether an individual is an employee of a covered enterprise and thus protected by the FLSA, as opposed to an independent contractor, courts typically look at six factors. These six factors dictate whether individuals are economically dependent upon the business to which they render service. The six factor test, called the economic reality test, examines:

- the degree to which the alleged employee is independent or subject to the control of the employer;
- the alleged employee's opportunities for profit or loss;

- the alleged employee's investment in the facilities and equipment of the business;
- the permanency of the relationship between the business and the alleged employee;
- the degree of skill required to perform the work of the alleged employee; and
- the extent to which the alleged services in question are an integral part of the employing entity.

No one of these factors is determinative, but the response to these six issues should indicate the extent to which the individual's performance is controlled by the business for which the individual is working. Independent contractor issues are more specifically discussed in Chapter 9.

In practice, most workers are deemed employees, and almost all employees are covered by the FLSA. Because coverage and specific rules can pose complex questions, the opinion of legal counsel or your Employer Association should be sought when in doubt.

3. MINIMUM WAGE REQUIREMENTS

The current minimum wage for all employees covered by the FLSA is shown on the Poster found in Chapter 17. If an employee is paid an hourly rate for some hours of work during the week and a piece rate for others, the hourly rate must be at least the minimum wage and the piece-rate earnings must average at least the minimum wage for the piece-rate hours worked.

Exceptions to the minimum wage are made for certain learners, apprentices, messengers, and handicapped workers; however, employers must have a certificate of exemption from the Wage and Hour Administrator before paying these workers a reduced rate. Additionally, if an employee is a "tipped employee," the employer must pay the tipped employee a cash wage of not less than $2.13 an hour. However, if an employee's tips combined with the employer's cash wage of $2.13 an hour do not equal the minimum hourly wage, the employer must make up the difference.

4. OVERTIME REQUIREMENTS

The overtime provisions of the FLSA require payment of one and one-half times the employee's regular rate for all hours worked in excess of 40 in any workweek. Generally speaking, the hours of work which must be counted in computing overtime liability include all time employees are actually working or are required to be on duty and cannot use the time for their own purposes.

5. EXEMPTIONS FROM MINIMUM WAGE AND OVERTIME

There are four basic categories that fall under the "white collar" exemptions. These are the Executive (supervisory), Administrative, Professional and Outside Sales exemptions. The so-called "white collar" exemption is undoubtedly one of the more important provisions of the Fair Labor Standards Act.

The exemption is self-executing—that is, no specific application for an exempt status is required. All of the essential tests, however, as prescribed by the Wage-Hour Administrator, must be met before an employee may be considered exempt. The duties performed by the employee, and not the title of the job, determine whether or not an employee can be considered exempt. The burden of establishing the exempt status of an individual employee rests with the employer.

a. The Executive Employee Tests for Exemption:

There are four tests that must be satisfied to qualify under the Executive Exemption:

(1) Compensated on a salary basis at a rate of not less than $684 per week (equivalent to $35,568 per year for a full-year worker);

(2) Primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;

(3) Customarily and regularly directs the work of two or more other employees; and

(4) Has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

Definition of term used for the Executive Exemption:

Primary duty: The principal, main, major or most important duty that the employee performs. (The employee who spends more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. Time alone, however, is not the sole test.)

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; and other related duties.

Customarily recognized 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 a frequency that must be greater than occasional but which, of course, may be less than constant.

Two or more other employees: The phrase "two or more other employees" means two full-time employees or their equivalent.

Particular weight: To determine whether an employee's suggestions and recommendations are given "particular weight," factors to be considered include, but are not limited to, whether it is part of the employee's job duties to make such suggestions and recommendations; the frequency with which such

suggestions and recommendations are made or requested; and the frequency with which the employee's suggestions and recommendations are relied upon.

b. The Administrative Employee Tests For Exemption:

There are three tests that must be satisfied to qualify under the Administrative Exemption:

(1) Compensated on a salary or fee basis at a rate of not less than $684 per week (equivalent to $35,568 per year for a full-year worker);

(2) Primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

(3) Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Definition of terms used for the Administrative Exemption:

Primary duty: The principal, main, major or most important duty that the employee performs. (The employee who spends more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. Time alone, however, is not the sole test.)

Directly related to management or general business operations: To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business or related to the management or general business operations of the employer's customers and 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.

Discretion and independent judgment: "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. "Discretion and independent judgment" implies that the employee has authority to make an independent choice, free from immediate direction or supervision. (It does not require that the decisions made by an employee have a finality that goes with unlimited authority and a complete absence of review.) 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.

c. The Professional Employee Tests For Exemption:

(1) Learned Professional

There are two tests that must be satisfied to qualify under the Learned Professional Exemption:

(a) Compensated on a salary or fee basis at a rate of not less than $684 per week (equivalent to $35,568 per year for a full-year worker); and

(b) Primary duty must be the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.

Definition of terms used for the Learned Professional Exemption:

Primary duty: The principal, main, major or most important duty that the employee performs. (The employee who spends more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. Time alone, however, is not the sole test.)

Work requiring knowledge of an advanced type: Work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual mechanical or physical work.

Field of science or learning: Includes the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations.

Customarily acquired by a prolonged course of specialized intellectual instruction: Evidence that an employee meets this requirement is possession of the appropriate academic degree. However, "customarily" means that the exemption is also available in such professions to employees 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.

(2) Creative Professional

There are two tests that must be satisfied to qualify under the Creative Professional Exemption:

(a) Compensated on a salary or fee basis at a rate of not less than $684 per week or $35,568; and

(b) Primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Definition of terms used for the Creative Professional Exemption:

Primary duty: The principal, main, major or most important duty that the employee performs. (The employee who spends more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. Time alone, however, is not the sole test.)

Invention, imagination, originality or talent: Work which is distinguished from work that primarily depends on intelligence, diligence and accuracy.

In a recognized field of artistic or creative endeavor: Includes such fields as music, writing, acting and the graphic arts.

(3) Computer Professional

Salaried

Computer systems analyst, computer programmers, software engineers or other similarly skilled workers in the computer field who are compensated on a salary or fee basis of not less than $684 per week may be eligible to qualify under the Administrative, Learned Professional, or Computer Professional Exemptions.

Hourly

Compensated at an hourly rate of not less than $27.63 per hour. Note this hourly rate did not change with the DOL's final overtime rule set to take effect January 1, 2020.

Computer Exemption Tests

(a) Compensated on a salaried or hourly basis; and

(b) Primary duty consists of:

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

II. 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;

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

IV. A combination of the above duties, requiring the same level of skills.

Definition of terms used for the Computer Professional Exemption:

Primary duty: The principal, main, major or most important duty that the employee performs. (The employee who spends more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. Time alone, however, is not the sole test.)

d. Salary Level Test, Salary Basis Test, and Deductions from Salary

Employers classifying employees as exempt from the FLSA overtime requirements based on the executive, administrative, or professional exemptions must satisfy the salary level test, the salary basis test, and the job duties test. Employers satisfy the salary level test by compensating such

employees on a salary or fee basis at a rate of not less than $684 per week or $35,568 annually. Employers may use nondiscretionary bonuses and incentive payments (including commissions) paid on an annual or more frequent basis, to satisfy up to 10 percent of the standard salary level. Additionally, if after the 52-week period, the employer has not met its financial obligation, the employer can make a final "catch-up" payment within one pay period after the end of the 52-week period to bring an employee's compensation up to the required level. Any such catch-up payment will count only toward the prior year's salary amount and not toward the salary amount in the year in which it is paid.

Employers satisfy the salary basis test if an employee regularly receives a set, predetermined amount of compensation and is not subject to deductions because of quality or quantity of work. An employee is not deemed to be paid on a salary basis if the employer makes deductions for absences occasioned by the employer or by the operating requirements of the business. This rule does not apply in the initial and terminal weeks of employment where the salary can be prorated, typically on a daily basis.

Subject to certain permissible deductions, discussed below, an exempt employee must receive his full salary for any week in which the employee performs any work without regards to number of hours or days worked. Exempt employees need not be paid for any workweek in which they perform no work. The following are permissible deductions for an employee paid on a salary basis.

(1) Absences for personal reasons other than sickness or disability

A deduction may be made when the exempt employee is absent for one or more full days for personal reasons, other than sickness or disability. The absence must be in full-day increments. For example, an exempt employee who is absent for one and a half days would be subject to a deduction for only the full-day absence.

(2) Absences for sickness or disability

Deductions may also be made for full days of absence occasioned by sickness or disability if the deduction is made in accordance with a bona fide plan or policy that provides compensation for loss of salary resulting from the sickness or disability. The sickness or disability plan does not have to compensate the employee for all loss of salary. Further, the employer may continue deductions for absences after the employee has exhausted the benefits of the plan.

(3) Infractions of major safety rules

Deductions may also be made from an exempt employee's pay for a penalty imposed in good faith for violating safety rules of "major significance." Safety rules of major significance would include those relating to the prevention of serious danger in the workplace, such as a rule prohibiting smoking in an explosives plant or coal mine. Importantly,

the "full day" rule does not apply to pay deductions for violating major safety rules. Exempt employees may be docked for partial-day suspensions.

(4) Infractions of workplace conduct rules

The regulations contain a section permitting deduction from pay for one or more full days for disciplinary suspensions for infractions of workplace conduct rules. Such suspensions must be imposed pursuant to a written policy applicable to all employees. Public comments by the Wage and Hour Administrator suggest that this provision should be "construed narrowly." It is likely to be limited to disciplinary suspensions for serious misconduct, such as workplace violence, sexual harassment, and infractions of drug- and alcohol-related policies.

(5) Jury Duty, Attendance As A Witness, And Temporary Military Leave

Deductions may not be made for absences of less than a full workweek for absences occasioned by jury duty, attendance as a witness in a judicial proceeding, or temporary military leave. An employer may, however, offset against the employee's salary any jury fees, witness fees, or military pay received.

(6) FMLA Leave

Deductions are permitted for partial-day absences occasioned by unpaid leave under the Family and Medical Leave Act. The deduction must be proportionate to the normal workweek. Thus, if an exempt employee who normally works a 50-hour workweek used 5 hours of unpaid FMLA leave, you may deduct 10 percent of the employee's salary that week. This may be accomplished by converting the salary to an applicable hourly rate and then multiplying that converted hourly rate by the number of FMLA hours taken.

(7) Deductions From Accrued Leave Or "Paid Time Off" Accounts

Many employers provide employees with blocks of time that can be accrued for various reasons, such as vacations, sick days, personal time, etc. These blocks of time accrued by employees are often referred to as "leave banks." In a number of opinion letters, DOL's Wage and Hour Division had previously taken the position that partial-day deductions of exempt employees' accrued leave accounts did not invalidate an employee's exempt status. An employer may require an exempt employee to debit his/her accrued leave account by the amount of hours taken for personal absences or any other absence recognized under the accrued leave policy.

(8) Safe Harbor Provision

If an employer has a clearly communicated policy (preferably in writing) that prohibits improper deductions and includes a complaint mechanism, reimburses employees for improper deductions, and makes a good-faith commitment to comply in the future, the exemption(s) will not be

lost unless the employer continues to make improper deductions after receiving employee complaints. This mechanism allows employers to correct improper deduction practices while preserving an employee's exempt status.

e. Outside Salesperson Tests For Exemption:

There are two tests that must be satisfied to qualify under the Outside Sales Exemption:

(1) Primary duty is making sales which involves obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

(2) Customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

Definition of terms used for the Outside Sales Exemption:

Primary duty: The principal, main, major or most important duty that the employee performs. (The employee who spends more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. Time alone, however, is not the sole test.) Work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work.

Making sales which involves obtaining orders or contracts: Sales includes the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property. Sales includes the obtaining of orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer.

Away from the employer's place or places of business: The outside sales employee is an employee who makes sales at the customer's place of business or, if selling door-to-door, at the customer's home.

f. Highly Compensated Employee Tests for Exemption.

There are three tests that must be satisfied to qualify under the Highly Compensated Workers exemption:

(1) Earn total compensation of $107,432 or more, which includes at least $684 per week paid on a salary basis, though the annual compensation may include commissions, non-discretionary bonuses, and other non-discretionary compensation;

(2) Primary duty includes performing office or non-manual work; and

(3) Customarily and regularly perform at least one of the exempt duties or responsibilities of an exempt, administrative, or professional employee; but is not required to meet every requirement of the tests for executive, administrative, or professional employees.

g. Other Exemptions:

There are numerous other exemptions from the FLSA minimum wage and/or overtime requirements. Examples of these exemptions include certain agricultural workers, fish processing and canning employees, forestry and lumbering employees, railroad employees, ICC covered motor carriers, motion-picture theater employees, employees of small local newspapers, radio and television announcers, tobacco (leaf) services employees, and others. Since the rules governing exemptions from the FLSA are complicated and subject to change, employers who are uncertain about whether an exemption applies to its operations should contact their Employer Association or labor counsel.

6. CHILD LABOR

The child labor provisions of the FLSA provide that no employer may employ "oppressive child labor." In general, the law defines "oppressive child labor" as employing any person under 16 in nonfarm occupations. In occupations that have been found to be hazardous, the employee must be at least 18 years old (e.g., motor vehicle drivers, logging occupations, coal mine occupations and most manufacturing occupations). Employment of 14 and 15-year old's is permissible in retail, food service, gasoline service establishments, offices of other businesses and work experience/career exploration programs which are school supervised and administered. **Caution:** North Carolina law prohibits employment of youths under 18 years of age who are in school (through grade 12) during the hours of 11:00 p.m. to 5:00 a.m. preceding a school day. It does not apply to youths aged 16 and 17 if the youth's parents or guardians and the youth's school principal give written approval to the employer. (See Chapter 4.)

Youth Subminimum Wage

A subminimum wage – $4.25 an hour – is established for employees under 20 years of age during their first 90 consecutive calendar days of employment with an employer. Employers are prohibited from displacing employees in order to hire youth at the subminimum wage. Also prohibited are partial displacements such as reducing employees' hours, wages, or employment benefits.

7. EQUAL PAY ACT

The equal pay standards contained in the FLSA generally require that male and female workers receive equal pay for work requiring equal skill, effort and responsibility. Equal pay standards are discussed in greater detail in Chapter 12.

8. ENFORCEMENT

The FLSA provides for the following enforcement actions:

a. Investigations and inspections by representatives of the Wage and Hour Division;

b. Voluntary settlements and consent decrees;

c. Suits by employees to recover any back pay due them for the previous two years (three years for willful violations), liquidated damages, attorneys' fees

and costs;

d. Suits by the Secretary of Labor to enjoin employers from violating the FLSA;

e. Suits by the Secretary of Labor to collect underpayments and liquidated damages; and

f. Criminal actions brought by the Justice Department for "willful" violations (Maximum $10,000 fine, imprisonment up to six months, or both).

9. RELATED FEDERAL LAWS

a. Walsh-Healey Public Contracts Act: The Walsh-Healey Public Contracts Act sets basic labor standards for work done pursuant to contracts with the federal government in excess of $10,000. Employers are covered under this Act upon entering into a federal contract for more than $10,000 calling for the manufacture or supplying of goods. Employees are covered only if they spend any part of a workweek producing the actual goods to be provided under the federal contract. Employers must pay covered employees a "prevailing wage" which is set by the Secretary of Labor. In addition, employees must be paid time and one-half for all hours worked in excess of 40 in a week. Executive, administrative and professional employees are exempt from this requirement.

b. Davis-Bacon Act: This Act establishes employment standards for laborers and mechanics working on public projects under federal contracts for amounts in excess of $2,000. The Davis-Bacon Act requires payment of "prevailing wages" set by the Secretary of Labor and also provides for payment of certain "prevailing" fringe benefits.

c. Service Contracts Act: The Service Contract Act sets certain labor standards for employers that provide services to the federal government under contracts valued at more than $2,500. Service contracts covered by this Act include contracts for laundry and dry cleaning, custodial and janitorial work, packing and crating, guard duty, food and cafeteria service and miscellaneous housekeeping work. Employees who perform work under such contracts must be paid the "prevailing wage" and certain fringe benefits.

C. ACTIONS REQUIRED BY EMPLOYERS

In addition to complying with the various provisions of The Fair Labor Standards Act and related laws, employers also have the following obligations:

1. **RECORDKEEPING:** The FLSA requires the retention of payroll records, individual employment contracts, collective bargaining agreements, piece-rate tables, age certifications and certain other records for varying periods of time. A list of the recordkeeping requirements is set forth in Chapter 17.

2. **POSTERS:** All employers subject to the FLSA and employers covered by Walsh-Healey, Davis-Bacon, or the Service Contract Act must display certain federally

approved posters in the workplace. Current posting requirements are listed in Chapter 17.

D. TIPS FOR EMPLOYERS

Payment of the minimum wage and overtime for hours worked in excess of 40 are the basic requirements of the FLSA. There are, however, other factors to consider. For example, how is the minimum wage computed, what factors are included in the "basic hourly rate" that is used to compute overtime and what constitutes "hours worked"? Employers should know the answers to these and other questions in order to ensure compliance with the FLSA. Here are some points to consider:

1. **DEDUCTIONS FROM WAGES**
   Generally speaking, an employer cannot make certain deductions from an employee's wages if the deductions cause the employee's pay to fall below the minimum wage in any workweek. Examples of such deductions include deductions for purchase and maintenance of uniforms that are required by the employer; deductions for certain debts owed by the employee to the employer; deductions for tools or safety equipment required by the employer. Examples of deductions that can be made regardless of whether they reduce net pay below the minimum wage include most charitable deductions and deductions for union dues, taxes, social security, insurance premiums, and savings bonds. (See also N.C. Law in Chapter 4).

2. **Bonuses and Similar Payments**
   Employees are entitled to overtime pay based on one and one-half times their "regular rate." The question often arises whether bonuses and other discretionary payments can be excluded in computing an employee's "regular rate." The FLSA sets forth specific types of bonuses and similar payments that may be excluded in computing an employee's regular rate. These include discretionary bonuses, gifts, employer contributions to certain benefit plans and employer payments to certain profit-sharing, thrift, and savings plans. Non-discretionary bonuses such as attendance bonuses, pay-for-performance bonuses, and bonus given in lieu of an annual pay increase must normally be added to an employee's wages to determine the regular rate upon which overtime pay must be based.

3. **"SUFFER OR PERMIT" TO WORK**
   The concept of "hours worked" by an employee includes all time the employee is "suffered or permitted" to work. An employer is generally not liable for time worked by an employee without his permission. However, the employer's permission can be express or implied. Thus, the employer may be liable to the conscientious employee, secretary, or non-

exempt manager who starts work early, stays late, works through unpaid lunch breaks or takes work home, if: (1) the employer is aware that the employee is working during these periods; and (2) the employer permits the employee to do so. Management has the obligation to see that the unauthorized work is not performed and cannot accept the benefits of such work without compensating the employee.

4. LECTURES, SEMINARS, MEETINGS, ETC.

The Administrator of the Wage and Hour Division has determined that attendance at meetings, lectures, training programs, and similar activities need not be counted as working time if the following criteria are met:

a. Attendance is outside the employee's normal working hours;

b. Attendance is voluntary;

c. The course, lecture or meeting is not directly related to the employee's job; and

d. The employee does not perform any productive work during such attendance.

5. WAITING TIME

In determining whether waiting time or periods when an employee is "on call" is compensable working time, the courts have made a distinction between employees who are "engaged to wait" and those "waiting to be engaged". An employee who is engaged to wait on the employer's premises for any work that might arise or an employee who waits off premises under circumstances that preclude the use of the waiting time for his or her own purposes is "engaged to wait" and such time is normally compensable. On the other hand, an employee who comes to work early or an employee who is "on call" during periods when the time can effectively be used for personal purposes is "waiting to be engaged" and such time is not compensable.

6. TRAVEL TIME

Ordinary travel time by employees between their homes and job sites is not compensable time. Furthermore, time spent in a car pool between work and home would not be considered compensable time. In situations where an employee is permitted to drive a company vehicle between work and home, such time would be considered compensable unless the employee voluntarily chose to drive the vehicle, the driving is primarily for the benefit of the employee, and the work site is within the normal commuting area for employer's business.

Once an employee starts the workday, all time spent traveling in a day is compensable.

Overnight travel time is generally compensable for the time spent traveling during the hours corresponding to the employee's normal

working hours. If the travel carries through on weekends or holidays, the hours which correspond to the normal working hours on other days of the week must be counted as compensable. In other words, if an employee's regular work hours are 8:00 A.M. to 5:00 P.M., travel during those hours even on the weekend is compensable, and travel after those hours is not. Employers may, however, exclude bona fide meal periods from the hours worked. Employees who choose to drive their own vehicles as a convenience instead of riding as a passenger on a plan, train or bus, are subject to the same rules. Employees who are required to drive their own or a company vehicle (for example, to carry tools on the job) must be compensated for all driving time.

In addition, when an employee who generally works at only one location is given a special one day assignment in another city which does not require an overnight stay, the time spent traveling outside of the normal working hours must be counted as compensable.

7. PORTAL TO PORTAL ACT

The Portal-to Portal Act of 1947 was designed to clarify the meaning of the term "working time" for minimum wage and overtime purposes. Under this Act, "working time" does not include time spent in activities that are "preliminary" or "postliminary" to the "principal activities" which the employee is engaged to perform, if:

a. The "preliminary" or "postliminary" activities occur before or after the principal activities of the day, and

b. The activities are not compensable by virtue of any contract, custom or practice at the particular establishment where the employee is employed.

Under the Portal to Portal Act, time spent "walking, riding or traveling" during normal work hours and time spent in traveling from the place where one principal activity is performed to the place where another is performed is compensable working time. Time spent on the employer's premises before or after work changing into company required uniforms may also constitute compensable working time if the uniforms are essential to the performance of the employee's principal activities. Time spent donning and doffing protective gear is compensable time.

8. The above examples are merely illustrations of the factors used in determining "minimum wage", "regular rate" and "hours worked". There are many additional factors that should be considered to ensure compliance with the FLSA. Your Employer Association or labor council should be consulted about questions in these areas and for copies of rulings and regulatory bulletins.

9. Neither the FLSA or North Carolina wage and hour law require an employer to give employees rest or meal breaks. However, if rest and meal breaks are given, certain conditions must be met regarding non-exempt pay.

Rest Periods

Rest periods given up to 20 minutes must be counted as hours worked and compensable time.

Meal Periods

Ordinarily, bona fide meal periods, to be counted as non-work time, must last 30 minutes or more. A shorter period may be allowed under special conditions. In order to be non-paid time, the employee must be completely relieved from duty during the meal break.

For survey data concerning area practices with regard to rest and meal periods, contact your Employer Association.

Nursing Mother Amendment to FLSA

The Patient Protection and Affordable Care Act of 2010 (PPACA) established a Nursing Mother Amendment to the Fair Labor Standards Act (FLSA). It requires employers covered by the FLSA to provide for unpaid breaks to nursing mothers so they can express breast milk. Covered employers with less than 50 employees are exempted from this provision if they can prove that these breaks would impose an "undue hardship" on the employer meaning that it would cause the employer significant difficulty or expense. Covered employers have two obligations under this amendment: (1) employers must allow a "reasonable break time" for the employee to express milk for the child during the first year of the child's life; and (2) employers must provide a room other than a bathroom. The nursing mother must be shielded from view and be assured of privacy, with no interruptions by other employees or the public.

4. North Carolina Wage & Hour Laws

A. BACKGROUND

North Carolina employers must comply with both the Fair Labor Standards Act ("FLSA") and the North Carolina Wage-and-Hour Act ("NCWHA"). While some portions of the NCWHA do not apply to employers who are subject to the FLSA, practically all private employers with employees working in North Carolina are subject to the wage payment provisions of the NCWHA.

B. HOW THE LAW WORKS

1. WAGE PAYMENT

The wage payment provisions of the NCWHA generally specify the time and manner that wages must be paid in North Carolina. The NCWHA statute is found at N.C. General Statutes § 95-25. The Department of Labor regulations that interpret the NCWHA are found at 13NCAC12, Title 13 NC Administrative Code Chapter 12. The requirements for payment of wages in North Carolina include the following:

a. *Regular Payday:* Employers must pay employees all accrued wages and tips on the regular payday. Pay periods may be daily, weekly, bi-weekly, semi-monthly or monthly. Wages based on bonuses, commissions, or other forms of calculation may be paid as infrequently as annually if the employee is told in advance. [N.C. Gen. Stat. § 95-25.6].

b. *Definition of "Wages":* The term "wages" in North Carolina is defined as all "compensation for labor or services rendered by an employee." Importantly, the definition of "wage" specifically includes "sick pay, vacation pay, severance pay, commissions, bonuses and other amounts promised when the employer has a policy or practice of making such payments." [N.C. Gen. Stat. § 95-25.2(16)]. The NCWHA's "promised wages" obligation exceeds the FLSA requirements [See Chapter 3].

c. *Payment to Separated Employees:* The inclusion of certain fringe benefits in the definition of wages is significant because the law requires payment of all "wages" (e.g. including accrued vacation pay, sick pay, bonuses, etc.) to a separated employee on or before the next scheduled pay day after separation unless: (1) the employer has a policy covering vacation pay, sick pay, bonuses, etc.; (2) these policies are made available to employees in writing or through a posted notice; (3) the policy specifically provides for forfeiture of such benefits upon separation [N.C. Gen. Stat. § 95-25.7 and § 95-25.13].

2. DEDUCTION FROM WAGES

a. *Permissible Deductions:* An employer may withhold or make deductions from an employee's paycheck only when:

(1) The employer is required or empowered to do so by state or federal law; or

(2) The employer has a written authorization from the employee which is signed on or before the payday for the pay period from which the deduction is to be made indicating the reason for the deduction. Two types of written authorizations are permitted.

- Where the amount of the deduction is known in advance, the authorization must specify the dollar amount (or percentage) of wages to be deducted from one or more paychecks.
- Where the amount of the deduction is not known and agreed upon in advance, the authorization need not specify the amount of the deduction, provided that the employee receives at least 24 hours advanced written notice of the specific amount of any proposed deduction and is given a reasonable chance to withdraw the authorization before it is made. [N.C. Gen. Stat. § 95-25.8];

b. *Deductions for Cash and Inventory Shortages, Damage to Company Property:* Cash shortages, inventory shortages, or loss or damage to company property may not be deducted from an employee's wages unless the employee receives notice of the amount to be deducted at least seven days prior to the payday on which the deduction is to be made, except when a separation occurs the seven day notice is not required. However, if criminal process has been issued against an employee under these circumstances, the employer may deduct wages down to minimum wage without the employee's authorization. [N.C. Gen. Stat. § 95-25.8]

c. *Maximum Deductions:* Deductions for cash or inventory shortages, damage to company property, uniforms or uniform maintenance, tools, or any deductions for the employer's benefit, cannot reduce an employee's wages to below the minimum wage and no deductions are permitted from overtime payments required by the FLSA. Deductions, however, for advanced wages or overpayment of wages can reduce wages below minimum wage and can be done so without authorization from the employee. [N.C. Gen Stat § 95-25.8]

C. ACTIONS REQUIRED BY EMPLOYERS

1. Under the wage payment provisions of the NCWHA, employers must:

a. Notify employees in writing at the time of hire of the promised wages, and the day and place of payment if delivering payment in person or the method of payment if using a different form (e.g., direct deposit or mail). Keep in mind that the term "promised wages" includes benefits such as vacation, sick days, severance pay and the like;

b. Make available to employees, in writing or by posted notice, all employment practices and policies regarding promised wages;

c. Notify employees in writing or by posted notice of any changes in practices or policies regarding promised wages [N.C. Gen. Stat. § 95-25.13];

d. Post notices in every establishment summarizing the major provisions of the NCWHA. Notices that satisfy this requirement are contained in the labor law posters and are available from your Employer Association. (See Chapter 17); and

e. Once an employer sets wages, the NCWHA prevents an employer from orally reducing wages. The reduction must be in writing, and the employee must be notified of the reduction at least one pay period prior to any changes in promised wages.

2. Other provisions of the NCWHA apply primarily to employers who are not subject to the requirements of the FLSA. State and Local governments are covered by the NCWHA but only to the extent that they must pay the minimum wage to certain, nonexempt employees. Some highlights of the NCWHA include:

a. *Minimum Wage* - The current North Carolina minimum wage is shown on the poster in Chapter 17.

b. *Overtime* - Employers must pay covered employees not less than time and one-half the regular rate of pay for all hours worked in excess of 40 hours in a workweek.

c. *Youth Employment* - No youth under 18 years of age may be employed by an employer in any occupation without obtaining a "youth certificate" unless specifically exempted. Certificates are issued by county directors of social services. No youth under 18 years of age may be employed in any occupation which the U.S. Department of Labor has declared hazardous under the FLSA. No youths under the age of 18 who are in school (through grade 12) may be employed between the hours of 11:00 p.m. and 5:00 a.m. preceding a school day except 16 and 17-year old's can be employed during these hours if the employer has written permission from the youth's parents or guardians and the youth's school principal. Employers are subject to fines and civil penalties for violations. In addition, civil and criminal penalties may be imposed for violations of the state Occupational Safety and Health Law where injury or death occurs, and for falsification of records pertaining to employees under 18 years of age.

d. *Recordkeeping* - Employers subject to the state wage and hour law are required to maintain records of persons employed by the employer and of the wages, hours and other relevant conditions and practices of employment. Further, employers are required to make, keep and preserve employment records that include the ages of employees. Employers are subject to civil penalties for failure to maintain adequate records. Employers are also required to display the state-approved poster summarizing the major provisions of the state wage and hour law.

e. *Exemptions* - There are numerous exemptions to the minimum wage, overtime and child labor requirements of the NCWHA. Questions concerning coverage should be discussed with your Employer Association or labor counsel.

f. *Form of Authorization or Notice* - A written authorization from an employee or a written notice from an employer regarding wage deductions may be made in the form of an electronic record such as an e-mail. [N.C. Gen. Stat. § 95-25.8.]

D. TIPS FOR EMPLOYERS

North Carolina employers commonly encounter difficulty with two aspects of the NCWHA which differ from the FLSA, improper deductions from wages and the modification or forfeiture of "promised" wages. With regards to modification of wages, employers must keep in mind that compensation plans which include bonuses and commissions may not be modified retroactively. Rather, any changes to compensation must be made prospectively, before the "promised" wages are earned.

Further, policies regarding payment and forfeiture of fringe benefits must be clearly spelled out. For example, if it is not the employer's intent to pay vacation pay, sick pay, bonuses, etc., to employees who are discharged, a forfeiture provision must be included in policies covering these benefits. Subject to certain federal laws such as ERISA, a forfeiture provision can be as narrow or as broad as the employer desires, but it must be included in the policy. Policies providing for the accrual of benefits such as vacations and sick pay based on time actually worked also provide protection against "windfall" payments in the event of separation. Your employer association can assist in developing policies of this nature.

If changes are to be made in pay levels to reduce compensation, notice must be given in writing at least one pay period prior to the effective date of such reduction. We recommend notice of one pay period for good employee relations.

In the case of changes in sick pay, vacation, and comparable matters, there is a requirement that the notice be in writing.

5. North Carolina's Workers' Compensation Law

A. BACKGROUND

The purpose of North Carolina's Workers' Compensation Act [N.C. Gen. Stat. § 97-1 et. seq.] is to provide compensation to employees for lost wages caused by occupational injuries and diseases "arising out of and in the course of employment." As used in the Workers' Compensation Act, the words "arising out of and in the course of employment" express the law's basic requirement that an injury or disease must be work-related in order to be compensable.

Recovery under North Carolina's Workers' Compensation Act is an employee's exclusive remedy for work-related injuries or diseases, except in the case of an injury resulting from the intentional misconduct of the employer. Intentional misconduct includes situations where the employer engages in misconduct that is substantially certain to cause death or serious injury. Absent an intentional injury, an employee cannot sue his employer outside of workers' compensation for damages resulting from occupational injuries caused by the employer's negligence. The employer in turn cannot avoid a workers' compensation claim by showing that the employee's negligence caused the injury or disease. However, an employee is not eligible for workers' compensation benefits if the employer can prove the injury resulted from intoxication, use of controlled substances not prescribed by a doctor, or willful intent to injure himself or another.

The North Carolina Workers' Compensation Act is administered by the North Carolina Industrial Commission, Dobbs Building, 430 N. Salisbury Street, Raleigh, North Carolina 27603. The Commission consists of a Chair and five Commissioners who are appointed by the Governor subject to legislative confirmation for terms of six years, with a two-term limit, and who provide appellate review of cases in panels of three. Deputy Commissioners are the trial judges who conduct hearings, take evidence and enter orders, opinions and awards. Special Deputy Commissioners act as quasi-magistrate judges who hear pre-hearing motions and initial disputes regarding discovery and medical benefits.

B. HOW THE LAW WORKS

1. COVERAGE

All employers in the State with 3 or more employees must provide workers' compensation coverage. State and local governments, and all political subdivisions thereof, must also provide coverage for their employees. Employers can obtain workers' compensation insurance through an insurance carrier or be self-insured upon meeting certain requirements established by the Commission.

2. COMPENSABLE INJURIES AND DISEASES

a. *Injuries in General:* Except in the case of back injuries and hernias, an "injury" is compensable under the North Carolina Workers' Compensation Act if:

(1) The injury was caused by accident;

(2) The injury arose out of the employment; and

(3) The injury was sustained in the course of employment.

The requirement that an injury must be caused by accident is an important feature of the North Carolina Workers' Compensation Act. The Act specifically provides that an "accident" shall not include "a series of events in employment occurring regularly, continuously, or at frequent intervals." The courts have defined the term "accident" to mean a separate, "unlooked for and untoward event which is not expected or designed by the injured employee." The burden of proving that an injury was caused by an accident arising out of and in the course of employment rests with the employee.

b. *Back Injuries:* A limited exception to the "injury by accident" requirement is made for back injuries. The law provides:

With respect to back injuries; however, where injury to the back arises out of and in the course of the employment and is the direct result of a specific traumatic incident of the work assigned, "injury by accident" shall be construed to include any disabling physical injury to the back arising out of and causally related to such incident.

c. *Hernias:* The Workers' Compensation Act sets forth specific requirements for compensation for hernias or ruptures. In order to receive compensation for a hernia or rupture resulting from an injury by accident or like back injuries, a specific traumatic incident arising out of and in the course of employment, the employee must prove:

(1) That there was an injury resulting in hernia or rupture;

(2) That the hernia or rupture appeared suddenly;

(3) That the hernia or rupture immediately followed an accident. Provided, however, a hernia shall be compensable under this article if it arises out of and in the course of employment and is the direct result of a specific traumatic incident of the work assigned;

(4) That the hernia or rupture did not exist before the accident for which compensation is claimed.

N.C. Gen. Stat. § 97-2(18).

d. *Unexplained Falls:* The Courts have held that a fall at work, for which there is no explanation, is presumed compensable. To rebut this presumption, the employer must prove that the fall was due to a non-work related condition or an infirmity of the employee.

e. *Occupational Diseases:* Section 97-53 of the North Carolina General Statutes contains a list of recognized occupational diseases that are compensable under the Act. Compensable diseases include asbestosis, silicosis, radium poisoning, injury by X-rays, poisoning by certain chemicals, tenosynovitis caused by trauma, byssinosis, occupational deafness, and others. In addition to the

occupational diseases spelled out in this section of the Act, an occupational disease may also include:

Any disease, other than hearing loss covered in another subdivision of this section, which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment. N.C. Gen. Stat. § 97-53(13).

Unlike most injuries, there is no requirement that an occupational disease be caused by an "accident." The law expressly provides that "disablement or death of an employee resulting from an occupational disease shall be treated as the happening of an injury by accident."

Pre-Existing Conditions Claims related to pre-existing conditions may be compensable where an injury materially aggravates or accelerates a pre-existing condition and causes disability.

An employer must take his employee as he finds him and will be liable for the full extent of the employee's compensable injury even where a pre-existing condition substantially contributes to the degree of the injury.

When a pre-existing, non-disabling, non-job-related condition is aggravated or accelerated by an accidental injury arising out of and in the course of employment or by an occupational disease so that disability results, the employer must compensate the employee for the entire resulting disability even though it would not have disabled a normal person to that extent. In this situation, the NCWCA requires compensation only for that portion of the disability caused, accelerated, or aggravated by the occupational disease and liability will no longer exist upon the employee's return to "baseline." However, when a pre-existing, non-disabling, non-job-related disease or infirmity eventually causes an incapacity for work without any aggravation or acceleration by a compensable accident or occupational disease, the resulting incapacity is not compensable.

3. BENEFITS

Three types of benefits are available to employees who suffer occupational injuries or diseases: (1) compensatory benefits, (2) medical benefits, and (3) death benefits.

a. *Compensatory Benefits:* Compensatory benefits are designed to compensate an employee for lost wages caused by a work-related injury or disease. The following rules apply to compensatory benefits:

(1) *Waiting Period:* Compensatory benefits are not paid during the first 7 calendar days of disability unless the disability continues for more than 21 days. These 21 days do not have to be consecutive and any day in which an employee does not earn full wages because of disability is counted as a full day of disability. After disability has continued for 21 days, the employee is entitled to compensation for the first 7 days.

(2) *Amount of Benefits:* During a period of total disability, an employee is entitled to receive weekly benefits of 2/3 his average weekly earnings subject to a specified minimum and maximum payment. Weekly benefits are paid to the employee until the employee returns to earning wages or death or settlement of the case or by order of the Commission or, in post-amendment claims, 500 weeks passes from date of first disability. If an employee returns to work with a partial disability resulting in diminished earnings, he is entitled to 2/3 of the wage loss during this period up to a 500 week maximum from the date of first disability (except in some catastrophic cases), unless a permanent partial disability settlement has been reached. An employee who is released back to full duty, without restrictions, is not entitled to further weekly benefits except for a permanency rating, however termination of weekly compensation without the employee's actual return to work requires an order from the Commission.

(3) *Payment for Scheduled Injuries:* If an injury results in amputation or permanent loss of a specified part of the body, compensation is payable, even after his return to work or release to full duty work, for a number of weeks set by statute for each body part.

If one of the disabilities specified is permanent, but not total, then the percentage of loss suffered is applied to reduce the number of weeks payable for the disability. For example, if an injury causes a 20% permanent loss in the use of a leg, the employee is entitled to 20% of 200 weeks, or 40 weeks compensation in addition to benefits received during the healing period. Disabilities resulting from occupational disease are compensated identically to disabilities resulting from occupational injuries.

b. *Medical Benefits:* In addition to compensation for lost earning capacity, the Act also provides for the payment of medical benefits. The employer is required to provide medical, surgical, hospital, nursing services, medicines, sick travel, rehabilitation services and other treatment reasonably required to effect a cure or give relief. Normally, the employer selects a physician or medical facility and is entitled to direct treatment for the injured employee. However, in an emergency, or if an employer refuses to provide medical benefits, the employee can obtain the necessary treatment from a physician or hospital of his own choice and must be reimbursed by the employer. Additionally, if an employee is dissatisfied with the treatment being rendered by the physician furnished by the employer, he can seek permission from the Commission to change physicians. In cases involving permanent total disability, medical expenses must be paid for the life of the employee. Where an employee reaches maximum medical improvement (MMI), and is not in need of further medical treatment, the right to medical treatment ceases once the employee goes two years without medical treatment. However, if at the time of MMI, a treating physician determines that there is a substantial likelihood that the employee will need further medical treatment as a result of the compensable injury, then the treating physician can complete a Form

18M, which would allow the employee lifetime medical benefits for that condition.

Employees are entitled to statutory second medical opinions at the employer's or carriers expense. These second opinions are divided into two categories: second opinions on overall care, including diagnosis, prognosis, and treatment recommendations, and second opinions on the Permanent Partial Disability rating. For the latter, the employee has absolute discretion on the provider for the second opinion, but the provider will be subject to the fee schedule. The Commission will typically average the two ratings. For the former, the employer and employee must agree on a provider.

c. *Death Benefits:* When a compensable injury or occupational disease causes the death of an employee, death benefits are payable provided that a claim is filed with the Industrial Commission in writing within two years after death. If the claim is not filed within two years, the right to benefits is lost. Death benefits are paid to the following persons in the following order: (1) total dependents which include the widow or widower and unmarried children under 18 years of age, who are conclusively presumed to be dependent; (2) if no total dependent, then to those partially dependent upon the employee at the time of death; (3) if no total or partial dependents, then to the next of kin as listed in the intestacy statute. All persons in the same class take equal shares of compensation.

Compensation for death is paid for 500 weeks, unless a widow or widower is physically or mentally disabled and unable to work at the time of the employee's death, in which case compensation continues for the life of the widow or widower or until remarriage. Payments to dependent children continue until they reach 18 or for 500 weeks, whichever is longer.

The weekly benefit payment is 2/3 of the employee's average weekly wage subject to minimum and maximum payments set forth in the law. Up to $10,000 can be allowed for funeral expenses. Medical benefits paid to the employee before death are not counted as death benefits.

5. HEARINGS, AWARDS, AND APPEALS

a. *Application and Hearing:* If the employer or insurance carrier decides to deny liability in a case, a detailed statement of the reasons for the denial must be filed within fourteen days after it has notice of the injury or death. The employer must advise the employee of the denial on a Form 61, see sample form at the end of this chapter. If the employer is uncertain whether the claim is compensable or if it is liable, the employer may initiate payments without prejudice and without admitting liability. The employer must file a Form 63 in these circumstances. These payments may continue until the employer contests or accepts the claim or the expiration of ninety (90) days, whichever occurs first. If the employer contests the claim within the ninety day period, it may suspend payments if it promptly notifies the Commission. If it does not do so, liability is deemed admitted. However, if a Form 63 is filed for a medical-only injury and is not out of work, an employer may provide medical benefits under a Form 62, Section 2 indefinitely without admitting or denying

the compensability of the claim.

If the employer and the employee disagree as to whether compensation is due or the amount that is due, either party may apply to the Industrial Commission requesting a hearing on the issues in dispute. Industrial Commission Form 33 is used to make such a request. Self-insured employers and insurance carriers must respond to a claimant's request for a hearing on Form 33R within 45 days of the receipt of the request. Upon application, a hearing will be scheduled before a Deputy Commissioner in the city or county where the injury occurred.

b. *Mediation:* In almost all cases in which a Form 33 has been filed, except unrepresented cases, the Industrial Commission orders that the parties participate in mediation. Within 55 days after the request for a hearing is filed, the parties must select a mediator or file a motion to be excused from the mediated settlement conference. The mediation must be held within 120 days after the hearing request is filed. However, failure to schedule the mediation within that deadline will not postpone the hearing.

c. *Determination and Award:* Within 180 days after a hearing, the Deputy Commissioner will issue a determination including findings of fact, rulings of law and, if appropriate, an award.

d. *Review of an Award:* Within 15 days after the notice of award, a party may apply to the Full Commission for a review of the award. If good grounds are shown, the Commission may reconsider the evidence and amend the award. No new evidence is typically taken by the Full Commission, and this hearing is primarily an appellate one, although newly discovered evidence can be admitted on motion to the Commission. The award of the Full Commission is normally conclusive and binding on all questions of fact. However, either party may appeal questions of law to the North Carolina Court of Appeals within 30 days of the Full Commission decision.

e. *Termination of Benefits:* Under the Commission's regulations, an employer or its insurance carrier cannot unilaterally stop payments of compensation required by an award of the Commission until the terms of the award have been fully satisfied, or until the employee returns to work. The employer or his insurance carrier can, however, file a request to discontinue benefits on a form provided by the Commission I.C. Form 24 on various grounds, such as a refusal to return to work, a full duty release, or malingering. These requests are heard on an expedited basis by a Special Deputy Commissioner.

f. *Trial Return to Work:* The law allows an employee to attempt a trial return to work for a period of nine months or less. During the trial return to work period, the employee must be paid any amounts owed for a partial disability. If the trial return to work is unsuccessful, the employee remains eligible for any rights to compensation for total disability. Form 28T must be filed if the employee returns to work on a trial basis. If the employee believes the trial return to work is unsuccessful, the employee must have a Form 28U completed by a treating physician in order for benefits to resume.

6. RETALIATION FOR FILING A CLAIM IS PROHIBITED

An employer may not discharge or demote an employee for filing a workers' compensation claim or testifying in a workers' compensation proceeding. Employees who claim to be discharged for exercising their rights under the Workers' Compensation Act may file a complaint with the Commissioner of Labor. The Commissioner will investigate the complaint and issue a determination of whether unlawful retaliation occurred. The Commissioner or the aggrieved party may sue in Superior Court for reinstatement, back pay, and attorneys' fees. (See Chapter 9)

7. PREVENTION OF DOUBLE RECOVERY

The Industrial Commission has the discretion to allow a credit for unemployment benefits received by an employee who is receiving or claiming temporary total or temporary partial disability benefits. Such a credit is usually agreed on by the parties. There is no offset of benefits for permanent partial disability or other permanent scheduled injury under N.C. Gen. Stat. § 97-42.1 for unemployment compensation received by an employee. Generally, employers may receive an offset for short- or long-term disability paid to an injured employee, so long as the employer contributed to the premium for those benefits. The amount of the offset is typically adjusted based on the percentage of the premium paid by the employer.

8. SECOND INJURY FUND

The Second Injury Fund was established to provide compensation for employees in unusual cases of second injuries. The Industrial Commission is authorized to disperse money from the Fund in the following situations:

a. When the employee is an epileptic or sustained a permanent injury in an earlier employment and then receives a permanent injury by accident in a subsequent employment, the subsequent employer is liable only for the degree of disability which would have resulted from the later accident if the earlier disability had not existed. The Second Injury Fund provides any additional compensation.

b. When the employee has previously incurred permanent partial disability through the loss of a hand, arm, foot, leg or eye and by subsequent accident in the same employment incurs total permanent disability through the loss of another member, the employer is liable for the subsequent injury only. The Second Injury Fund provides the additional compensation, which is not to exceed the compensation for total disability provided for in N.C. Gen. Stat. § 97-29. [N.C. Gen. Stat. § 97-40.1]

9. COMPROMISE SETTLEMENT AGREEMENTS

Unlike settlements of EEOC charges and other employer/employee disputes, all compromise settlement agreements must be submitted to the Industrial Commission for approval. The Commission's rules set forth a number of requirements which must be met before the agreement will be approved. In general, these requirements are meant to ensure that the Commission has all

relevant data, such as medical records, and that the agreement was knowingly and voluntarily entered into by the employee.

10. AFFIRMATIVE DEFENSES TO COMPENSABILITY

The Act provides for several defenses against compensability of an injury based on employee conduct. Specifically:

a. First, no compensation is payable for an injury proximately caused by the employee's willful intention to injure or kill himself or herself, or another. See N.C. Gen. Stat. § 97-12(3).

b. Likewise, no compensation is payable where an employee's injury is proximately caused by intoxication or the influence of any controlled substance under the North Carolina Controlled Substances Act sufficient to cause appreciable impairment to the employee's mental and/or physical faculties, unless such substance was prescribed for the employee or was supplied by the employer. See N.C. Gen. Stat. § 97-12.

c. Finally, compensation shall be barred if an employer proves that, at the time of hire or in the course of entering into employment or during the post-offer medical examination: (1) the employee knowingly and willfully made a false representation as to the employee's physical condition; (2) the employer relied upon one or more false representations by the employee, and the reliance was a substantial factor in the employer's decision to hire the employee; and (3) there was a causal connection between the false representation by the employee and the injury or occupational disease at issue. See N.C. Gen. Stat. § 97-12.1.

C. ACTIONS REQUIRED BY EMPLOYERS

1. FIRST REPORT OF INJURY

Within 5 days after an employer has knowledge of the occurrence of an injury to an employee which causes his absence for more than one day or medical expenses in excess of an amount determined by the Commission, the employer must report the injury on Commission Form 19. If the employer is insured by an insurance carrier, the report must be sent through the carrier. If the employer is self-insured, the report must be sent directly to the Commission. At the same time, the completed Form 19 and a Commission Form 18 must also be provided to the employee. Failure to file this report subjects the employer to a fine of up to $25.00 for each such failure to report.

2. RETURN TO WORK REPORT

If the employer's Report of Injury [I.C. Form 19] did not indicate when the injured employee returned to work, the employer should file a "Return to Work Report" [I.C. Form 28] with the Insurance Carrier, or if self-insured, with the Commission.

3. "MEDICAL ONLY" CASES

"Medical Only" cases in which the injured employee is not absent from work more than one day or medical expense is less than an amount determined by the Commission are not normally reported to the Commission if the medical charges are in line with the Commission's medical fee schedule. However, self-insured employers and insurance carriers must maintain in their files a Form 19 covering each injury together with medical bills, HCFA Form 1500i and attending physician reports for two years. In July of each year, self-insured employers and insurance carriers must submit to the Industrial Commission a Form 51 stating the total number of "medical only" claims and total dollars paid for such claims for the twelve calendar months ending June 30.

4. OTHER REPORTS AND RECORDS

Other Reports and Records must be submitted to the Industrial Commission. These reports are normally submitted by the employer's insurance carrier after a Form 19 has been filed. Self-insured employers must file these reports themselves (e.g., Agreement for Compensation for Injury; Report of Compensation and Medical Paid; Medical and Hospital Charges, etc.) Information concerning the filing of these reports can be obtained from the insurance carrier, your employer association or legal counsel. The Industrial Commission will also provide information on required reports.

5. POSTING "WORKERS' COMPENSATION NOTICE"

All employers covered by the North Carolina Workers' Compensation Act must post on the bulletin board or some other conspicuous place a poster entitled "Workers' Compensation Notice and Instructions to Employers and Employees" [I.C. Form No. 17].

NORTH CAROLINA SELF-INSURANCE GUARANTY ASSOCIATION

The North Carolina Self-Insurance Guaranty Association was created by the General Assembly in 1986 to provide mechanisms for the payment of covered claims under self-insurance coverage and to avoid financial loss to claimants due to the insolvency of a self-insurer. Membership in the Association is a prerequisite for receiving authority to self-insure from the Industrial Commission. All self-insured employers are required to contribute to a fund established to compensate claimants of insolvent self-insured employers and to submit annual reports.

D. TIPS FOR EMPLOYERS

North Carolina's workers' compensation benefit system is a "hybrid" system exhibiting attributes of both a "PPD" (partial permanent disability) system and a "Wage Loss" system. This system is a result of decisions made by the NCIC (North Carolina Industrial Commission) and NC courts. A traditional "PPD" system is where an employee receives a partial permanent disability settlement once MMI (maximum medical improvement) is reached.

Temporary total disability (TTD) benefits end at this point. In a typical "Wage Loss" benefit system, TTD income benefits continue as long as the employee is unable to return to work. Under North Carolina's "hybrid" system, injured employees who have not returned to work once MMI is reached can choose a PPD settlement or continue to receive TTD benefits for a maximum of 500 weeks. This system has resulted in longer durations of TTD benefits and higher PPD settlements.

Legislative and regulatory changes in 2011 and 2015 are causing these positive results:

- **Medical costs per claim in NC are now 28% below the 18-state comparative median according to WCRInet.org (2019).**
- **Despite this overall decrease in cost, access to physicians and hard-to-find specialists has improved.**
- **Annual growth in indemnity (wage) claims has slowed to match wage increases in the market.**
- **NC is no longer the clear cost leader on indemnity, joining three other states in the top 20%.**
- **Workers' compensation premiums, approved by the Insurance Commissioner, have fallen 17.2%, 12.5% and 8.5% in the three most recent years.**

ECNC (Employers Coalition of North Carolina), the public policy arm of the three North Carolina employer associations, continues to address this "hybrid" system through its efforts at the North Carolina General Assembly.

Unions continue to emphasize employee safety and health concerns during union organizing campaigns. Of course, the vast majority of North Carolina employers are vitally concerned and interested about the safety and health of their employees. Yet employees may not be aware of this concern unless it is communicated by the employer on a regular basis. Employee meetings, safety committees, etc. can be used for this purpose. Your employer association can assist in developing such a program.

You should police claims carefully, keeping in touch with the injured employee, physician and insurance carrier to facilitate an early return to work as well as continuing good employee relations.

Such attention may reduce appeals and other legal action on the part of legitimately injured employees and reveal malingering on the part of others. Remember, your company has the right to select the physicians to treat and examine the injured or ill employee. North Carolina law also gives employers the right to obtain medical treatment records from physicians providing treatment in workers' compensation cases without having to obtain the permission of the employee receiving the treatment. The request for records from the treating physician should be in writing with a notice of such provided to the employee. Oral communications between an employer and physician are also permitted as long as proper procedures are followed

in accordance with N.C. Gen. Stat. § 97-25.6 (C)(3). Your company should have some established relationship with local physicians who understand the work your employees must perform.

Additionally, before a claimant reaches MMI or the end of the healing period, any employment with the employer of injury and within an employee's physical restrictions as approved by the authorized treating physician is considered suitable, even temporary partial duty positions. After MMI, suitable employment is determined based on the employee's education and physical vocational abilities as long as the job is within 50 miles of the employee's residence.

Be aware that employees out of work due to a workplace injury or illness may also have protections under the Family Medical Leave Act (Chapter 24) and/ or the Americans with Disabilities Act (Chapter 19). If you have questions on how these protections interact with workers' compensation contact your employer association or legal counsel.

Relevant Links:

http://www.ic.nc.gov/forms/form51.pdf

https://www.ic.nc.gov/forms.html

North Carolina Industrial Commission

ANNUAL CONSOLIDATED FISCAL REPORT OF "MEDICAL ONLY" AND "LOST TIME" CASES

Emp. Code #_____

Carrier Code #_____

The Use of This Form Is Required Under the Provisions of the Workers' Compensation Act

5

It is the responsibility of the Carrier, Self-Insured Employer, Group Self-Insured as certified by the N.C. Department of Insurance and Statutory Self-Insured (State Agencies and Political Subdivisions) to submit a consolidated fiscal report yearly to the N.C. Industrial Commission on medical expenses paid without prior submission of the billings to the Commission, due to (1) the charges having been incurred in "medical only" cases, (2) application of the Commission's Fee Schedule by an approved firm, or (3) payment pursuant to a contract with a Managed Care Organization exempt from the Fee Schedule. An MCO, Third Party Administrator, or service company may file on behalf of these parties. A Form 51 covering the preceding July 1 - June 30 shall be submitted on or before July 30 of each year.

#	Name and Code # of Carrier, Self-Insured Employer, Group Self-Insured as certified by the North Carolina Department of Insurance, or Statutory Self-Insured (State Agencies and Political Subdivisions)

All Must Complete the Following

1. Total Number of "Medical Only" Cases: _____
2. Total Amount Paid "Medical Only" Cases: $ _____

Complete the Following Section Only If You Are a Managed Care Insurer or Are Directly Applying the Industrial Commission Medical Fee Schedule to Submitted Medical Bills:
(Exclude "Medical Only")

3. Total Number of "Lost Time" Cases: _____
4. Total Hospital -- Outpatient paid: $ _____
5. Total Hospital -- Inpatient paid: $ _____
6. All other Providers, excluding Rehabilitation: $ _____
7. Total Amount Paid for Rehabilitation: $ _____
8. Total Medical Comp. Paid (Add lines 4-7): $ _____

Address of Submitting Office:

_____

_____

_____

REPORTING YEAR: JULY 1, 20__ THROUGH JUNE 30, 20__

E-MAIL TO: FORMS@IC.NC.GOV

FORM 51
02/2017
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FORM 51

6. North Carolina Employment Security Act

A. BACKGROUND

Unemployment insurance in North Carolina is governed by a dual system of federal and state laws. The purpose of these laws is to provide temporary income protection for individuals who lose their jobs through no fault of their own.

The federal system of unemployment is controlled by the Federal Unemployment Tax Act, a part of the Internal Revenue Code and Social Security Act. Under this law, unemployment taxes are collected by the states and deposited in the federal treasury where they are subsequently requisitioned by the states to pay claims for benefits to the unemployed in accordance with state law. Employers' credit card receipts and other third-party payments may be garnished by the state to collect unpaid unemployment taxes.

The North Carolina Employment Security Act establishes procedures for distributing unemployment funds within the state. The purpose of this law is twofold: (1) to help the unemployed find work through job service programs; and (2) to provide unemployment benefits for a limited time while unemployed individuals seek work.

The Division of Employment Security (DES) is responsible for administering the Employment Security Act.

B. HOW THE LAW WORKS

1. COVERAGE

Ninety-seven percent (97%) of all wage and salaried employment in North Carolina is covered by the Employment Security Act. Coverage includes all work for which wages are paid by:

a. An employer who employs one or more workers in any 20 weeks during a calendar year, or whose payroll is $1,500 or more during a calendar quarter;

b. An agricultural employer who employs 10 or more workers on any day during 20 weeks in a calendar year, or who pays $20,000 or more in gross wages in any calendar quarter;

c. An employer who pays $1,000 or more for domestic service during any calendar quarter;

d. State and local governments;

e. Non-profit elementary and secondary schools;

f. An employee leasing company or temporary help company, that, under contract, supplies individuals to perform services for clients and customers;

g. An employer who acquires all or any portion of a covered business in North Carolina;

h. A 501(c)(3) non-profit organization with at least four workers in 20 different

calendar weeks during a calendar year ;

i. An employer subject to Federal Unemployment Tax Act;

j. Any Indian tribe as defined in the Federal Unemployment Tax Act.

2. ELIGIBILITY REQUIREMENTS

To be eligible for unemployment insurance benefits, individuals must:

a. Be unemployed through no fault of their own;

b. Be physically able to work;

c. Be actively looking for work including making at least five contacts with prospective employers each week;

d. Have registered for work with the Employment Security Commission and filed a claim for benefits;

e. Have satisfactory immigration status with the Immigration and Naturalization Service;

f. Report all wages earned during any week for which benefits are claimed;

g. Report all job offers made during any week for which benefits are claimed;

h. Have earned wages equal to a specified amount during a "base period" as provided in the law;

i. Present a qualifying form of photo identification

3. DISQUALIFICATION

Individuals who meet the above eligibility requirements may still be disqualified from receiving benefits if they:

a. Left their last job without good cause attributable to the employer;

b. Were discharged for "misconduct" connected with work;

c. Refuse to apply for or accept suitable work;

d. Test positive for a controlled substance on a test performed as a condition of hire for a suitable position;

e. Refuse to accept Commission-approved training, quit such training, or are discharged from such training for misconduct;

f. Are unemployed because of a labor dispute involving their employer;

g. Knowingly make a false statement or withhold information in order to obtain benefits;

h. Are on a bona fide disciplinary suspension (of no more than 30 days) based on acts or omissions in the work constituting some degree of fault;

i. Are unemployed due to revocation, loss or inability to obtain a necessary license, permit, bond, etc., that was within their power to prevent;

j. Are unemployed because their significant ownership interest was voluntarily sold; or

k. Are receiving, received, or will receive as a result of separation, remuneration in the form of wages in lieu of notice, accrued vacation pay, terminal leave pay, severance pay, separation pay, dismissal payments or wages by whatever name, the individual will not be considered unemployed for the effected week of claim unless the individual is enrolled in approved training.

4. AMOUNT OF BENEFITS AND DURATION

a. *General:* The amount and duration of an employee's benefits are determined by the wages earned and amount of time worked during a "base period" of employment. North Carolina law requires that a claimant satisfy a one-week waiting period prior to receiving unemployment benefits.

b. *Base Period:* In North Carolina, the "base period" upon which benefits are based is defined as the first four of the last five calendar quarters before the quarter in which an unemployment claim is filed. An individual who lacks sufficient base period wages to establish a claim shall have an "alternate base period" defined as the last four completed calendar quarters. Furthermore, claimants with insufficient base period wages due to a workers' compensation injury may file a written petition asking the Commission to extend the base period. The extended base period is defined as the four quarters prior to the individual's base period. The Commission may substitute these prior four quarters for the current base period on a quarter-by-quarter basis, as needed, to establish a valid claim.

c. *Weekly Benefit Amount:* An individual's weekly benefit amount is determined by dividing the wages earned during the last two quarters in the base period by 52. However, payments are subject to a maximum weekly benefit of $350.

d. *Duration of Benefits:* The duration of benefit payment varies from 12 to 20 weeks depending upon unemployment rates.

e. *Extended Benefits:* When the insured unemployment rate becomes unusually high for a period of several months, extended benefits may be paid to eligible individuals.

5. FILING PROCEDURES, HEARINGS AND APPEALS

The procedure for filing and contesting claims for unemployment insurance benefits is as follows:

a. *Filing of Claim and Decision of Claims Adjudicator:* The claimant initiates a claim for benefits by filing NCUI Form 500 at the local Employment Security Office. NCUI Form 500AB, Notice of Claim and Request for Separation Information, is then sent to the claimant's last employer who has 10 days from the date of the filing to complete and return the form. If contested issues are raised by the claimant or the last employer, a copy of a Fact Finding Report is prepared by a Claims Interviewer and this report together with a copy of a NCUI Form 500AB is sent to a Claims Adjudicator for determination of eligibility.

b. *Notice of Initial Claim and Potential Charges:* Whenever a new claim is processed, Form NCUI 551, Notice of Initial Claim and Potential Charges to your acount is generated and sent to each base period employer except one who is also the claimant's last employer. Form NCUI 551 notifies any base period employers who are not the last employer that a former or current employee has filed a claim for benefits based either wholly or in part on wages paid by the employer. Form NCUI 551 offers a base period employer an opportunity to request non-charging of unemployment benefits, provided non-charging is warranted.*

c. *Appeal of the Claims Adjudicator's Decision:* Either the claimant or the employer may appeal the Claims Adjudicator's decision by filing a notice of appeal within 30 days from the date of the Adjudicator's decision. If an appeal is filed, a hearing will be held before an Appeals Referee/Hearing Officer. Evidence concerning the claimant's separation and other related matters will be taken under oath and a record of the evidence is made. This is an employer's only opportunity to present evidence, and all appeals will be decided solely on the basis of competent evidence produced at this hearing. Both the employer and the claimant have a right to be represented by an attorney at the hearing before an Appeals Referee/Hearing Officer.

d. *Appeal of the Decision of the Appeals Referee/Hearing Officer:* This decision may be appealed to the Division in Raleigh within 10 days from the date of the Appeals Referee's/Hearing Officer's decision. The appeal must state the grounds upon which the appeal is based. New evidence cannot be introduced at the Division level. The appeal will be decided by the Board of Review or a Hearing Officer who may affirm, modify, or reverse the decision of the Appeals Referee/Hearing Officer, or, in some cases, remand the case for the taking of additional evidence.

e. *Appeal to the North Carolina Courts:* The decision of the Division can be appealed to the North Carolina Superior Court by filing a notice of appeal with the Superior Court in the county of appellant's residence or principal place of business within 30 days of the DES decision. The Superior Court's decision can, in turn, be appealed to the North Carolina Court of Appeals and Supreme Court.

6. NON-CHARGEABLE CLAIMS

If an employee receives unemployment benefits, but is eventually disqualified, the employer's account may not be charged if a non-charging request is made. Other significant non-chargeable circumstances include claims paid due to a(n):

a. Result of domestic violence to the individual or minor child;

b. Bona fide inability to do the work for which he was hired within 100 days of

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** Form NCUI 551L, Notice to Last Employer, is sent to an employer who is both the last employer and a base period employer. This form contains the same information as Form NCUI 551. However, it cannot be used for non-charging; the 500AB serves this purpose.*

hire;

c. Employer providing employment on substantially the same basis as when base period wages were reported;

d. A major natural disaster that has been declared by the President; or

e. Employee resigning to accompany a military spouse who is relocating due to a new place of work.

C. ACTIONS REQUIRED BY EMPLOYERS

1. CONTESTING NON-CHARGEABLE CLAIMS

Where an employee is separated under non-charging conditions, an employer should:

a. A claimant's last employer should file NCUI Form 500AB in a timely manner. This form requests separation information and is used to determine a claimant's eligibility for benefits. An employer who is a claimant's base period employer only (see page 6-3) should file NCUI Form 551 in a timely manner to request non-charging. The DES sends these forms to a claimant's employer(s).

b. If the decision of the Claims Adjudicator or Appeals Referee/Hearing Officer does not disqualify the claimant who has quit or was discharged for cause, consideration should be given to appealing the decision to the next highest authority. Instructions for filing appeals are generally included in decisions rendered at each level of the adjudication process. If a decision at a particular level does not disqualify a claimant, the employer's request for non-charging will not be allowed.

2. OTHER FORMS THAT MUST BE FILED

a. Benefit Claim for Attached Worker- An attached claim for unemployment benefits must be filed for an individual who works or is paid "less than three customary scheduled full-time days" or less than 60% of the customary scheduled full-time hours because work was not available. Any other wages or pay including bonus, vacation pay, and holiday pay must be applied in determining whether the three days or 60% threshold has been met. Attached claims are filed electronically but are limited to one claim per employee per year with a maximum duration of six consecutive weeks. Employers with a positive credit balance are required to submit payment to the DES in an amount to pay for the attached claims at the time of filing. Employers with a negative balance can only utilize attached claims if they submit payment to the DES bringing their balance up to at least zero and then submitting an additional payment to cover the cost of the attached claims.

b. NCUI Form 101; During the month following each calendar quarter, all covered employers must file NCUI Form 101 "Employer's Quarterly Tax Wage Report." Employers with more than 100 employees must

file the quarterly tax and wage report on magnetic tape or diskette. Failure to file these required reports can result in penalties and interest assessments.

c. Employers must now report to the DES the name of each claimant who is denied employment because the individual tested positive for a controlled substance.

3. RECORDKEEPING AND REQUIRED POSTINGS

Certain payroll records are required to be kept for 5 years. Additionally, NCESC Form 524 is a poster which must be displayed by all covered employers. A detailed summary of recordkeeping and posting requirements can be found in Chapter 17.

4. REIMBURSEMENTS FOR PRIOR BENEFITS

When a back pay award or other such compensation is provided to a former employee, the employer must deduct unemployment benefits paid to the employee and forward this amount to the Commission.

D. TIPS FOR EMPLOYERS

1. UNEMPLOYMENT CLAIMS INVOLVING OTHER LEGAL CLAIMS:

If a claimant for unemployment benefits has filed or is expected to file a lawsuit, EEOC charge, NLRB charge, or charges with other federal or state agencies involving the employment or separation from employment, the advice of labor counsel should be sought before responding to the unemployment claim. This is important for a number of reasons. First, an employee who intends to sue as a result of separation is likely to have retained an attorney. Additionally, written statements and testimony provided by the employer to the DES can affect your defense to proceedings before courts or other federal and state agencies. In many situations, unions or attorneys representing claimants will use unemployment proceedings in an attempt to obtain evidence that will assist them in proving charges of discrimination. For these reasons, labor counsel or your employer association should be consulted at the earliest possible stage of the unemployment proceedings if further charges are expected to be filed with other federal or state agencies.

2. ANNUAL REVIEW OF FORM 104

You should also review carefully each year NCUI Form 104, Cumulative Experience Rating Statement, to determine if you have been properly charged and whether a voluntary contribution might reduce your overall costs. Contact your employers' association for assistance if needed.

3. MISCONDUCT

North Carolina's Employment Security Act has long provided that claimants discharged for "misconduct" will be disqualified from

benefits for the duration of their employment. Misconduct is defined as intentional acts or omissions evincing disregard of an employer's interest of standards of behavior which the employer has a right to expect or has explained orally or in writing to an employee or evincing carelessness or negligence of such degree as to manifest equal disregard.

The statutory definition of misconduct specifically includes separations initiated by the employer for reporting to work significantly impaired by alcohol or illegal drugs, consuming alcohol or illegal drugs on the employer's premises, or conviction for manufacturing, selling or distributing controlled substances while in the employ of the employer.

4. DRUG AND ALCOHOL CASES

To establish misconduct in a case involving drug use, the employer must show that the employee was aware of the employer's drug and alcohol policy. In cases involving drug or alcohol testing, an affidavit must be obtained from the testing laboratory showing the test results, and that the chain of custody and other requirements of North Carolina's Controlled Substance Examination Act (See Chapter 9) were met. Expert testimony may be necessary if the claimant contests impairment. The former ESC rulings clarified that the expert testimony can be taken by telephone.

5. LEAVING EMPLOYMENT FOR GOOD CAUSE

Generally, employees who leave work are ineligible to receive unemployment benefits unless they left for good cause attributable to the employer. The burden of establishing good cause is placed on the former employee. Good cause exists by statute where the employee left because of a unilateral and permanent reduction in hours of work of more than 50%, a reduction in rate of pay of more than 15%, or because of lack of work due to the bankruptcy of the employer. The North Carolina Court of Appeals has recognized that a constructive discharge based on illegal harassment constitutes leaving employment for good cause.

6. REQUESTING NON-CHARGING

Employers should be very specific and timely in requesting non-charging on Form NCUI 551. This form does not list all of the separation circumstances that qualify for non-charging that are found on page 6-5 in this chapter. Employers are advised to write in the basis for non-charging on this form. If necessary, attach a document to the form providing additional information.

7. Garnishment of Wages

A. BACKGROUND

A *garnishment* is a court order directing a garnishee (someone in possession of property belonging to a debtor) to hold the debtor's property pending resolution of a dispute between the debtor and a creditor. Employers may be placed in the role of a garnishee if a court orders the employer to withhold wages due an employee for payment of some debt owed by the employee.

A *wage assignment* differs from a wage garnishment in that an assignment is a voluntary agreement by the employee (debtor) to transfer or allow payment of his wages or a portion thereof to a creditor.

Various federal and state laws restrict the extent to which wages can be garnished or assigned. In North Carolina, wage garnishments have, for the most part, been limited by a law restricting garnishments of "personal service income." However, wages can still be garnished for federal and state taxes, by order of a bankruptcy court, for debts on federally guaranteed student loans, for child support, for recovery of fraudulent payments made to recipients of a N.C. public assistance program, and for ambulance service in certain counties. North Carolina law also makes acceptance of employee wage assignments by employers voluntary in most cases.

B. HOW THE LAWS WORK

1. GARNISHMENTS

The wage garnishment process normally starts when a creditor sues a debtor for debts owed. The court, if it deems appropriate, will issue a set of papers to the employer. These papers include an order of attachment, a summons and a notice of levy.

The *summons* directs the employer to report to the court whether the employer owes unpaid wages to the employee involved. Normally, the employer will admit that he owes specified, unpaid wages to the employee, but there are procedures for denying any such debt. The attachment order will normally direct an officer of the court to seize the property or wages in the hands of the garnishee (employer). The notice of levy notifies the employer that a lien has been created on the earnings of the employee and prohibits transfer of the earnings to the employee pending resolution of the dispute.

If the employer acknowledges owing the unpaid wages, the court will enter a judgment for the amount of wages owed to the employee or for the full amount of the debt, whichever is less.

The employee's garnished wages, subject to certain federal and state limitations, must then be paid by the employer to the court for disbursement to the employee's creditors.

Under the Interstate Family Support Act, North Carolina employers must treat a child support order from another state the same as an order issued by a North Carolina court. Upon receipt of a child support order form from another state, the employer should immediately provide a copy of the order to the employee and distribute the funds as directed in the order. Employees have the same rights to contest an out-of-state order as with a North Carolina order.

2. LIMITATIONS ON WAGE GARNISHMENTS

a. *North Carolina Law:* North Carolina law exempts from garnishment the debtor's earnings for personal services performed within 60 days next preceding the garnishment order if the debtor shows the court by means of an affidavit that such earnings are needed for the use of the debtor's family. This law has curtailed the use of the wage garnishments in North Carolina. However, the exemption for personal services does not apply to garnishment of wages for payment of taxes, payment of federally guaranteed student loans, garnishments pursuant to the order of a federal bankruptcy court under Chapter 13 of the Bankruptcy Act, child support orders, recovery of fraudulent payments made to recipients of a N.C. public assistance program, and fees for ambulance services in certain counties. Additionally, up to 40% of the debtor's monthly disposable income can be garnished for a single child support payment ordered by a court.

b. *Garnishment for Child Support:* Under North Carolina law, all child support orders must contain a provision stating that the parent's wages will be subject to withholding if the parent is in arrears in child support payments or upon the request of the parent. In the event withholding is necessary, the court or agency supervising the case must send the employer a Notice and Order to Withhold, which must state the employer's rights and obligations and the specific amount to be withheld. The amount withheld cannot exceed 40% of the employee's disposable (after tax) income for one withholding order, 45% of the employee's disposable income for multiple withholding orders if employee is supporting a spouse or other dependent children, or 50% of the employee's disposable income for multiple withholding orders if employee is NOT supporting a spouse or other dependent children. Upon receipt of the Order to Withhold, the employer is required to:

(1) Pay the Clerk of Court or agency the amount specified in the Order;

(2) Continue withholding until further notice; and

(3) Notify the court or agency if the employee is terminated for any reason and supply the employee's last known address.

Employers who fail to comply with the Order to Withhold become liable for the amount they should have withheld. In addition, employers cannot discharge, refuse to hire, or take disciplinary action against an employee solely because of the withholding. An employer guilty of such conduct may be forced to reinstate the employee, pay damages suffered by the employee, and pay a fine.

c. *Administrative Fees Allowed in North Carolina:* The following administrative

fees are allowed in North Carolina for processing each garnishment:

(1) Child support orders (non-IV-D public assistance cases): $2.00

(2) Garnishment to collect a fraudulent public-assistance payment: $1.00

Administrative fees are not allowed to process any other garnishments in North Carolina.

d. *Federal Restrictions – The Consumer Credit Protection Act:* Federal Law generally limits garnishments on earnings to the smaller of:

(1) 25% of the debtor's disposable weekly earnings; or

(2) The amount by which the employee's earnings exceed 30 times the applicable federal minimum wage.

Federal restrictions on the maximum amount that may be garnished under federal law do not apply to: (1) Certain orders of the bankruptcy courts; (2) Any debt due on federal or state tax; and (3) Support orders, including child support orders under North Carolina's Child Support Laws.

3. ASSIGNMENTS

State law provides that "No employer shall be responsible for any assignment of wages to be earned in the future, executed by an employee, unless and until such assignment of wages is accepted by the employer in a written agreement to pay same." [N.C. Gen. Stat. § 95-31.] In other words, an employer does not have to honor any assignment of future wages if it does not desire to do so.

Assignment of wages already earned and due an employee may present a different situation. One North Carolina court has ruled that wage assignments for past earnings are enforceable without employer approval.

C. ACTION REQUIRED BY EMPLOYERS

Upon receiving a valid garnishment order, employers must comply with the order or risk liability to the employee's creditor for the amount of the garnished wages.

Garnishment Priority

If multiple orders for garnishments or levies are received for a single employee, they should be processed in the following order:

Court Ordered Child Support

Court Ordered Child Support takes priority over any garnishment, levy or deduction. When an obligor is subject to more than one withholding for child support, withholding for current child support shall have priority over past-due support. Where two or more orders for current support exist, each family shall receive a pro rata share of the total amount withheld based on the respective child support orders being enforced.

Notify the appropriate clerk of court in writing of any attachments that cannot be completely satisfied.

All Other Garnishments or Levies (except federal tax levies)

Process after all Court Ordered Child Support garnishments are applied.

Priority is based on the order in which the garnishments/levies were received. Notify, in writing, the appropriate clerk of court or levying agency of any attachments that cannot be completely satisfied.

Federal Tax Levies

Process after all other garnishments/levies are applied.

Levy remains in effect until the IRS sends a release form.

Employee cannot apply for any new voluntary deductions until the levy is satisfied.

Child support court orders received after the date of the levy cannot be used to calculate the employee's exemption amount.

D. TIPS FOR EMPLOYERS

1. COURT ORDERS REQUIRED

Valid and enforceable wage garnishments normally should be supported by court orders. These orders normally take into consideration the limitations on wage garnishments discussed above. If garnishment is sought without a valid court order, the advice of someone knowledgeable in this area of the law should be sought.

An exception to this is the federal law allowing garnishments for non-payment of student loans. That statute allows the guaranty agency to issue a withholding order directly to an employer.

Child support orders from other states do not require an order by a North Carolina court to be enforceable.

2. DISCHARGE OR DISCIPLINE FOR WAGE GARNISHMENTS RESTRICTED

The Consumer Credit Protection Act prohibits an employer from discharging an employee for garnishment of wages arising out of a single indebtedness. The courts have held that employers may also violate Title Vll of the Civil Rights Act by discharging certain employees for incurring wage garnishments because discharges for garnishments can have a disparate impact on certain protected classes of employees.

North Carolina laws allowing garnishments for child support and debts to public hospitals also prohibit discharging an employee solely because of such garnishments.

8. North Carolina's Right-To-Work Law

A. BACKGROUND

Under the National Labor Relations Act (NLRA), an employee has a legal right to join or refuse to join a union except where the employer has a valid collective bargaining agreement which requires union membership or payment of union dues within a specified time after the employee is hired. Notwithstanding the above, the NLRA permits states to enact "right-to-work" laws which prohibit such agreements. At present, 27 states including North Carolina have right-to-work laws. States with right-to-work laws are:

Alabama	Kentucky	South Carolina
Arizona	Louisiana	South Dakota
Arkansas	Michigan	Tennessee
Florida	Mississippi	Texas
Georgia	Nebraska	Utah
Idaho	Nevada	Virginia
Indiana	North Carolina	West Virginia
Iowa	North Dakota	Wisconsin
Kansas	Oklahoma	Wyoming

In North Carolina, the right to work on a job without regard to union membership or nonmembership has been declared a public policy of the State. N.C. Gen. Stat. § 95-78 provides:

> The right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion. It is hereby declared to be the public policy of North Carolina that the right of persons to work shall not be denied or abridged on the account of membership or nonmembership in any labor union or labor organization or association.

Specific statutes have been enacted in North Carolina which guarantee the right to work without regard to membership or nonmembership in a union. These statutes are discussed below.

B. HOW THE LAW WORKS

1. WHAT IS PROHIBITED

North Carolina's right-to-work laws provide that:

a. No person shall be required to become or remain a member of any labor union as a condition of employment or continued employment;

b. No person shall be required by an employer to abstain or refrain from membership in any labor union as a condition of employment or continued employment;

c. No person shall be required to pay any dues, fees, or other charges of any kind to any labor organization as a condition of employment or continued employment.

In short, the law not only prohibits compulsory unionization, it also prohibits discrimination against individuals who are or want to be union members.

2. EFFECT OF THE LAW

The effect of North Carolina's right-to-work law is to prohibit the following types of agreements:

a. *Closed Shop:* Under this type of agreement, the hiring of any individual who is not a union member is prohibited. A closed shop agreement also requires employees to maintain union membership as a condition of continued employment.

b. *Union Shop:* Under this type of an agreement, an individual need not be a member of the union in order to be hired. However, once hired, the individual must become and remain a union member as a condition of continued employment.

c. *Maintenance of Membership:* Agreements of this nature do not require an individual to join the union as a condition of employment or continued employment. However, once an individual joins the union, he must remain a member during the term of the collective bargaining agreement as a condition of continued employment.

d. *Agency Shop:* Individuals do not have to be members of the union to be hired or retained in employment under this type of an agreement. However, they must pay the equivalent of union dues and other union fees as a condition of employment.

3. PENALTIES FOR VIOLATIONS

Employers and unions that violate North Carolina's right-to-work laws are jointly and severally liable for damages suffered by an individual as a result of the violation. Remedies can include reinstatement or an order to hire an individual with back pay. Violation of the right-to-work law is also a misdemeanor.

4. BECK RIGHTS

In states where employees can lawfully be compelled to pay union dues, an employee may elect to pay a non-member fee instead. This fee includes a proportionate share of negotiation and representation expenses, but not organizing, lobbying or political costs. Communication Workers v. Beck (1988, U.S. Supreme Court).

C. ACTIONS REQUIRED BY EMPLOYERS

The only affirmative duty placed on an employer by the state's right-to-work laws is to refrain from making membership or nonmembership in a union or the payment of union fees a condition of employment or continued employment.

D. TIPS FOR EMPLOYERS

1. **SUPERVISORS NOT COVERED:**

   North Carolina's right-to-work laws do not apply to supervisors. Thus, bona fide supervisors can be required by an employer to refrain from engaging in any type of prounion activities as a condition of employment.

2. **OTHER EXCLUSIONS:**

   North Carolina's right-to-work laws do not apply to persons employed on federal enclaves and persons whose principal job site is out of state or those persons covered by the National Railway Labor Act (primarily airlines and railroads).

9. Miscellaneous North Carolina Employment Laws

A. BACKGROUND

In addition to the North Carolina employment laws discussed in previous chapters, there are also a number of miscellaneous employment-related laws in North Carolina that employers should be aware of. They include both statutes and common law (i.e., law derived primarily from court decisions).

An up-to-date chart of all North Carolina Laws Affecting the Employment Relationship is included in Preface 16.

B. HOW THESE LAWS WORK

1. MISCELLANEOUS NORTH CAROLINA STATUTES

a. *Employer References:* It is lawful, and indeed advisable, for an employer to seek information about job applicants from the applicant's former employer. It is likewise lawful for an employer to supply information concerning an employee or former employee to another company. However, North Carolina law, as well as some federal laws, place restrictions on the type of information which may be sought or obtained by an employer.

N.C. Gen. Stat. § 14-355 is entitled "Blacklisting," and provides that an employer may supply information to another employer about a discharged employee provided that: (l) the information is truthful; (2) it is in writing; (3) the discharged employee has applied for employment; and (4) the prospective employer has made a request for such information. In Friel v. Angell Care, the North Carolina Court of Appeals held that the blacklisting statute is violated only where the statements to the prospective employer are unsolicited.

This same North Carolina statute and other federal laws make it unlawful to "blacklist" a former employee by providing false information to a prospective employer or information concerning the employee's exercise of a statutorily protected right. For example, it is normally unlawful for an employer to seek or provide information concerning an employee's union activities, the filing of an EEOC charge, Title VII suits, and the like.

Employment Reference Immunity: N.C. Gen. Stat. § 1-539.12 provides a qualified immunity to employers that provide certain employment references on current or former employees. The law grants a limited immunity from civil liability to an employer who discloses information about a current or former employee's job history or job performance to a prospective employer of the current or former employee. The reference must be provided upon request of the prospective employer or upon request of the current or former employee. Although not specified in the statute, job history will most likely include such employment information as dates of employment, pay level, job assignments,

etc. The statute does specifically list job performance as including (1) the suitability of the employee for re-employment; (2) the employee's skills, abilities, and traits as they may relate to suitability for future employment; and (3) in the case of a former employee, the reason for the employee's separation. The employer loses the protection of this immunity, however, if a plaintiff shows by a "preponderance of the evidence" that the information disclosed by the current or former employer was both false and the employer providing the information knew or reasonably should have known the information was false.

b. *Communicable Disease Law:* Under the Communicable Disease Law, it is unlawful to discriminate against any person with AIDS or HIV infection to determine suitability for continued employment. In addition, no AIDS test may be given to determine suitability for continued employment. Any person aggrieved by a discriminatory practice or act prohibited by this law may institute an action for backpay. The law does not prohibit testing job applicants for AIDS virus infection or denying employment to an applicant based on a confirmed positive test for AIDS virus infection. In addition, the law allows employers to reassign or terminate an existing employee if the continued employment of the individual who has AIDS or HIV infection would pose a significant risk to the health of the employees, co-workers or the public, or if the employee is unable to perform the normally assigned duties of the job. [NOTE: AIDS or HIV infection is a disability. Discrimination against individuals with this disability may violate the Americans with Disabilities Act or the Rehabilitation Act (Chapter 19).]

Another provision of the law that is relevant to employers' concerns confidentiality of records. The law provides that all records, both publicly and privately maintained, which identify a person as having AIDS or another communicable disease shall be strictly confidential and shall not be released except under the eleven circumstances listed in the Act. The exceptions most pertinent to employers include:

(1) Release is made of specific medical information for statistical purposes in a way that no person can be identified;

(2) Release is made of all or part of the medical record with the written consent of the person identified;

(3) Release is made to health care personnel providing medical care to the patient;

(4) Release is made to the Department of Human Resources or local health department to prevent or control the spread of the communicable disease or condition; and

(5) Release is made in compliance with laws that authorize or require the release of information or records relating to AIDS.

Any person who releases employee records relating to communicable diseases in violation of the above provisions is guilty of a misdemeanor.

c. *Concealed Weapons:* North Carolina law allows individuals with permits to carry concealed weapons. The statute specifically prohibits concealed weapons on certain premises, such as state or federal offices and financial institutions. The statute also prohibits concealed weapons on "any other premises" where notice that carrying a concealed handgun is prohibited by the posting of a conspicuous notice or statement "by the person in control of the premises." Accordingly, employers should notify employees in writing that weapons are prohibited on company property. In addition, a notice should be posted to notify non-employees that weapons are not allowed on the premises.

d. *Disaster Leave:* Voluntary firefighters, rescue squad workers and emergency medical service personnel called into service by the state in response to a disaster or emergency have the right to unpaid leave. Employers cannot require use of other accrued leave during the absence. N.C. Gen. Stat. § 166A-19.76.

e. *Drug Testing:* Testing is regulated by the Controlled Substance Examination Regulation Act. State law does not require, discourage or support drug testing of employees. However, if testing occurs, the process itself is regulated. The employer must provide written notice of the employee's rights under the act at the time of the test and within 30 days from the date the results are delivered to the employer. Samples must be collected in sanitary conditions respecting individual dignity, and with "chain of custody" safeguards. Employers may perform the initial screen on-site for applicant testing only, provided that positive samples are sent to an approved laboratory for confirmation. Alternatively, the approved laboratory may perform both the screening and confirmation tests. An applicant required to submit to testing whose first screening test produces a positive result may waive a second examination that is intended to confirm the results. For testing of current employees, the approved laboratory must perform all tests. Positive samples must be retained by the lab, and confirmation tests must be run on positive samples. An employee who tests positive is entitled to a retest at the employee's expense. Employers that violate the act are subject to fines. N.C. Gen. Stat. § 95-230. It is a crime to defraud drug or alcohol screening tests. N.C. Gen. Stat. § 14-401.20.

f. *Expunction of Criminal Records:* To receive an expunction of a criminal record following a conviction, an individual must:

- File a petition with the court where convicted;
- Prepare an affidavit stating he/she has been of good moral character since the date of conviction;
- Prepare an affidavit that no restitution orders or civil judgments representing amounts ordered for restitution entered against the petitioner are outstanding;
- Obtain two (2) additional affidavits from people unrelated to the petitioner stating that they know the character and reputation of the petitioner as being good; and

- Complete a background authorization form.

See N.C Gen. Stat. §§ 15A-145 et seq. for more information on expunctions. CAI recommends consulting a lawyer regarding an individual's eligibility for an expunction of his/her criminal record.

g. *Discrimination in Health Insurance and Employment Based On Genetic Information:* N.C. Gen. Stat. §§ 58-3-215 and 95-28.1A prohibit employers and insurers from discriminating against employees or applicants on the basis of genetic information. The statute prohibits employers from denying employment to an applicant or discharging an employee because the individual requested genetic testing or counseling services, or on the basis of genetic information obtained concerning the individual or a member of the individual's family. The statute also prohibits insurance companies from refusing to issue health coverage or raising premium rates paid by a group based on genetic information about an individual member of the group. This law also amended North Carolina's Retaliatory Discrimination Act (N.C. Gen. Stat. § 95-241 (a)) by adding genetic testing and genetic information as protected activities. (see 1.o below).

h. *Injunctions Against Strikes and Picketing:* Orders may be obtained under certain circumstances in North Carolina to enjoin violence and mass picketing that may accompany a strike. However, the right to obtain state court injunctions in labor disputes is, to a large degree, controlled by federal law.

i. *Inventions:* State law prohibits employers from requiring employees to assign all rights to all inventions to the employer. If the invention is developed entirely on the employee's own time (with their own supplies) and the invention does not relate to the employer's current business or anticipated research, it belongs to the employee. N.C. Gen. Stat. §§ 66-57.1 and 57.2.

j. *Juror Protection:* North Carolina law provides that employees may not be discharged or demoted because they were called for jury duty or actually served as juror. A civil action may be brought seeking "reasonable damages suffered" and reinstatement. There is no requirement for the employer to pay the employee for time absent from work. Employers must exercise caution to comply with Fair Labor Standards Act Provisions governing deductions from salaried wages, if the time is unpaid jury duty.

k. *Lawful Use of Lawful Products:* N.C. Gen. Stat. § 95-28.2 prohibits discrimination against an applicant or employee because they lawfully use a lawful product away from work. For example, an employer may prohibit tobacco smoking at work, but may not discharge or refuse to hire an individual who smokes away from work. There are defenses in the law which allow employers to consider any adverse effects of smoking on job performance, the safety of other employees, bona fide occupational requirements, the fundamental objectives of the organization, or failure to complete a substance abuse program. Employers may provide employees in higher risk or cost categories fewer benefits if the difference is actuarially justified and the same premium is paid on behalf of each employee. Back pay,

reinstatement and attorney's fees are available if a successful lawsuit is filed.

l. *Payment for Medical Examination:* It is unlawful in North Carolina for employers with more than 25 employees to require an applicant for employment to pay the cost of a medical examination, or the cost of furnishing any records required by an employer as a precondition to employment. Violations may result in fines of up to $100. N.C. Gen. Stat. § 14-357.1.

m. *Protection for N.C. National Guard Members:* State law provides that citizens have the right to serve in the North Carolina National Guard or the National Guard of another state "without fear of discrimination or retaliatory action from their employer or prospective employer on the basis of that membership, application for membership, performance of service, application for service, or obligation." N.C. Gen. Stat. § 127A-202.1.

The North Carolina Commissioner of Labor has authority to enforce this law in accordance with the provisions spelled out in North Carolina's Retaliatory Discrimination Act, which includes reinstatement, compensation for lost wages, lost benefits and other economic losses. Lost wages, benefits and other economic losses may be trebled if it is found that the violation was "willful."

n. N*ew Hire Reporting:* State law requires all employers to provide the state with information on newly-hired employees. States must make new-hire reporting mandatory to comply with the "Personal Responsibility and Work Opportunity Reconciliation Act of 1996," commonly known as the Welfare Reform Act. This federal law contains several other provisions to track parents who are delinquent in child support payments.

All North Carolina employers must provide to the North Carolina New Hire Directory the following information on every new employee for whom a W-4 form is completed:

- The employee's name, address, and social security number; and
- The company's name, address, and federal and state employer identification numbers (EINs).

The employer must report this information within 20 days from the date of hire or, in the case of an employer who chooses to transmit twice-monthly new-hire reports electronically, not less than 12 nor more than 16 days apart. Employers may provide the actual W-4 form with the employer information added, and may create their own reporting form.

o. *Retaliatory Employment Discrimination Act:* N.C. Gen. Stat. § 95-240. This so-called "whistleblower" statute prohibits retaliation against employees who file or threaten to file workers' compensation claims, OSHA complaints or state wage-hour or wage payment claims. State law also prohibits discrimination in employment against any person because the person has requested genetic testing or counseling services, or because of genetic information obtained concerning the person or a member of the person's family. An employer may not retaliate against an employee who exercises rights under North Carolina's

Domestic Violence Act. Discrimination against an employee because of the employee's service in the National Guard is also prohibited. Finally, discrimination is prohibited against certain retail employees who reasonably and in good faith take certain actions under the state's Drug Paraphernalia Control Act of 2009. Complaints are investigated by the Employment Discrimination Bureau in the North Carolina Department of Labor. The Bureau may issue subpoenas to require the attendance and testimony of witnesses under oath. If the Bureau determines that there is reasonable cause to believe the charge is true, either the employee or the Commissioner of Labor may file suit in state court. Jury trials are available. Victims of unlawful retaliation will be reinstated to their jobs with back pay and attorney's fees. Triple damages are available in cases of willful violation.

The Retaliatory Employment Discrimination Act also applies to employees who must comply with North Carolina's "Juvenile Justice Reform Act." Under the "Juvenile Justice Reform Act," an employee who is a parent, guardian, or custodian of a juvenile is required to attend judicial hearings involving the juvenile under the jurisdiction of the juvenile court unless excused by the court. Moreover, under the Act, a parent, guardian, or custodian can be ordered by the court to attend parental responsibility classes and/or participate directly in any medical, psychiatric, psychological, or other evaluation or treatment of the juvenile. The court also has the authority to order the parent, guardian, or custodian to undergo psychiatric, psychological, or other evaluation or treatment or counseling. No employer may discharge, demote, or deny a promotion or other benefit of employment to any employee because the employee has to comply with any provisions of the "Juvenile Justice Reform Act." Thus, if an employee has to miss work in connection with this Act, the employer is prohibited from taking any type of disciplinary action against that employee. The law, however, does not prohibit employers from requesting appropriate documentation from the employee to verify the need for the employee to be absent from work. There is no requirement for the employer to pay the employee for time absent from work.

Similar protections against discharge, demotions, or failure to promote apply to employees who take time off from work to pursue rights under North Carolina's Domestic Violence Act.

p. *Leave for Parent Involvement in Schools:* N.C. Gen. Stat. § 95-28.3 requires all employers to grant up to four hours of unpaid leave per year to any employee who is a parent, guardian, or person standing in loco parentis of a school-aged child so that the employee can become involved in school activities. This has been interpreted to allow four hours per calendar year, rather than school year. The term "school" is defined as any public or private grade school, preschool or child day care facility. Leave under this section is subject to the following conditions:

(1) The leave must be scheduled for a time that is mutually agreeable to the employer and the employee.

(2) The employer may require the employee to make a written request at least

48 hours before the leave begins.

(3) The employer may require the employee to furnish written verification from the child's school that the employee attended or was involved in school activities during the time of the leave.

The statute prohibits discrimination against employees who request or take this type of leave. Employees claiming discrimination can bring a civil action against the employer seeking reinstatement and lost wages.

q. *Discharge or Refusal to Hire Individuals with Sickle Cell Trait:* N.C. Gen. Stat. § 95-28.1 prohibits the discharge or refusal to hire individuals who possess sickle cell trait or hemoglobin C trait. Discrimination of any type against persons with either of these traits may also violate Title VII of the Civil Rights Act of 1964 [See Chapter 12].

r. *Trade Secrets:* The North Carolina Trade Secrets Protection Act provides that no person may "misappropriate" a trade secret. N.C. Gen. Stat. § 66-152. A trade secret is defined as business or technical information that derives value from not being generally known or reverse engineered and is subject to efforts to maintain its secrecy.

s. *Identity Theft Protection Act:* North Carolina employers are required to implement security measures regarding access to and the disposal of employee personal identifying information. These measures include policies and procedures regarding the destruction of paper and electronic records upon disposal of such. "Disposal" includes:

- The discarding or abandonment of records containing personal information, and
- The sale, donation, discarding or transfer of any medium, including computer equipment, or computer media, containing records of personal information, or other non-paper media upon which records of personal information are stored, or other equipment for non-paper storage of information.

Employers must take all reasonable measures to protect against unauthorized access to or use of the personal information in connection with or after its disposal. The reasonable measures must include, but may not be limited to:

- Burning, pulverizing, or shredding of papers containing personal information so that information cannot be practicably read or reconstructed;
- The destruction or erasure of electronic media and other non-paper media containing personal information so that the information cannot practicably be read or reconstructed;
- Taking reasonable steps to ensure that no unauthorized person will have access to the personal information for the period between the discarding of the record and the record's destruction.

North Carolina employers are not permitted to use social security numbers

for identification purposes, e.g., identification cards and computer or electronic access. Employers may not mail printed materials containing social security numbers (unless required by law), may not transmit social security numbers electronically without protective measures, nor disclose an individual's social security number to a third party for any purpose without the written consent to the disclosure from the individual.

These prohibitions do not apply when a social security number is included in an employment application or in documents related to an enrollment process, or to establish an account, contract, or policy. A social security number that is permitted to be mailed under this section may not be printed, in whole or in part, on a postcard or other mailer not requiring an envelope, or visible on the envelope or without the envelope having been opened.

This subsection does not apply to:

- The collection, use, or release of a social security number for internal verification or administrative purposes provided that no consideration is exchanged between the person and the third party for the collection, use, or release of the social security number.
- The collection, use, or release of a social security number to investigate or prevent fraud or to conduct background checks.
  [Note: Any time an employee is required to receive a summary of rights under the Fair Credit Reporting Act, a North Carolina employer must also provide the Notice of a Security Freeze.]

t. *NC Workplace Violence Prevention Act:* North Carolina law allows employers to act when personal issues spill over into the workplace and have the potential for workplace violence. Employers are authorized to apply to state courts for civil no-contact orders (under N.C.G.S. Chapter 50 C) to protect employees from workplace violence when they are the subject of threats, stalking, or attempted bodily harm. N.C. Gen. Stat. § 95-261.

The law requires employers to consult with any employee prior to initiating the civil action to see if the employee has concerns for his/her safety as a result of participating in such action. Employers may not discipline an employee for failing to agree to seek a no-contact order. Employers are also prohibited from taking disciplinary action against an employee who seeks a protective order or takes other legal action on their own for relief from domestic violence or other abuse. From a practical standpoint, employers have the right to ask employees to submit documentation to support the need for this leave.

u. *Verification of Work Authorization – E-Verify Requirements:* All governmental agencies and private employers with more than 25 employees are required to use the federal E-Verify system to ensure that their employees are legally authorized to work in the United States.

The law includes provisions for the NC Commissioner of Labor to handle complaints of violations, investigations, hearings and penalties for employers who fail to comply with the requirement to use E-Verify. It also authorizes

the NC Commissioner of Labor to notify U.S. Immigration and Customs Enforcement (ICE) and local law enforcement agencies if there is a reasonable likelihood that an employee is an undocumented worker.

2. E-VERIFY IS A FEDERAL, WEB-BASED SYSTEM USED BY EMPLOYERS TO CHECK THEIR NEW HIRES' ELIGIBILITY FOR EMPLOYMENT, AS WELL AS THE VALIDITY OF THEIR SOCIAL SECURITY NUMBERS. THE FREE PROGRAM WAS ORIGINALLY DESIGNED TO BE VOLUNTARY FOR MOST EMPLOYERS BUT MANDATORY FOR MANY FEDERAL CONTRACTORS. FOR MORE INFORMATION ON THE FEDERAL E-VERIFY PROGRAM, REFER TO CHAPTER 20 OF THE EMPLOYMENT LAW GUIDE OR VISIT WWW.USCIS.GOV.COMMON LAW DOCTRINE OF EMPLOYMENT-AT-WILL

a. *General Rule:* As a general rule, employees hired for an indefinite term can be discharged "for good reason, bad reason, or no reason at all." The "employment-at-will" doctrine is based on the legal concept of mutuality. That is, because an employee can quit his job at any time for any reason, the employer has a corresponding right to discharge an employee whenever and for whatever reason it chooses.

Historically, the only exceptions to the employment-at-will doctrine were: (l) statutes like Title VII which prohibited discriminatory discharges; (2) employment contracts for a definite term; (3) collective bargaining agreements in which the employer agrees to discharge employees only for just cause; and (4) when an employee gives up something of value in exchange for a promise of job security.

Courts in most states have fashioned exceptions to the at-will doctrine. North Carolina courts were initially reluctant to liberalize the at-will rule. North Carolina is among the growing number of states that recognizes significant exceptions to the at-will rule.

b. *Public Policy Exception:* The most common exception to the employment-at-will rule is the public policy exception where an employee's discharge violates public policy embodied in a specific statutory or constitutional provision. The "public policy" exception was first recognized by a California court in the case of Petermann v. International Brotherhood of Teamsters. This 1959 case involved a union business agent who was fired by the Teamsters Union for refusing to perjure himself before a state legislative committee. Damages were awarded to the business agent because the court determined that it would be contrary to public policy to condone the discharge of an employee who refused to testify falsely.

Following the Petermann case, courts in most states have joined California in recognizing the public policy exception to the employment-at-will doctrine. The exception has been applied to discharges resulting from whistle blowing, filing workers' compensation claims, performing jury duty, invoking health and safety laws, consumer protection laws, and other laws which embody public policy.

In Coman v. Thomas Manufacturing Co., 381 S.E.2d 445 (N.C. 1989), the North Carolina Supreme Court adopted the public policy exception to employment-at-will. The case involved a truck driver who was allegedly discharged for refusing to falsify driving time logs kept pursuant to federal and state regulations. The court found that such a discharge violates the public policy contained in state laws and regulations. Later decisions explained that public policy can be violated by acts "injurious to the public or against the public good".

The breadth of the Court's decision in Coman and Amos (Amos v Oakdale Knitting Co., 416 S.E.2d 166 (N.C. 1992) is staggering. In recognizing actions for public policies contained in state statutes, the Court opened the door to suits under statutes which previously did not allow such a remedy, such as G.S. § 143-422.2, which states that it is the public policy of the State to ensure equal employment opportunity without discrimination based on sex, race, religion, national origin or handicap. The existence of a state court remedy may allow employees to ignore Title VII procedures and sue in state court, where extra damages are available.

c. *Employee Handbook and Personnel Manuals:* Traditionally, courts have ruled that employee handbooks and policy manuals do not constitute employment contracts.

The North Carolina Supreme Court addressed the employee handbook issue in Harris v. Duke Power Co. In Harris, the Court refused to adopt the rationale of cases from other states which hold that handbook provisions are binding upon employers. However, a significant fact in Harris was that the employer expressly retained complete discretion to discharge employees for reasons not stated in the policy manual. The court hinted that given the proper facts, it would adopt the handbook exception to the at-will rule.

The courts are likely to uphold claims based on employee handbooks which contain specific promises. Accordingly, employers should exercise extreme caution when drafting employee handbooks and policies. Specifically, employers should avoid statements which limit discharge to only for "just cause" and should explicitly state that discharge of employees is not limited to the reasons listed in the handbook. Further, employers should retain the discretion to change personnel policies at any time.

The Court of Appeals has held that promises of benefits in employee handbooks are enforceable. In White v. Hugh Chatham Memorial Hospital, Inc., the court stated that an employer who promised continued medical insurance coverage to its employees who became disabled while employed must pay the medical expenses of a nurse who became disabled while employed full-time. The court found that the handbook promise, coupled with the nurse's acceptance of the offer by remaining in the hospital's employ until she became disabled, created an enforceable unilateral contract. The court noted that the offer of benefits could be revoked at any time prior to acceptance but could not be rescinded after acceptance. This decision highlights the need for periodic review of handbooks, policy manuals and

procedures to detect potential "promises" to employees.

d. *Oral Promises:* Oral representations can be considered by the court when determining whether an employment contract exists.

e. *Employment Contract for a Definite Term:* An employment agreement for a definite term (time-period) creates a contractual exception to employment at-will.

3. OTHER COMMON LAW CLAIMS FOUND IN EMPLOYEE LAWSUITS

a. *Intentional Infliction of Emotional Distress:* Individuals who claim to have suffered emotional or mental anguish as a result of another's actions often sue for damages. North Carolina Law permits an employee to sue an employer for intentional infliction of emotional distress based on sexual harassment and discrimination. In order to maintain an action under this theory, an employee must prove that the employer's acts constitute "extreme and outrageous conduct" beyond mere insults and threats. Employees have increasingly used this legal theory, particularly in sexual harassment cases.

b. *Negligent Hiring and Retention:* An employer who knew or should have known of an applicant's or employee's dangerous or offensive characteristics may be held liable for the damages caused. Placing an employee with a history of child abuse in charge of children is an example. If a reasonable investigation of the employee's past would have revealed the potential problem, liability is possible. Likewise, employees who demonstrate harmful tendencies (such as sexual harassment) and are retained without adequate discipline/supervision, expose employers to liability.

c. *Defamation:* Untrue statements about an employee or applicant can lead to liability. If the person's reputation in the community or chance of getting another job is injured, damages, including pain and suffering, are available. Generally, employers may have reasonable discussions among supervisors and managers about allegations and suspicion of employee misconduct. They may also discuss these beliefs with government agencies investigating a charge of discrimination. Problems typically arising when statements (which are later found to be false or incomplete) are made to persons without "a need to know." The best practice is to keep sensitive or embarrassing information confidential and avoid communicating it to persons who do not need the information, or to persons outside the company. Drug test results, sexual preference and communicable diseases present opportunities for defamation. Employers should exercise caution when providing information about former employees to prospective employers, and ensure the protections granted by state law on references are available.

d. *Assault/Battery:* Assault occurs when a person is placed in reasonable apprehension of an imminent harmful or offensive contact. Battery is an intentional and harmful (or offensive) contact without consent. Assault and battery may occur during a fight, theft or even as part of sexual harassment. Civil damages are available for injuries and mental suffering. Assault or battery may also be a crime.

4. LISTS OF EMPLOYEES

County tax officials may require by written notice that any employer furnish to them a list of all employees' names and addresses for purposes of tax garnishment. Tax officials are subject to a misdemeanor for divulging this information to any other person. Employers who refuse to furnish such lists, upon written request, are subject to a misdemeanor. N.C. Gen. Stat. §105-368.

Tips — We suggest that each page of such lists have printed on it the following: "Disclosure of any information on this list to any other person or use of this information for any purpose other than authorized by law is punishable as a misdemeanor. GS 105-368."

If such a request is made of you, do not refuse to honor it but have a meeting with your local tax authority to determine if there is some other way to assist them with whatever their need is for the full list and remind them of the penalty for disclosure.

5. GROUP INSURANCE

North Carolina does not require employers to provide health insurance for their employees. However, if an employer does provide insurance, it must be aware of specific coverage required to be included in health insurance policies and contracts. Several required items are summarized below. For a comprehensive list, refer to N.C. Gen. Stat. §58-3.

a. *Newborn Infant Coverage:* North Carolina law provides that all group insurers must cover newborn infants from time of birth if they suffer from any illness, sickness or disability at birth. In the event a newborn does not suffer such problems, coverage may start at a later time (typically 15 days).

b. *Nondiscrimination:* Group health insurance contracts covering 20 or more employees may not deny coverage or charge increased premiums based solely on an individual's mental illness or chemical dependency.

c. *Evidence of Insurability:* For employee groups of 50 or more persons, no evidence of individual eligibility may be required at the time the person first becomes eligible for insurance or within 31 days thereafter, except for insurance supplemental to the basic coverage.

d. *Waiting Periods:* Employees must be added to group insurance coverage no later than 90 days after their first day of employment. An employee, for purposes of this rule, is defined as a non-seasonal person working 30 hours per week and who is otherwise eligible for coverage but does not include a person who works on a part-time, temporary or substitute basis. Employment is considered to be continuous and will not be deemed broken except for unexcused absences for reasons other than illness or injury.

e. *Cancellation:* Employers must give at least 45 days written notice to each insured of any intention to stop payment on premiums. Absent such notice, employers are prohibited from canceling or failing to renew group health or life insurance and causing loss of coverage by willful failure to pay premiums according to the insurance contract. Violations are punishable by court order,

restitution or as felonies. Notice of health insurance conversion rights must be sent with the cancellation notice.

f. *Prescription Contraceptives:* Employers with group health care plans must provide coverage for prescription contraceptives if they offer prescription drugs in their plans. Specifically, the legislation requires insurance companies that sell employers health care insurance plans that include prescription drugs to also cover prescription birth control measures, including "drugs and devices that prevent pregnancy and that are approved by the United States Food and Drug Administration," excluding the prescription drugs RU-486 and Preven, "for use as contraceptives and obtained under a prescription written by a health care provider." However, the law provides religious employers with the option of being exempted from this requirement by requesting that their insurer exclude coverage for prescription contraceptives from their health care plan.

g. *Patients' Bill of Rights:* North Carolina allows patients another tier of review in the standard two-tier review system when a health maintenance organization or other managed care company denies them medical coverage and gives patients who have exhausted the appeals process the right to sue for damages in State Court.

h. *Lymphedema:* Health benefit plans must provide coverage for the diagnosis, evaluation, and treatment of lymphedema. Coverage must include benefits for equipment, supplies, complex decongestive therapy, gradient compression garments, and self-management training and education, if the treatment is medically necessary and provided by a licensed occupational or physical therapist, licensed nurse with experience providing this treatment, or other licensed health care professional whose treatment of lymphedema is within the professional's scope of practice. Coverage may be subject to the same deductibles, coinsurance, and other limitations applicable to similar services under the plan.

Group health benefit plans covering a large employer that provide coverage for both medical and surgical benefits and chemical dependency treatment benefits also must comply with applicable standards of the federal "Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008." This requirement also applies to hospital and medical service corporations and HMOs.

i. *Disabilities:* An individual or group accident and health insurance policy, hospital service plan policy, or medical service plan policy that provides that coverage of a dependent child terminates upon attainment of the limiting age for dependent children specified in the policy must also provide in substance that attainment of the limiting age does not operate or terminate the coverage of the child while the child is and continues to be incapable of self-sustaining employment by reason of mental retardation or physical disability and chiefly dependent upon the policyholder or subscriber for support and maintenance.

j. *College students on medical leave:* Health benefit plans that terminate dependent child coverage upon a change in enrollment in a postsecondary

educational institution must continue eligibility for a child during a medically necessary leave of absence from the institution in accordance with the federal "Michelle's Law."

6. EMPLOYEE ACCESS TO PERSONNEL RECORDS

Generally, employees have no right to see their personnel records or files. While there are exceptions (i.e., access to OSHA medical records), the exceptions are limited. From a practical standpoint, however, it may promote good employee relations to allow employees to view their own personnel records so long as certain precautions are observed. [See TIPS this Chapter].

7. DRAM SHOP LAW/SOCIAL HOST LIABILITY

Employer liability for service of or a provision of alcoholic beverages is a rather complex issue. We offer no legal opinion but some comments and suggestions we believe to be useful and practical to help reduce or avoid liability.

Civil liability will vary from case to case, but when an intoxicated person causes injury (usually by motor vehicle) there is a strong probability that the plaintiff will join as defendant every commercial establishment involved in the matter. These might include a restaurant, country club, and/or the company or person sponsoring, arranging, or paying for the event.

Two categories of host seem to appear (l) social host and (2) commercial host.

A "social host" is generally an individual or group entertaining guests without payment or direct business purpose.

A social host may be held liable for injuries caused by an intoxicated guest if (1) the host served alcohol, (2) the host served alcohol to a guest who appeared drunk at the time he was served and (3) the host knew that the guest would soon be driving a vehicle.

A "commercial host" is likely to be a club or restaurant charging a price or fee and might also include a company engaging such facilities for a business meeting or employee party or to entertain customers, salesmen or the like.

There are many risks inherent in the excessive use of alcoholic beverages ranging from criminal conviction for motorist offense and increased insurance costs to the risk of civil liability exposure and legal fees.

You as the party sponsor will likely be included in any suit filed in cases where your guests are involved in alcohol (or drug) related events.

We suggest some pre-party planning for social events to reduce or eliminate the potential for such suits to be successful:

a. Plan the agenda so that the social hour (bar) opens early and closes early — before dinner or business portion of the program to allow food and time to lessen the blood alcohol content.

b. Provide drivers where condition of a guest is in doubt. Car pools or vans can work well.

c. Program sponsors set a good example in handling drinking.

d. Follow ABC regulations and obtain proper permits. This varies with county and particular situation, where held, etc. Call local ABC if in doubt.

e. Check your insurance and/or attorney about your coverage.

f. Consider buying a breathalyzer for use when in doubt.

g. Assign a monitor to review these items and to be in charge.

h. Pay close attention to heavy drinkers. Be sure they get home safe and make a note of time and who took them.

Remember, these claims can be filed within three years so keep some record of these events indicating the care that you took in planning.

This is a serious matter and we suggest you treat it that way. Some companies will be sued and some will lose. Don't let it be you.

Tips — Check your master insurance plan with your carrier to be sure that your coverage complies with this law.

8. SMOKING BAN

Smoking is prohibited in most enclosed areas of bars and restaurants. Exceptions to the law provide that smoking may be permitted in designated smoking guest rooms in lodging establishments (no greater than 20% of guest rooms may be designated as smoking rooms); a cigar bar, provided the smoke does not migrate into enclosed areas where smoking is prohibited; or a private club. A person who manages, controls, or operates a restaurant or bar where smoking is prohibited must post signs clearly stating smoking is prohibited, must remove all indoor ashtrays and smoking receptacles, and must direct a person who is smoking to extinguish the lighted tobacco product. State law relating to local government restrictions on smoking in public places also has been revised. N.C. Gen. Stat. §130A-496.

9. TEXTING WHILE DRIVING

State law prohibits individuals from operating a vehicle on a public street or highway or public vehicular area while using a mobile telephone to manually enter letters or text or to read any electronic mail or text message (except for reading names or numbers stored in the telephone or caller identification information). This prohibition does not apply when the operator of a vehicle is lawfully parked or stopped; to a law enforcement officer, a member of a fire department, or the operator of a public or private ambulance while in the performance of his or her official duties; to the use of global positioning systems or wireless communications devices used to transmit or receive data as part of a digital dispatch system; or to the use of voice operated technology. N.C. Gen. Stat. §20-137.4A.

C. ACTION REQUIRED BY EMPLOYERS

Company officials who have the responsibility for interviewing or hiring new employees should keep North Carolina's "blacklisting" laws in mind, especially when checking references provided by job applicants. Hiring officials should be aware of the changing law in the area of employment-at-will and avoid making commitments that are inconsistent with company policy or practice.

D. TIPS FOR EMPLOYERS

1. BLACKLISTING/REFERENCE CHECKING

In light of federal and state blacklisting and anti-discrimination laws pertaining to hiring, it is a good idea to develop a written reference check form that has been reviewed for legality. Your Employer Association has such forms and can also assist in developing legal and effective hiring procedures.

The Reference Check Immunity law provides additional protections for employers that choose to provide substantive job references. The purpose of the statute is to encourage open exchange of job history and performance information. While the legal immunity is not absolute, it should encourage employers to provide more reference information than many provided in the past.

2. AVOIDING EMPLOYMENT-AT-WILL CLAIMS

a. Discharge Only for Just Cause: The best defense to a claim of wrongful discharge is documented facts showing that the employee was discharged for violating a company rule of which the employee was aware and that the discharge conformed to company policy. All discharges should be reviewed by the personnel manager or other management official to ensure that (l) the employee violated a company rule, (2) the employee was aware, or should have been aware of the rule in question, and (3) the discharge is permitted under the circumstances by the company's disciplinary procedure.

b. Disclaimers: Employers may be able to successfully defend wrongful discharge cases by including the following disclaimers on application forms or in the employee handbook.

- **Disclaimer for Application Form: I understand that no employee, manager or other agent of the company has authority to enter into an agreement for employment for any specified period of time unless the agreement is in writing and signed by _____. I further understand that absent such an agreement, employment can be terminated at any time for any reason by the company or by me**
- **Disclaimer for Handbooks and Policy Manuals: "The policies and procedures contained in this Handbook (Policy Manual) are not intended to create any contractual or other legal rights and may be**

changed from time to time, with or without notice to employees."

c. Disclaimer Pitfalls: The above disclaimers do not provide an "airtight" defense in wrongful discharge lawsuits. Some courts could choose to disregard the small print on an application form in the face of employee handbooks, policies and statements by company officials which brag about security, guarantees of fair treatment, and so on. Furthermore, such statements may provide unions with propaganda in a union drive. As noted above, the best defense in any discharge case is documentation showing the employee was treated in a fair, nondiscriminatory fashion. If this can be demonstrated, a "just cause" for discharge exists.

3. COMPANY RULES AND DISCIPLINARY PROCEDURES

Employers should not limit their discretion to take appropriate disciplinary action. Company rules should never say that the listed rules are the only rules that may result in discipline or discharge. Rather, it should be made clear that published company rules are only "illustrative" of disciplinary rules. Written lists of rules should also contain language that company rules "include, but are not limited to, the following . . ." Equally important, there should be no statement in any policy or handbook that discipline or discharge shall be only for "just cause" or "cause." Any of the above language can convert an employee handbook into a legally enforceable employment contract.

4. EMPLOYEE MISCLASSIFICATION

The Employee Fair Classification Act (EFCA) requires employers to report their compliance in properly classifying employees with state occupational licensing boards and commissions. Since December 31, 2017, the North Carolina Industrial Commission has a permanent Employee Classification Section responsible for taking complaints about, and facilitating the sharing of information among, state and federal agencies regarding misclassification of employees as independent contractors. This section will be responsible for sharing instances of employee misclassification among the North Carolina Industrial Commission, the North Carolina Department of Revenue, the North Carolina Department of Labor, and the Division of Employment Security in the North Carolina Department of Commerce. All of these agencies are charged with overseeing employee classification with respect to the state laws they enforce, and can penalize employers for misclassifying employees. The Section will also share information with the U.S. Department of Labor. Each agency investigation may result in cumulative fines, interest, and penalties for unpaid taxes, wages, and the failure to carry workers' compensation insurance. Some state agencies like the North Carolina Department of Revenue and the Division of Employment Security, may seek to recover back taxes for each misclassified worker for up to five years before the date a misclassification is made. State and federal wage and hour laws also allow misclassified employees to

file private lawsuits to recover up to double the amount of any unpaid overtime or lost wages that result from misclassification, as well as their attorneys' fees.

The Section is also required to create a "publicly available notice that includes the definition of employee misclassification" which is defined under the EFCA as "avoiding tax liabilities and other obligations imposed by Chapters 95, 96, 97, 105, or 143 of the General Statutes by misclassifying an employee as an independent contractor." The EFCA defines the term "employee" by incorporating definitions from various other statutes. As a result, the EFCA provides no single definition or test for who is an "employee" and who is not. Although the EFCA does not create a cause of action or levy an additional fine against an individual or entity that engaged in employee misclassification not already found in North Carolina, it does link employee misclassification with occupational licensing. As of December 31, 2017, the EFCA requires every state occupational licensing board or commission to include "on every application for licensure, permit, or certification, or application for renewal of the same" 1) a certification that the license applicant has read and understands the public notice statement defining employee misclassification and 2) disclosure by the applicant of any investigations for employee misclassification, and the result of those investigations for a period of time determined by that licensing board or commission.

5. ACCESS TO PERSONNEL FILES

Employees have no absolute legal right (absent a court order) to view their own personnel records but will likely become suspicious if denied such access. It is usually sound employee relations policy to remove irrelevant items from personnel files and typically allow active employees to view their own records if they so request. This will strengthen an effective open door policy and promote good employee relations. As a general rule; however, employees should not be allowed to photocopy materials in their file or to remove their files from company property.

Relevant Links:

Controlled Substance Forms | NC DOL
https://www.labor.nc.gov/documents/controlled-substance-forms

[COMPANY NAME]

N.C. CONTROLLED SUBSTANCE EXAMINATION REGULATION ACT

INITIAL NOTICE TO EMPLOYEES/APPLICANTS

In accordance with our company policy, you have been selected for a _____ controlled substance test (specify "post-accident," "random," etc.). In accordance with 13 NCAC 20.0401, this Notice explains your rights and responsibilities under the N.C. Controlled Substance Examination Regulation Act ("CSERA") (Chapter 95, Article 20 of the N.C. General Statutes) and the corresponding administrative rules (Title 13, Chapter 20 of the N.C. Administrative Code).

- You may refuse this test; however, your job or employment opportunity may be in jeopardy.
- Although applicants may be screened by means of a "Quick Test," any positive results must be confirmed by an approved lab using gas chromatography with mass spectrometry (GS/MS) or equivalent scientifically accepted method before hiring decisions are made.
- Current employees cannot be screened by means of a "Quick Test."
- An approved laboratory must perform testing of samples.
- You can request a "re-test" of any positive sample. Retests must be of the same sample and must be paid for by the employee.
- You can file a complaint with the N.C. Department of Labor – Wage and Hour Bureau at (919) 807-2796 or 1-800-NC-LABOR if you believe procedural requirements of the CSERA were violated. The Department has no jurisdiction regarding an employer's requirement for controlled substance testing or its decisions regarding results of controlled substance testing.

Employee/Applicant	**Date**
Employer Representative	**Title**

Disclaimer: The foregoing information is presented solely for the convenience of the reader and is not intended to replace any official source. Under no circumstances shall the Department of Labor be liable for any actions taken or omissions made from reliance on any information contained herein.

[NOMBRE DE COMPAÑÍA]

N.C. ACTO DE REGLA DE LA EXAMINACIÓN CONTROLADA DE LA SUSTANCIA

AVISO INICIAL A EMPLOYEES/APPLICANTS

De acuerdo con nuestra política de la compañía, le han seleccionado para _____ a prueba controlada de la sustancia (especifique "después del accidente," "al azar," el etc.). De acuerdo con 13 NCAC 20.0401. este aviso explica las sus derechas y responsabilidades bajo N.C. Controlado Acto de regla de la examinación de la sustancia ("CSERA") (capítulo 95, artículo 20 de la N.C. Estatutos generales) y las reglas administrativas correspondientes (título 13, capítulo 20 de la N.C. Código Administrativo).

- *Usted puede rechazar esta prueba; sin embargo, su trabajo o posibilidad de empleo puede estar en peligro.*
- *Aunque los aspirantes pueden ser defendidos por medio de una "prueba rápida," cualquier resultado positivo se debe confirmar por un laboratorio aprobado usando la cromatografía de gas con el spectrometry total (GS/MS) o el equivalente aceptó científico método antes de que se tomen las decisiones que emplean.*
- *Los empleados actuales no pueden ser defendidos por medio de una "prueba rápida.*
- *Un laboratorio aprobado debe realizar la prueba de muestras.*
- *Usted puede solicitar una "contra-prueba" de cualquier muestra positiva.Las contras-prueba deben estar de la misma muestra y deben ser pagadas para por el empleado.*
- *Usted puede archivar una queja con la N.C. Departamento del trabajo - la oficina del salario y de la hora en (919) 807-2796 o 1-800-NC-LABOR si usted cree los requisitos procesales del CSERA fue violada.El departamento no tiene ninguna jurisdicción con respecto al requisito de un patrón para la prueba controlada de la sustancia o sus decisiones con respecto a resultados de la prueba controlada de la sustancia.*

Employee/Applicant	*Fecha*
Representante Del Patrón	*Título*

Negación:la información precedente se presenta solamente para la conveniencia del lector y no se piensa para substituir ninguna fuente oficial.Bajo ningunas circunstancias el departamento del trabajo será obligado para cualquier acción tomada o las omisiones hechas de confianza en cualquier información contenida adjunto.

C O N F I D E N T I A L

N.C. Controlled Substance Examination Regulation Act

Waiver by Applicant of Confirmation Test

The sample you provided on _____, as required by our company policy and the N.C. Controlled Substance Examination Regulation Act ("CSERA"), initially tested positive for on _____, _____. In accordance with the CSERA (Chapter 95, Article 20 of the N.C. General Statutes) and the corresponding administrative rules (Title 13, Chapter 20 of the N.C. Administrative Code), you are afforded the following rights and responsibilities:

- You have the right to have the initial positive test result confirmed by a second examination of the sample utilizing gas chromatography with mass spectrometry or an equivalent scientifically accepted method.

- You must be given written notice of any positive result that has been confirmed by an approved laboratory within thirty (30) days of employer notification of the positive result.

- You may request, in writing, a re-test of any positive sample that has been confirmed by an approved laboratory with ninety (90) days of the date you are notified of the result. The re-test can be conducted by the same or another approved laboratory. You must pay all expenses associated with the re-test.

- You can file a complaint with the N.C. Department of Labor – Wage and Hour Bureau at (919) 807-2796 or 1-800-NC-LABOR if you believe procedural requirements of the CSERA were violated. The Department has no jurisdiction regarding an employer's requirement for controlled substance testing or its decisions regarding results of controlled substance testing.

By signing this Waiver in accordance with N.C. Gen. Stat. § 95-232(c1), you are hereby waiving the rights outlined above, including the right to have this initial positive result confirmed by a second examination of the sample utilizing gas chromatography with mass spectrometry or an equivalent scientifically accepted method. Results of controlled substance examinations, medical histories and use of lawful prescription drugs must be kept confidential by the employer.

_____

Employee/Applicant **Date**

_____

Employer Representative **Title**

Disclaimer: *The foregoing information is presented solely for the convenience of the reader and is not intended to replace any official source. Under no circumstances shall the Department of Labor be liable for any actions taken or omissions made from reliance on any information contained herein.*

CONFIDENTIAL

[COMPANY NAME]

N.C. CONTROLLED SUBSTANCE EXAMINATION REGULATION ACT

POST-TEST NOTICE TO EMPLOYEES/APPLICANTS

The sample you provided on _____, as required by our company policy and the N.C. Controlled Substance Examination Regulation Act ("CSERA"), has tested positive for _____.

We were notified of this positive result on _____. In accordance with 13 NCAC 20.0402, this Notice explains your rights and responsibilities under the CSERA (Chapter 95, Article 20 of the N.C. General Statutes) and the corresponding administrative rules (Title 13, Chapter 20 of the N.C. Administrative Code).

- You must be given written notice of any positive result of a controlled substance examination within thirty (30) days of employer notification of the positive result.
- You must be given a copy of this Notice or other written notice of your rights and responsibilities regarding re-testing.
- You may request, in writing, a re-test of the above sample at the same or other approved laboratory with ninety (90) days of the date you are notified of the result. You must pay all expenses associated with the re-test.
- Results of controlled substance examinations, medical histories and use of lawful prescription drugs must be kept confidential by the employer.
- You can file a complaint with the N.C. Department of Labor – Wage and Hour Bureau at (919) 807-2796 or 1-800-NC-LABOR if you believe procedural requirements of the CSERA were violated. The Department has no jurisdiction regarding an employer's requirement for controlled substance testing or its decisions regarding results of controlled substance testing.

Employee/Applicant	**Date**
Employer Representative	**Title**

Disclaimer: The foregoing information is presented solely for the convenience of the reader and is not intended to replace any official source. Under no circumstances shall the Department of Labor be liable for any actions taken or omissions made from reliance on any information contained herein.

CONFIDENTIAL

[NOMBRE DE COMPAÑÍA]

N.C. ACTO DE REGLA DE LA EXAMINACIÓN CONTROLADA DE LA SUSTANCIA

AVISO DE POST-TEST A EMPLOYEES/APPLICANTS

La muestra que usted proporcionó encendido _____, según los requisitos de nuestra política de la compañía y de la N.C. El acto de regla de la examinación controlada de la sustancia ("CSERA"), ha probado el positivo para _____.

Encendido nos notificaron de este resultado positivo _____. De acuerdo con 13 NCAC 20.este aviso 0402. explica las sus derechas y responsabilidades debajo del CSERA (capítulo 95, artículo 20 de la N.C. Estatutos generales) y las reglas administrativas correspondientes (título 13, capítulo 20 de la N.C. Código Administrativo).

- Usted debe ser dado el aviso escrito de cualquier resultado positivo de una examinación controlada de la sustancia en el plazo de treinta (30) días de la notificación del patrón del resultado positivo.

- Usted debe ser dado una copia del este aviso o del otro aviso escrito de las sus derechas y responsabilidades con respecto a reexaminar.

- Usted puede solicitar, en la escritura, la contra-prueba de la muestra antedicha en igual o el otro laboratorio aprobado con noventa (90) días de la fecha que le notifican del resultado.Usted debe pagar todos los costos asociados a la contra-prueba.

- Los resultados de las examinaciones controladas de la sustancia, de los historiales médicos y del uso de las drogas legales de la prescripción se deben mantener confidenciales por el patrón.

- Usted puede archivar una queja con la N.C. Departamento del trabajo - la oficina del salario y de la hora en (919) 807-2796 o 1-800-NC-LABOR si usted cree los requisitos procesales del CSERA fue violada.El departamento no tiene ninguna jurisdicción con respecto al requisito de un patrón para la prueba controlada de la sustancia o sus decisiones con respecto a resultados de la prueba controlada de la sustancia.

Employee/Applicant	**Fecha**
Representante Del Patrón	**Título**

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10. The National Labor Relations Act

IMPORTANT NOTE: Labor law as interpreted and implemented by the National Labor Relations Board ("NLRB") is one of the most politicized areas of American jurisprudence. Changes in various aspects of the law consistently occur as different political parties control the Presidency. As such, all employers are advised to stay continually aware of possible changes in the NLRB's direction on important issues affecting the workplace.

A. BACKGROUND

The basic policies covering labor-management relations in the United States are set forth in the National Labor Relations Act, as amended ("NLRA"). The NLRA, also called the Wagner Act, was enacted by Congress in 1935 for the purpose of regulating labor-management relations and promoting labor stability in private industry.

The Wagner Act was subsequently amended in 1947 by passage of the Labor Management Relations Act (commonly called the "Taft-Hartley Act"), and again in 1959 by the Labor Management Reporting and Disclosure Act ("Landrum-Griffin Act"). The 1947 and 1959 amendments were designed to clarify and strengthen the right of employees to refrain from union activity and enhance protections against union abuse of employee rights.

The Wagner Act, Taft-Hartley Act, and Landrum-Griffin Act, together with several hundred volumes of Labor Board cases and thousands of federal and state court cases, today comprise the complex set of laws commonly referred to by labor practitioners as "the NLRA" or "the Act." Among other things, the Act:

- Establishes the National Labor Relations Board ("NLRB") to administer the Act;
- Guarantees the right of employees to join or refuse to join a labor union;
- Guarantees the right of a majority of employees to designate or refrain from designating representatives for the purpose of collective bargaining;
- Guarantees the right of employees to engage in or refrain from engaging in concerted action; and
- Prohibits unions and employers from restraining or coercing employees in the exercise of these rights.

B. HOW THE LAW WORKS

1. COVERAGE

Essentially, the NLRA applies to all private employers that have employees and are engaged in interstate commerce. A brief description of these key terms follows:

a. *Employer:* The term "employer" is broadly defined in the NLRA to include any person acting as an agent of the employer, either directly or indirectly.

Excluded from the definition of "employer" are federal, state, and local governments and employers subject to the Railway Labor Act.

b. *Employees:* The term "employee" is also broadly defined in the Act. However, there are a number of specific exclusions, such as agricultural employees, domestic employees, individuals working for federal, state, or local governments, and workers for employers' subject to the Railway Labor Act. The two most common and important exclusions are **supervisors and independent contractors**.

c. *Commerce:* The NLRB has established administrative standards that govern the exercise of jurisdiction over employers engaged in interstate "commerce." These jurisdictional standards are:

(1) NON-RETAIL BUSINESSES: Indirect or direct sales of goods to out-of-state consumers or purchased by the employer from out of state must annually exceed $50,000.

(2) RETAIL BUSINESSES: The annual volume of business (including sales and excise taxes) must be at least $500,000.

(3) COMBINATION OF NON-RETAIL AND RETAIL BUSINESSES: When an employer is engaged in both retailing and non-retailing activities, either of the above tests may be used by the Board.

(4) NURSING HOMES AND HEALTH CARE FACILITIES: Gross annual revenues of over $100,000 are necessary for nursing homes before the Board will exercise jurisdiction. However, $250,000 in gross annual volume is required for hospitals, medical and dental offices, social services organization, child care centers, and residential care centers.

(5) LAW FIRMS AND LEGAL SERVICE ORGANIZATIONS: Gross annual revenues of $250,000 are required.

2. MAKEUP AND FUNCTIONS OF THE NLRB

Responsibility for administering the NLRA is vested in the National Labor Relations Board and its General Counsel. The NLRB consists of five members appointed by the President with the consent of the Senate to staggered five-year terms. The Board's General Counsel is also appointed by the President with the consent of the Senate for a four-year term.

Although the NLRB has the overall responsibility for administering the National Labor Relations Act, most of the day-to-day work has been delegated to the Board's regional offices which are located throughout the United States. Each Regional Office consists of a regional director, regional attorney, staff attorneys, field examiners (investigators), and other support personnel. The Regional Offices are responsible for investigating and prosecuting unfair labor practice charges and conducting representation elections.

Subregion 11 of the NLRB is responsible for administering the NLRA in North Carolina and reports to Region 10 in Atlanta, Georgia. Subregion 11's offices are located in Winston-Salem, North Carolina.

3. EMPLOYEE RIGHTS

Section 7 of the National Labor Relations Act spells out most of the statutory rights granted to employees. Section 7 provides:

Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and (employees) *shall also have the right to refrain from any or all of such activities . . .* (emphasis added).

Thus, the NLRA gives employees four basic rights: (1) the right to engage in union activity; (2) the right to engage in collective bargaining; (3) the right to engage in concerted action; and (4) the right to *refrain* from any or all of the above. As discussed below, interference with these rights by a union or employer generally constitutes an unfair labor practice.

4. UNION UNFAIR LABOR PRACTICES

The following conduct by a union or its agents constitutes an unfair labor practice.

- Violence or threats of violence directed at employees who refuse to support the union or refuse to support a union-called strike.
- Union-sponsored mass picketing that physically obstructs entrance to a worksite.
- Threats of job loss or adverse economic consequences for failing to join or support a union in situations where union membership is not made compulsory by a collective bargaining agreement.
- Spying on rival union meetings, blacklisting employees, and refusing to process grievances of non-union employees.
- Union fines that interfere with an employee's right to refrain from union activity or support.
- Forcing or attempting to force an employer to unlawfully discriminate against an employee.
- Bargaining in bad faith with an employer.
- Threatening, inducing, or engaging in a work stoppage or refusal to work in order to force some neutral employer (i.e., an employer not involved in the labor dispute) to cease doing business with the "primary employer" (i.e., the employer with whom the union has the dispute). The normal objective of this type of conduct, called a secondary boycott, is to force the primary employer to give in to the union's demands.
- Entering into certain "hot cargo" agreements with an employer that require the employer to cease or refrain from handling, using, selling, or transporting the products of another employer.
- Threatening or engaging in recognition or organizational picketing (i.e.,

picketing designed to force an employer to recognize an uncertified union).

Obviously, there are union unfair labor practices in addition to the ones enumerated above. Numerous exceptions are also contained in the law which may make the conduct listed above lawful in certain circumstances. It is important, therefore, to seek legal advice in any case where there is a suspected violation of the law by a union. The NLRB form which is used to file an unfair labor practice charge against a labor organization is found following this chapter.

5. EMPLOYER UNFAIR LABOR PRACTICES

Sections 8(a)(1), (2), (3), (4) and (5) of the National Labor Relations Act make it unlawful for an employer to:

- Interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act.
- Dominate or interfere in the formation or administration of a labor organization or to contribute financial or other support to it.
- Discriminate against an employee in order to encourage or discourage membership in a union.
- Discharge or discriminate against an employee for participating in NLRB proceedings.
- Refuse to bargain in good faith with the employees' representatives.

NOTE: It is important to keep in mind that the unfair labor practices listed above can only be committed by an agent of the company. By definition, a supervisor is a company agent. Other management personnel with authority to control the employer's business or a portion thereof are also agents of the employer. Under certain circumstances, hourly employees, clerical employees, and even non-employees can be company agents. For example, if a supervisor instructs an hourly employee to commit an unfair labor practice on the company's behalf, the employee is an agent of the company, and it is the company, not the supervisor or employee, that is responsible for the unfair labor practice. The NLRB form used to file an unfair labor practice charge against an employer is found following this chapter.

Listed below are the different types of unfair labor practices that can be committed by agents of the company.

a. *Employer Interference:* The acronym "TIPS" is often used to designate this category of employer unfair labor practices. "TIPS" stands for *"Threats," "Interrogation," "Promises,"* and *"Spying,"* all of which are prohibited by Section 8(a)(1) of the Act.

(1) Threats: Threats by an employer or its agents to take some adverse action against an employee because the employee is engaged in union activity is an unfair labor practice. Examples of unlawful threats include:

- Threats to close the plant or lay off employees because of the union.

- Threats to discharge, demote, or transfer employees to a more onerous position because of their union activity.
- Threats to reduce employees' pay, benefits, or hours because of their union activity.

(2) Interrogation: Interrogating employees about their union activities normally constitutes an unfair labor practice. Examples of unlawful interrogation include questions such as:

- How do you feel about the union?
- Have you signed a union card? Has your coworker or relative signed a union card?
- Where is the union holding its meetings?
- Why do you and your fellow employees want a union here?
- What has the union been promising you?

(3) Employer Promises to Employees: Promises of economic benefits made to employees who refuse to get involved in union activity are generally unlawful. Examples of such promises include:

- Promises of a promotion, better shift assignment, or better working conditions in exchange for abandoning the union.
- Promises of better treatment for a friend or relative in return for rejecting the union.
- Promises of larger-than-normal pay increases or benefit improvements if the union is defeated in an election.

(4) Spying: Spying on union meetings or other union activities is an unfair labor practice. It is unlawful for an agent of the employer to attend union meetings or to intentionally observe employees as they enter or exit union meetings. It is also unlawful for an agent of the company to create the impression of surveillance by making such statements as:

- The company knows who is attending union meetings.
- We know what the union is up to and who supports the union. We have our sources.
- We have the license tag number of every car that was over at the union hall last night.

b. *Employer Domination:* Section 8(a)(2) of the Act makes it an unfair labor practice for an employer to dominate or interfere with the formation or administration of a labor organization or to contribute financial or other support thereto. Section 8(a)(2) of the Act was designed to outlaw "company unions," which were prevalent prior to the passage of the Wagner Act. The following factors are indicative of employer domination of a union:

- Active solicitation by company officials on behalf of a particular union.

- Lack of opportunity for employees to voluntarily accept or reject the union.
- Permitting organizational activities on company time and company premises.
- Financial aid to the union.
- Use of company facilities by the union such as copy machines, secretarial services, bulletin boards, office space, etc.

Importantly, this Section of the Act has been applied so as to prohibit certain types of management-regulated employee committees where the purpose of the committee is to discuss wages, hours, or working conditions, or to make recommendations on these subjects to management. On the other hand, employee committees whose purpose is limited to quality and production problems have generally been found to be lawful.

c. *Discrimination:* Section 8(a)(3) of the Act outlaws discrimination against employees in order to encourage or discourage union membership. Prohibited discrimination can take a variety of forms including discharge, suspension, demotion, transfer, assignment to disagreeable tasks, denial of overtime, or denial of promotion.

Perhaps the clearest violation of Section 8(a)(3) is the summary discharge of an employee who is a leader of a union organizing campaign who has also been recognized by the employer in the past as an exemplary worker. Most often, however, unlawful discrimination is established by showing that a pro-union employee received less favorable treatment than anti-union employees in similar circumstances. For example, terminating a pro-union employee who is caught sleeping on the job in violation of a company rule would normally constitute a non-discriminatory reason for the discharge. However, if it can be shown that employees caught sleeping on the job in the past have escaped with lesser penalties than discharge, the NLRB will likely find that the difference in treatment resulted from unlawful discrimination.

Keep in mind that the law does not require special treatment for pro-union employees, nor does it matter whether the discharge was for a just cause. As one court said, "Management can discharge for good cause, bad cause, or no cause at all . . . with but one specific definite qualification: It may not discharge when the real motivating purpose is to do what Section 8(a)(3) forbids." Unlawful motivation can be demonstrated by showing: (1) that an employee was active on behalf of the union; (2) the employer knew it; and (3) the employee received some type of adverse treatment as a result of his union activity.

d. *Discrimination Against Employees For Participating In Board Procedures:* The same rules discussed above apply to discrimination against employees for participating in Board investigations, hearings, elections, etc. Discrimination against employees for this reason is specifically prohibited by Section 8(a)(4) of the Act.

e. *Refusal To Bargain:* Section 8(a)(5) makes it unlawful for an employer to

"refuse to bargain collectively with the representatives of his employees." Section 8(d) of the law defines "bargain collectively" as "the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." Significantly, the law goes on to provide that the obligation to bargain collectively "…does not compel either party to agree to a proposal or require the making of a concession."

Thus, the duty to bargain simply requires the employer to approach negotiations with an open mind and the intention of reaching agreement with the union if possible. The law does not require an employer to agree to union demands. Nor is the employer required to agree to increased wages or benefits. For legitimate reasons, an employer can refuse to increase wages or benefits, or even insist on reduced wages or benefits, and still fulfill its obligation to bargain in good faith.

6. CONCERTED ACTIVITY

Section 7 of the NLRA gives employees the right to "engage in concerted activity for the purpose of collective bargaining or other mutual aid or protection." Concerted activity may be either protected or unprotected. It is an unfair labor practice for employers to interfere with an employee's right to engage in protected concerted activity.

a. *Definitions*

(1) Concerted Activity: Concerted activity occurs when two or more employees act together to protest matters relating to wages, hours, or conditions of employment. A single employee can engage in concerted activity when acting on the authority of other employees and not solely by and on behalf of himself. Prior NLRB decisions have held that conversations between employees about some topics (such as wages or job security) are "inherently concerted" and may be protected by law even if no group action is contemplated at the time of the conversation. Also, individual action taken to implement or enforce an existing collective bargaining agreement may constitute concerted action.

(2) Protected Concerted Activity: Concerted activity is generally protected if the methods used and the objectives sought are lawful. The most common type of protected concerted activity is a work stoppage or strike involving demands for higher wages or better working conditions. In such a work stoppage, both the method used (i.e., work stoppage) and objective sought (i.e., better wages or working conditions) are lawful and thus the concerted activity is protected by federal law. Other examples of lawful methods of engaging in concerted action include employee petitions or simple group presentations of employee grievances. Other examples of lawful objectives of concerted activity include protesting the discharge of a fellow employee, protesting race or sex discrimination, or protesting new production rates.

b. *Employee Protections:* As noted above, employers are prohibited from

interfering with an employee's right to engage in protected concerted action. Examples of unlawful interference include threatening employees with disciplinary action for engaging in a lawful work stoppage or actually discharging employees who participate in a work stoppage.

c. *Employer Rights:* Although employees have a right to engage in concerted activity, this right is not absolute. Under the NLRA, an employee's right to engage in concerted action must sometimes give way to an employer's rights to continue to operate its business. Thus, concerted activity that interferes with an employer's right to continue its operations may be unprotected. The employer also has a legal right to continue to operate its business during a work stoppage by hiring replacements to permanently fill the jobs of economic strikers. [See Subsection e below].

d. *Unprotected Concerted Activity:* Concerted activity is not protected where the methods used unduly interfere with an employer's property rights. Examples of unprotected concerted action include strikes in violation of a collective bargaining agreement, "sit-down strikes," "slowdowns," or "quickie" strikes. Sit-downs, slowdowns, and quickie strikes normally involve the physical occupation of an employer's premises and a refusal to leave when asked to do so. This occupation by employees of the employer's premises unlawfully infringes on the employer's right to run its business. However, the infringement must be substantial before the employer's rights outweigh the rights of employees and the concerted activity becomes unprotected. If the action is truly unprotected, however, employees may be disciplined or discharged.

e. *Permanent Replacements:* Economic strikers, as opposed to unfair labor practice strikers, can be permanently replaced by someone who is willing to work. An economic striker is one who engages in a work stoppage over wages, hours, or working conditions. An unfair labor practice striker is one who engages in a work stoppage that is caused or prolonged by an employer's unfair labor practices. When an economic striker is permanently replaced, he has no right to return to his job until his permanent replacement leaves or a substantially equivalent job becomes vacant. Unfair labor practice strikers have a right to return to their old job upon making an unconditional offer to return to work.

f. *Other Types of Protected Concerted Action:* In addition to work stoppages and group presentation of grievances, other types of protected concerted activity include: (1) employee petitions; and (2) individual concerted action.

(1) Petitions: The circulation and presentation of employee petitions involving wages, hours, working conditions, and other terms and conditions of employment constitute protected concerted action. Of course, employees cannot circulate petitions during work time in violation of a valid and uniformly enforced no-solicitation rule.

(2) Individual Concerted Activity: Concerted action by a single individual that, by necessity, directly affects other workers, such as a safety complaint regarding a condition that would expose two or more employees to injury.

Individual concerted activity could also include an employee asking coworkers to support his or her workplace harassment complaint, even if the coworkers do not agree with the employee or choose to support the employee's claim.

CAUTION: Concerted action is a complex and frequently changing area of labor law. The above discussion is only a brief overview of the law in this area and does not cover all legal considerations that should be taken into account by employers who are faced with concerted action. Moreover, the application of individual concerted activity can vary widely with the labor or management inclination of the NLRB. An employer who is confronted with any type of concerted action should immediately contact labor counsel.

g. *Request for Representation at Investigatory Interviews:* In the past, both union-represented and non-union-represented employees had a legal right, upon request, to have representative or witness present during meetings called to investigate the violation of a company rule (i.e., a meeting called by a supervisor to get the employee's side of the story that could lead to their discipline or discharge). The National Labor Relations Board has changed its position on this issue several times and presently holds that the right to a witness only applies to a union-represented employee. Non-union-represented employees do not have legal right to demand a representative or witness during an investigatory interview.

As a result, a request for a witness during an investigatory review by a non-union-represented employee may either be accepted or denied by the employer as they choose, based on the circumstances, without any legal ramifications.

If a union-represented employee requests a representative at any investigatory interview that may lead to employee discipline, the Employer must: 1) grant the employee's request for a witness/representative or 2) cancel the interview and proceed to take disciplinary action based on the facts at hand. Once a union-represented employee requests a representative, it is unlawful to threaten the employee or otherwise force the employee to proceed with the investigatory interview unless the request is granted. It is also unlawful to discipline a union-represented employee for refusing to submit to an investigatory interview without the presence of a requested representative/ witness.

C. TIPS FOR EMPLOYERS

1. PERIODIC SUPERVISOR TRAINING

Because all supervisors are agents of the company and can commit unfair labor practices, employers who fail to provide supervision with periodic labor-law training are asking for trouble. Once a union campaign is under way, it is normally too late to provide the necessary training. Oftentimes, legal mistakes made at the beginning of a union drive can seriously

undermine an employer's ability to counter the union's organizing efforts. Additionally, the NLRB can order an employer to recognize and bargain with a union without an election as a remedy for serious unfair labor practices committed by supervision. Your Employer Association provides periodic courses and seminars designed to provide supervisors and other members of management with the "know how" to avoid committing unfair labor practices. On-site training for supervision can also be arranged by your Employer Association or labor counsel. The time and expense necessary to provide such training for supervisors is a sound investment for employers.

2. UPON RECEIPT OF AN UNFAIR LABOR PRACTICE CHARGE

Sometimes an employer will receive an unfair labor practice charge even though there is no apparent union activity under way. A copy of this form is normally mailed to the employer by the NLRB Regional Office and will include a questionnaire about the nature and dollar amount of the employer's business. Another questionnaire requesting information about a company's legal counsel is also included with the charge. Sometimes, investigators from the NLRB will contact employers before the charge is received in the mail and ask questions about the merits of the charge and the possibility of settlement.

Employers who are not familiar with the NLRB's unfair labor practice procedures are cautioned not to answer any NLRB questionnaires or respond to any requests for information by persons identifying themselves as NLRB investigators before seeking legal advice.

3. HANDBOOK POLICIES

In recent years, the NLRB has closely scrutinized employer work rules and found them to be unlawful where the NLRB believes such rules would be interpreted by employees as interfering with their Section 7 rights. Employers should also pay special attention to rules covering social media, confidential information, rules of conduct, solicitation and distribution of literature on company premises, and rules that prohibit off-duty employees from coming on company property. Rules of this nature are subject to charges of employer interference with employee rights and should be periodically reviewed to ensure compliance with the latest NLRB and court decisions on the subject. Employers should also pay special attention to the manner in which entrances to company facilities are posted. Signs that simply state "no soliciting" or "no trespassing" could be unlawful in some situations. Your Employer Association or labor counsel can provide assistance in this regard.

4. UNIFORM ENFORCEMENT OF COMPANY RULES

Many, if not most, unfair labor practices of a serious nature can be avoided by uniform and consistent enforcement of company rules. A company that allows one supervisor to enforce a rule one way and another supervisor to enforce the same rule in a different fashion is not

only subject to charges of "favoritism," but is also vulnerable to charges of unlawful discrimination. For this reason, a specific company official (normally the personnel manager) should be designated to monitor and approve disciplinary action. Periodic audits of disciplinary action together with supervisory training can also help achieve the goal of uniform enforcement of company rules.

5. COMPANY-SPONSORED COMMITTEES, DELEGATIONS, ETC.

Section 8(a)(2) of the Act prohibits employer domination of any "labor organization." The statutory definition of a "labor organization" is extremely broad and includes any "committee or plan in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." Because the term labor organization is defined so loosely, the NLRB will sometimes find that committees, delegations, and other employee groups, formed by an employer in a non-union plant for the purpose of discussing wages, hours, working conditions, or employee grievances, constitute illegally dominated "labor organizations." Before an employer establishes any type of employee committee for the purpose of dealing with wages, hours, conditions of work, or employee grievances, legal advice should be obtained as to whether the committee or group is lawful under Section 8(a)(2) of the NLRA.

6. UNION "SALTS"

The NLRB and United States Supreme Court have ruled that a company cannot lawfully deny employment to a paid professional union organizer, or volunteer union organizer, who applies for a position with the company based solely on their status as a union organizer or their affiliation with a union. Unions frequently use a technique in which union organizers apply for positions at a company and make it perfectly clear to the employer that they are affiliated with a union—i.e., they will indicate on their application that they are currently employed by a union, they will list hobbies such as "organizing companies," they will list union training courses in the education section of the application, they will inform the interviewer of their intention to organize the company, etc. In short, the union "salt" will leave no doubt as to their union affiliation and desire to unionize the target employer. The obvious purpose of this techniques is to: 1) cause the employer to reject the union applicant out of hand, after which the union will file unfair labor practice charges with the NLRB demanding the hire of the union applicant and back pay from the date the union applicant was denied a job to the date he is employed, or 2) obtain the actual employment of the union organizer who can then attempt to unionize the company "from the inside."

While a company cannot lawfully deny employment to a union "salt" based solely on his/her union affiliation, as with any job applicant for any job, other defenses exist, e.g., no available positions, the union applicant

is not qualified for the position, the company has better qualified applicants for the job, etc. Any company faced with union salting should immediately contact your Employer Association and labor counsel for advice on how to properly address the situation.

7. SELECTED EXCERPTS FROM THE N.L.R.A.

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 2(3). The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

Section 2(11). The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action. if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

UNFAIR LABOR PRACTICES

Section 8(a). It shall be an unfair labor practice for an employer—

1. **to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;**
2. **to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: provided, that subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited**

from permitting employees to confer with him during working hours without loss of time or pay [e.g. collective bargaining];

3. **by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;**
4. **to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;**
5. **to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).**

Section 8(c). The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Section 8(d). For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

Section 9(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment provided, that any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, that the bargaining representative has been given opportunity to be present at such adjustment.

Section 9(c)(l). Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

a. **by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number**

of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

b. by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a).

The Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

11. NLRB Elections & Election Procedures

IMPORTANT NOTE: Labor law as interpreted and implemented by the National Labor Relations Board ("NLRB") is one of the most politicized areas of American jurisprudence. Changes in various aspects of the law consistently occur as different political parties control the Presidency. As such, all employers are advised to stay continually aware of possible changes in the NLRB's direction on important issues affecting the workplace.

A. BACKGROUND

The NLRB has delegated responsibility for conducting representation elections to its Regional Offices. An NLRB representation proceeding in North Carolina is initiated by the filing of a petition with the Board's Subregion 11 in Winston-Salem or with Region 10 in Atlanta. The various types of representation petitions which can be filed are:

- RC PETITION - a petition for certification filed by employees or a labor organization.
- RD PETITION - a petition for decertification filed by employees or any individual or labor organization on behalf of employees.
- RM PETITION - a petition filed by an employer to test the majority status of a labor organization.
- UC PETITION - a petition filed by a labor organization or an employer to clarify a bargaining unit of a currently recognized or certified labor organization.
- AC PETITION - a petition filed by a union or employer to amend the NLRB's certification of a labor organization to change the name or affiliation of the labor organization involved or the name or location of the employer.
- UD PETITION - a petition filed by employees to rescind the authority of a union to enter into agreements that require union membership as a condition of employment (i.e., "Union Shop" agreements).

By far, the most common NLRB petitions are RC petitions and RD petitions. The Board's procedures for handling RC and RD petitions are discussed below.

B. HOW THE NLRB'S ELECTION PROCEDURES WORK

1. RC (CERTIFICATION) PETITIONS

a. In general, the RC petition must identify the name of the employer and the nature of its business, the unit of employees the union seeks to represent, the approximate number of employees in the unit, the identity of the union or individual filing the petition, and the petitioner's position on various election

details. The petitioner must serve the petition on the employer and all other parties named in the petition.

Upon receipt of the petition, the Regional Office will provide copies to the employer and other interested parties with a commerce questionnaire, a letter describing the employer's right to counsel, a "Notice of Petition for Election" (which must be posted within two days of the notice for the pre-election hearing), and a request for a list of the names of employees in the unit described in the petition. Other forms explaining the rights of employers and employees may also be included.

b. *Showing of Interest:* The labor organization filing a RC petition must also submit proof to the Regional Office that at least 30 percent of the employees in an appropriate unit want the union to be their bargaining agent or want the NLRB to conduct an election. This "showing of interest," as it is called, normally takes the form of union authorization cards. These cards must be signed and dated by the required 30 percent of employees in the unit. The NLRB now permits electronic signatures to suffice for a showing of interest.

An employer can contest the union's showing of interest by submitting proof to the Regional Director that the authorization cards were forged or by showing that supervisors were directly involved in soliciting employees to sign the cards. If the number of invalid cards destroys the union's 30 percent showing of interest, it is possible to have the petition dismissed.

An employer can also provide the Region with a list of employees in the petitioned-for unit and request that the Region check the union's showing of interest by confirming that the union's showing of interest encompasses at least 30 percent of the employees on the employer's list of employees in the unit.

c. *Unit Questions:* After determining that a valid RC petition has been filed, the Board then determines whether the unit named in the petition is an "appropriate unit" for the purpose of collective bargaining. Many times, the employer and the union will agree on which job classifications, departments, or facilities constitute an appropriate unit. If such an agreement is reached, a "Consent Election Agreement," "Full Consent Election Agreement," or "Stipulated Election Agreement" is arranged by the Board. The difference among the three agreements is the extent of the parties' waiver of a right to a hearing, and the agreed-upon waiver is broader in the Full Consent Election Agreement and the Consent Election Agreement. Where the parties disagree on the composition of the unit and cannot reach agreement, a "representation hearing" may be held, and, with or without a hearing, a determination is made by the Regional Director on the scope of the appropriate unit, subject to review by the NLRB. Under the NLRB's current regulations, the employer must provide a detailed Statement of Position one day prior to the hearing that sets forth all the employer's arguments regarding the inappropriateness of the petitioned-for unit. Arguments that are not contained in this Statement of Position are deemed waived by the NLRB. Under the current rules, the NLRB's review of the Regional Director's decision to direct an election is

discretionary and normally will not occur until after the election occurs.

Important Note on Temporary or Leased Employees: The NLRB has repeatedly changed its standard on whether temporary or leased employees may vote in the same bargaining unit as a company's "regular" employees—e.g., during the Clinton Presidency temporary/leased employees could vote with regular employees if they were "jointly employed" by the leasing/temporary agency and the company, but during the Bush Presidency, temporary/leased employees could not be placed into the same bargaining unit with regular company employees unless all parties agreed to this inclusion—the union, the Company, and the temporary/leasing agency. The Obama Board reverted to the Clinton Board standard, and this remains the same standard today. If any of the parties object to the inclusion of the temporary/leased employees in the same unit as employees of the regular employer, a union could argue they must be included in the same bargaining unit as regular company employees if they share a community of interest. Because of this uncertainty and because temporary/leased employees could be prime targets during union organizing drives (lack of benefits, generally lower pay than regular workers, etc.), companies should discuss the issue of their temporary/leased employees with their Employer Association or labor attorneys to examine the ways to avoid joint employer status with their temporary/leasing agencies, or in the alternative, how to object to a union's attempt to include temporary/leased employees in a voting unit with the company's regular employees.

d. *Election Procedures:* The NLRB election will normally be held within 14 to 28 days of the date the petition was filed if the parties agree to a Stipulated Election Agreement or Consent Election Agreement. If no agreement is reached and a hearing occurs, the election usually occurs as soon as possible after the Regional Director issues a decision on the appropriate unit. The actual date and time of the election may be agreed upon by the employer and the union or set by the Regional Director if no agreement is reached. Normally, elections are held at the employer's facility on company time in order to give all employees in the unit a chance to vote. Mail ballots may occur for units with dispersed employees. An agent of the NLRB's Regional Office conducts the election itself.

e. *Voter Eligibility List:* After an election date is set, the employer must submit, within two days, a list of the names and addresses of all eligible voters. If the employer (including supervisors) has in its possession eligible voters' personal e-mail addresses and/or personal phone numbers, the employer must also include that information in the voter list. Also included are eligible employees' shifts, job classifications and work locations. This voter eligibility list, colloquially called the Excelsior List, must be turned over to the union for its use prior to the vote. The deadline is two days after an election agreement is approved by the Regional Director or as specified by the Regional Director in a Decision and Direction of Election.

f. *Notice of Election:* Prior to the date of the election, the NLRB will provide a "Notice of Election," which must be conspicuously posted at the employer's facility three (3) full working days before the date of the election. This Notice contains a sample ballot and other information regarding the election.

g. *Polling Place:* The actual location of the voting will be worked out with the NLRB before the election. It will generally be in an employee meeting area or cafeteria, not in a management work area. Campaigning is not allowed in or around the polling area, and management must take steps to ensure that supervisors stay away from the polling area. In some cases, the Board may order a mail-in ballot where the ballots are mailed to eligible voters and returned to the NLRB Regional Office where they are counted. The use of mail-in ballots has become much more prevalent during the coronavirus pandemic.

h. *Election Observers:* Both the company and the union are entitled to designate election observers to be present in the polling area during the voting. Generally, voting unit employees are selected as observers by both sides. The observers' responsibilities include checking off the names of employees as they vote, reporting improper conduct (such as campaigning or threats), challenging ineligible voters, and observing the counting of the ballots.

i. *Pre-Election Conference:* Immediately before the opening of the polling area, the NLRB agent responsible for conducting the election will hold a conference with company and union officials to resolve any last-minute problems or details on voting procedures. Matters frequently discussed at these conferences include the schedule by which employees in various departments will be released for voting and potential challenges to the eligibility of certain employees to vote. After the pre-election conference, all company and union officials must leave the polling area until voting has been completed.

j. *Challenges:* Either the company, the union, or the Board agent conducting the election may challenge the eligibility of any voter. Employers normally challenge individuals who have been discharged, permanently laid off, or are otherwise not eligible to vote. Unions often challenge employees by asserting supervisory or employment status. If a ballot is challenged, it is placed in a sealed envelope with the name of the voter on the envelope. If the number of challenged ballots is sufficient to affect the final outcome of the election, the challenged ballots will be investigated by the Regional Director after the election and a determination will be made whether the challenges should be sustained or the challenged votes opened and counted.

k. *Ballot Tally:* After the scheduled time for voting has ended and the polls are closed, management and union officials may return to the polling area to observe the tally of the ballots. The NLRB agent will open the ballot box, count the ballots out loud, and announce whether a majority of the voting employees have voted for the union. At the conclusion of the tally, the NLRB agent will execute a standard NLRB Tally of Ballots showing the number of votes for the employer and the union. Copies of this tally will then be given to all parties.

l. *Objections to Election:* Within 7 days following the election, either party may file objections to the conduct of the election or to conduct affecting the results of the election. In most cases, in order to overturn the election, the party filing the objection must prove that improper or unlawful conduct occurred which affected the result of the election.

If objections are filed, they are investigated by the Regional Director who may sustain or overrule all or part of the objections. In some instances, the Regional Director will order an evidentiary hearing to resolve factual questions. If the objections are sustained by the Regional Director, a rerun election will normally be held. If the objections are overruled, the results of the election will be certified.

m. *Certification:* If no objections are filed and the challenged ballots were not sufficient in number to affect the outcome of the election, or at the conclusion of all proceedings on challenges and objections, the NLRB will issue a Certification of Results of Election if the company wins or a Certification of Representative if the union wins. If the company wins, the Board will not conduct an election in the same unit for a one-year period following the date of the election. If the union wins, it is certified as the exclusive bargaining agent of employees for a one-year period beginning on the date of certification and no decertification or competing union certification election will be conducted during that time.

2. RD (DECERTIFICATION) PETITIONS

a. *General:* The NLRB's decertification procedures provide a means by which employees can vote out an incumbent union. Employees represented by a union may petition for an election to determine whether the union should continue to represent them. The petition, known as a "RD" petition, must be supported by the signatures of at least 30 percent of the employees in the bargaining unit. The employee's signatures may be on a petition or on separate cards which clearly indicate that the employees no longer want to be represented by the union for the purposes of collective bargaining. The Act provides that any employee, group of employees, or individual acting on behalf of the employees may file a decertification petition. Petitions for decertification are normally processed in the same manner as RC petitions. In order to avoid decertification, the union currently recognized or certified must receive a majority of the valid ballots cast.

b. *Time for Filing:* The time for filing a decertification petition is restricted by two well-established Board policies known as the "contract-bar rule" and the "certification year rule" (these rules also apply to RC petitions). A petition which is untimely under either rule will be dismissed. Under the contract bar rule, a valid collective bargaining agreement will prevent the filing of a petition unless it is filed more than 60 days but not more than 90 days before the expiration date or the three-year anniversary of the contractor, whichever comes first. In the health care industry, the window period for filing a decertification petition will be from 90 to 120 days prior to the expiration date or three-year anniversary of the contract, whichever comes first. Under the

contract bar rule, a decertification petition is also timely after a contract has expired and before a new contract is signed. Under the certification year rule, a union is presumed to have the support of a majority of the employees in the unit for one full year following its certification as bargaining representative. No one can contest the union's majority status during the certification year and the Board will not entertain any petitions for an election during this period.

c. *Employee Inquiries About Decertification:* Management's involvement in a decertification effort should be limited in scope. The general rule is that management's assistance should not go beyond "ministerial aid." Employer conduct which initiates or promotes the decertification effort is unlawful and will result in the dismissal of the petition. However, an employer is free to respond to employee requests for information about the decertification process. For example, information concerning the Board's showing of interest requirements and the address and telephone number of the appropriate regional office of the NLRB would be proper information to provide in response to employee inquiries. Should such inquiries be made, contact your Employer Association or labor attorney.

3. EMPLOYER "FREE SPEECH"

Section 8(c) of the National Labor Relations Act gives employers the right to actively and openly oppose union organizational efforts. Without this provision in the law, nearly all forms of employer opposition to unions would be outlawed by Section 8(a)(1) of the Act which makes it an unfair labor practice for an employer to "interfere" with the right of employees "to form, join or assist labor organizations." Section 8(c) provides:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Thus, Section 8(c) makes it lawful for employers in union-free facilities to express their opinions on labor unions so long as the employer does not threaten, promise benefits, interrogate, or give the impression of spying on employees. For example, it is lawful for employers to:

- Tell new employees after they are hired that the company is opposed to unionization and explain the reasons why the company believes unions have nothing constructive or worthwhile to offer employees.
- Conduct a campaign against a union that is trying to organize employees by holding meetings with employees on company time and on company premises or by engaging in one-on-one discussions with employees in a noncoercive setting and in a noncoercive manner. Other communication techniques such as letters, posters, handouts, websites and audio-visual presentations can also be used to explain the company's position on unions. Employers, however, may not contact employees at home by phone or in-person for election purposes; such contact is viewed as coercive.

- Tell employees that belonging to a union does not automatically result in increased wages or benefits.
- Tell employees their wages and benefits could go up, remain the same, or go down as the result of collective bargaining. (NOTE: It would be an unlawful threat to tell employees that they could automatically lose benefits or that they would have to "start over" on benefits if they choose to be represented by a union.)
- Inform employees about the union's history of labor law violations and mistreatment of members.
- Report facts on union strikes and violence.
- Tell employees the union is a business that is after initiation fees and dues.
- Warn employees to read carefully anything the union asks them to sign.
- Advise employees they do not have to sign union cards.
- Tell employees how much the union charges in dues, fees, fines, and assessments.
- Inform employees that their wages, benefits, and working conditions are better than those of employees represented by the union (when this is true).
- Answer any and all false and misleading statements made by the union organizer.
- Tell employees that workers who go out on strike over wages, hours, or working conditions will not be paid by the company, cannot draw unemployment compensation in North Carolina, and that such strikers can, under certain conditions, be permanently replaced.

These are only a few of the many topics that can be discussed with employees during a campaign leading up to an NLRB election. Moreover, these same topics can be discussed at times when there is no union activity if the employer so chooses. When talking to employees about a union, employers must keep in mind that statements made to employees about unionization cannot convey "any threat of reprisal or force or promise of benefit."

(CAUTION: Additional restrictions apply to unionized employers. During the term of a contract and during contract negotiations, certain disparaging statements designed to undermine the union's majority status have been found to be unlawful. However, if a decertification petition has been filed, the "free speech" rights guaranteed by Section 8(c) are generally applicable.)

C. ACTIONS REQUIRED BY EMPLOYERS

1. UPON LEARNING OF A UNION DRIVE

At the first sign of a union organizing drive, the employer should contact its Employer Association. The first days of the union's campaign can be critical. The

union will use this time to get as many authorization cards signed as possible. The union organizer knows that once employees fully understand the legal and practical implications of signing a union card, it is much more difficult to get cards signed. Thus, time is of the essence and employers should develop a lawful program for getting employees the facts they will need to decide whether a union is in their best interest. Experience shows that once employees have the facts, they will often refuse to sign cards and a costly and divisive union campaign can be avoided.

2. UPON RECEIPT OF A NLRB PETITION FOR AN ELECTION

If a NLRB petition is received, the employer should immediately contact its Employer Association, labor counsel, or someone within the corporation who is familiar with NLRB procedures. Do not answer or return any of the NLRB questionnaires that are included with the petition; do not provide the NLRB with a list of employees and their job classifications; and do not post any NLRB notices before obtaining advice on how to proceed with these matters.

3. BE PREPARED FOR A DIRECT CONTACT FROM THE UNION

When home visits, union meetings, and other contacts convince the union organizer that the union has the necessary support among employees, a contact may be made directly with management by the union organizer. The union organizer may contact management by telephone, e-mail, letter, or unannounced personal visit. The organizer will probably state that the union represents a majority of the employees and will ask the employer to agree to verify the union's majority status.

Do not agree to anything and do not answer any written correspondence from the union until you have received advice on the proper and legal way to respond. If a personal or telephone contact is made, the person contacted should simply tell the union official that he/she has no authority to recognize the union or agree to anything at this time. Avoid any further discussions with the organizer. Do not examine and refuse to accept any union authorization cards or petitions that the organizer may have in his possession. Likewise, do not examine any union cards or petitions for union representation that may be received from the union in the mail.

4. MAKE SUPERVISORS AWARE OF HOW TO DEAL WITH CONTACTS BY UNION OFFICIALS

Employers should advise all supervisors in nonunion facilities how to handle contacts from union officials. Supervisors should be told to do nothing more than refer the union organizer to a top management official who has been designated to handle these situations. Supervisors should not examine union cards or get into debates or arguments with the union organizer.

D. TIPS FOR EMPLOYERS

1. DEVELOPMENT OF POLICY ON UNIONIZATION

As discussed above, employers have a legal right to oppose unionization and to express this opposition to employees in a noncoercive manner. If an employer is opposed to the unionization of its facilities, both supervision and employees should be made aware of this fact. Many employers have developed a written policy statement that outlines their position on unions and explains some of the reasons why the employer feels that unionization is unnecessary. If an employer does not take a position on this subject, employees may think that the company doesn't care one way or the other. Once such a policy has been adopted and reviewed to ensure that it is legal, the employer can disseminate this information in orientation programs for new employees, in audio-visual programs, or at meetings with employees. Your Employer Association or labor counsel can assist you in developing a policy in this regard and help you determine the best time and manner to discuss your position on unions with employees.

2. TRAINING SUPERVISORS TO RESPOND TO QUESTIONS ABOUT UNIONS

The best time to train supervisors on how to respond to questions about unions is before an organizing drive begins. Experience shows that most supervisors either cannot or will not provide their employees with simple, straightforward answers to such basic questions as: "What is the Company's position on unions?"; "How do you feel about unions personally?"; and "Why is the company opposed to unionization?" Union organizers understand this fact and will take advantage of it if possible. A favorite union tactic is to make it appear that the employer is opposed to unions for selfish reasons. A typical union handout used at the beginning of an organizing campaign will attack the employer's motive for opposing the union by asking: "If employees don't stand to gain improvements in pay and benefits if the union is voted in, why is management spending so much time and money trying to keep it out?" Unfortunately, many supervisors are not prepared to answer this kind of question. Unless supervisors receive training on how to respond to questions about unions, it would be unreasonable to expect them to respond in a lawful and convincing fashion.

3. MAINTAINING EFFECTIVE COMMUNICATION WITH EMPLOYEES

An effective communications program with employees should, at a minimum, include periodic meetings, individual conferences, and a suggestion/complaint procedure. An employer's sudden interest in employees in response to a union campaign has little impact and probably will be viewed by employees with suspicion. Employers should constantly work on good communications and keeping employees informed through bulletin board notices, letters, and individual and

group meetings with employees. The use of employee opinion surveys is a well-established way to ensure upward communication. See your Employer Association for details on conducting these surveys.

4. **KEEPING WAGES, BENEFITS AND OTHER WORKING CONDITIONS UP TO AREA STANDARDS**

   A noticeable lag in wages and benefits is an invitation to union organizing efforts. Wage and benefit reviews can be used to ensure that the employer remains competitive with similar industries in the area in which it operates. Your Employer Association conducts periodic wage and benefit surveys for member companies that will assist employers in evaluating their wage and benefit programs.

12. Equal Employment Opportunity Law

A. BACKGROUND

There are eight major federal equal employment laws that apply to employers in North Carolina: (1) Title VII of the Civil Rights Act of 1964; (2) Section 1981 of the Civil Rights Act of 1866; (3) The Equal Pay Act of 1963; (4) The Age Discrimination in Employment Act of 1967; (5) The Civil Rights Act of 1991; (6) The Lilly Ledbetter Fair Pay Act; (7) The Genetic Information Nondiscrimination Act of 2008; and (8) The Americans with Disabilities Act which is discussed in Chapter 19. There are also several North Carolina laws dealing with the subject of equal employment opportunity. These federal and state laws are discussed below. In addition, employers holding contracts with the federal government may be covered by Executive Order 11246, the Rehabilitation Act of 1973, and the Vietnam Era Veteran's Readjustment Act of 1974. These laws are discussed in Chapter 13.

B. HOW THE EQUAL EMPLOYMENT LAWS WORK

1. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Scope and Coverage: Title VII outlaws discrimination in public and private employment on the basis of race, color, religion, sex and national origin. Title VII covers all employers "engaged in an industry affecting commerce with fifteen or more employees." The Civil Rights Act of 1991 expanded Title VII coverage to American citizens working in a foreign country for an American employer or for an American-controlled foreign company. Excluded from coverage are all tax-exempt private membership clubs, Indian tribes acting as employers, and employees of the federal government. [Note: The U.S. Supreme Court has held that, for purposes of determining the number of workers at a company in Title VII cases, a company's list of workers includes anyone it has an "employment relationship" with, whether or not that person is at work on a given day (which would include employees who work full-time, part-time or are on leave).]

Since its enactment in 1964, the courts have interpreted Title VII to prohibit discrimination in virtually all aspects of employment including job recruitment, hiring, wages, benefits, job assignments, discipline, apprenticeship and training programs, testing, promotions, transfers, layoffs and recalls, discharges and retirement.

What is Prohibited: Title VII makes it unlawful for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's race, color, religion, sex, or national origin." The majority opinion in a 2020 Supreme Court Case Bostock v. Clayton County reaffirmed the EEOC's previous decisions related to discrimination against homosexuals and transgender individuals, stating: "An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex

plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."

In general, an employer's policies, practices or employment decisions can violate Title VII in any of four ways. https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender.

- BY DISCRIMINATORY TREATMENT: Discriminatory treatment occurs when an employer's policy or rule is discriminatory "on its face" (i.e., a policy which states that blacks cannot be promoted to a supervisory position; a rule prohibiting females from taking a leave of absence to care for sick children where no such rule exists for males, etc.).
- BY DISCRIMINATORY ENFORCEMENT: Discriminatory enforcement occurs where a "neutral" rule or policy is not applied equally to all employees or where it is enforced only against certain employees (i.e., discharging blacks for insubordination where whites were given warnings for similar conduct; enforcing a no smoking rule only against female employees, etc.).
- BY DISCRIMINATORY IMPACT: Discriminatory impact occurs when a facially neutral policy or rule has a disproportionate impact on members of a protected group (i.e., use of employment tests which eliminate more blacks than whites from job consideration; enforcing a "no garnishment" rule that has a disproportionate impact on blacks).
- BY RETALIATION: Title VII also contains a specific provision which prohibits employers from discriminating or taking any other retaliatory action against any employee or applicant for employment who has filed a charge, testified, assisted or participated in any manner in an investigation or proceeding under Title VII, regardless of whether the person belongs to a protected group.

The U.S. Supreme Court has held that former employees who get bad job references or suffer other harms after filing a civil rights complaint can file a suit against companies that allegedly retaliated against them. Under federal law, it is illegal to retaliate against employees for having complained about a civil rights violation, and this decision now extends the retaliation protection provision to former employees.

Recently, the U.S. Supreme Court confirmed that Title VII's retaliation provisions extend to employees who participate in employer-ordered/conducted investigations. Thus, employees may be able to base a retaliation claim upon statements or complaints he/she made during an internal company investigation.

Pregnancy Amendments to Title VII: In 1978, Title VII was amended to prohibit all forms of discrimination in employment based on pregnancy. Under this amendment, pregnancy and pregnancy-related conditions must be treated the same as other short-term medical disabilities. Some of the anti-discrimination rules relating to pregnancy include:

- Employers cannot refuse to hire or refuse to promote female employees because they are pregnant.

- A pregnant employee cannot be forced to go on leave as long as she is still able to perform her job.
- Employees who go on leave due to pregnancy are entitled to the same reinstatement rights as employees on leave due to other temporary disabilities.
- Female employees are entitled to the same fringe benefits such as disability benefits, sick leave, health insurance for pregnancy and pregnancy-related conditions as employees who are unable to work for other medical conditions.
- Child care leaves after pregnancy must be granted on the same basis as leaves granted to employees for nonmedical, personal reasons.
- Employers cannot require pregnant employees to exhaust vacation benefits before qualifying for sick pay or disability benefits unless this requirement is imposed on all other persons absent for any medical reason.
- Employers cannot have arbitrary rules requiring employees on leave for childbirth to remain on leave for a predetermined length of time.

As with the general provisions of Title VII, the pregnancy disability amendment does not require special treatment for pregnant employees. Instead, employers are only required to treat pregnant workers in the same manner that they treat other temporarily disabled workers. Accordingly, employers:

- Are not required to provide light-duty assignments to pregnant employees unless this is done for employees having other disabilities or illnesses. However, the Supreme Court recently created a strict test that all but requires employers to accommodate the light duty requests of pregnant employees, capping off more than a decade of controversial litigation over the application of the Pregnancy Discrimination Act, amending Title VII, to accommodations claims. Employers, on the other hand:
- have no obligation to hire pregnant applicants who are physically unable to perform the job.
- can require pregnant employees to meet the same prerequisites for leave as employees with other disabilities.
- are not required to give employees returning from pregnancy leave their old job unless this is done for employees returning from other disability leaves.

Caution: The Family and Medical Leave Act (FMLA) provides greater protections than the pregnancy amendments to Title VII. If a pregnancy leave qualifies as a FMLA leave, the employee is entitled to reinstatement to an equivalent position. The FMLA is covered in Chapter 24.

Sexual Harassment Guidelines: The EEOC guidelines prohibit sexual harassment in the workplace. These rules forbid unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when:

- Submission is made a term or condition of employment, either explicitly or implicitly.

- Submission to or rejection of a sexual invitation is used as a basis for an employment decision.
- The sexual advance or request for sexual favors has the purpose or effect of substantially interfering with an individual's work performance or creates an "intimidating, hostile or offensive" working environment.

The Supreme Court has ruled that an employer is liable for a supervisor's sexual harassment of an employee, even if the company has no knowledge of this misconduct, IF the harassment culminates in a tangible employment action (i.e. - demotion, discharge, etc.). If a supervisor's harassment does not result in a tangible employment action (i.e. - acts creating a "hostile work environment") the employer can escape liability if the employer proves both of the following elements: 1) the employer exercised reasonable care to prevent and correct any harassing behavior and 2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid the harm.

Employers can also be liable for sexual harassment by employees and third parties (i.e., customers, sales representatives from other companies) if such harassment creates "an intimidating, hostile or offensive work environment and the employer, its supervisors or its agents knew or should have known of the conduct." To escape liability for the actions of employees and third parties, the employer must take immediate and appropriate action to stop the harassment.

Same Sex Harassment. The Supreme Court has held that a sexual harassment suit involving members of the same sex can be brought under Title VII just as suits brought from members of the opposite sex.

Certain states and municipalities require some form of harassment training.

Harassment Other Than Sex: Under recent EEOC enforcement guidance, an employer's anti-harassment policy must prohibit harassment on all protected categories (not just sex harassment) - i.e., harassment on the basis of race, color, sex, religion, national origin, age, genetic information, and disability status include at a minimum:

- A clear explanation of the prohibited conduct;
- Assurance that employees will be protected against retaliation;
- The ability to make a complaint to more than just the employee's immediate supervisor;
- Confidentiality - to the extent possible;
- Prompt, thorough and impartial investigations; and
- Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.

National Origin Discrimination: EEOC guidelines define national origin discrimination as the denial of equal employment opportunity because of an individual's ancestors, place of origin or because the individual possesses

the physical, cultural or linguistic characteristics of a national origin group. The EEOC says it will "examine with particular concern" charges of national origin discrimination based on: (1) Marriage to or association with persons of a particular national origin group; (2) Associations identified with or seeking to promote the interests of national origin groups; (3) Participation in schools, churches, temples or mosques generally used by persons of a national origin group; and (4) An individual's name or spouse's name that is associated with a national origin group. "Fluency-in-English" rules and "Speak-English-Only" rules will also be scrutinized by the EEOC to ensure that such rules are actually required by legitimate business reasons.

The guidelines also prohibit national origin harassment in much the same manner as sexual harassment is prohibited. The EEOC takes the position that employers have an "affirmative duty" to maintain a working environment free of harassment on the basis of national origin. Prohibited conduct includes ethnic slurs, jokes, and other verbal or physical conduct relating to an individual's national origin which create an offensive working environment, unreasonably interfere with a person's work performance or otherwise affect an individual's employment opportunities. Employers may be "strictly liable" for national origin harassment by its agents or supervisors that results in a "tangible employment action" (discharge, demotion, etc.) Similarly, employers can be held responsible for harassment committed by fellow employees and non-employees if "the employer or supervisor knows or should have known of the conduct" and fails to take immediate corrective action.

Religious Discrimination Guidelines: In 1977, the Supreme Court held that employers have an affirmative duty under Title VII to make reasonable accommodations for the religious beliefs of their employees provided that these accommodations do not constitute an "undue hardship." This duty to accommodate extends to any sincerely held religious belief and even covers employees or applicants who are not members of a recognized church.

In 1980, the EEOC issued guidelines on religious discrimination which require employers to consider reasonable alternatives of accommodating the religious beliefs of both job applicants and employees and to offer "the alternative which would least disadvantage the employment opportunities of the individual." Under these guidelines, employers:

- Must make reasonable accommodations to religious needs of job applicants as well as those already in the workforce.
- Can make pre-hire inquiries into an applicant's availability for work on all days of the week and all shifts only if justified by business necessity. Employers cannot make a pre-hire inquiry into religious practices.
- Must make reasonable accommodations to religious holidays or pastoral duties, prayer breaks during work, shift scheduling problems, dress, grooming habits, prohibition of medical examinations, observation or mourning periods, etc.

Alternatives which can be used to accommodate an individual's religious

needs include the use of voluntary employee substitutes, shift swaps, flexible scheduling, lateral transfers and change of job assignments.

An employer may lawfully refuse to accommodate the religious needs of an employee if it would cause undue hardship or involve more than a de minimus cost to the company. The need for accommodation and determination of whether it would involve more than a de minimus cost are issues that must be decided on a case-by-case basis.

Importantly, the Supreme Court recently held that an employee does not have to make a specific request for a religious accommodation to obtain relief under Title VII. An employer may not make an employee or applicant's religious practice, confirmed or otherwise, a factor in employment decisions. It does not matter if an employer has actual knowledge, or merely a suspicion of the employee's religious practice.

Enforcement Procedures Under Title VII: The Civil Rights Act of 1964 created the Equal Employment Opportunity Commission (EEOC) to administer and enforce Title VII. The EEOC has authority to investigate, conciliate and prosecute charges of race, age, religion, sex or national origin discrimination. The EEOC can delegate its powers to local or state "deferral agencies" certified by the EEOC to handle such matters. In North Carolina, there is no state-wide deferral agency for private employers. However, there are three local deferral agencies authorized to investigate discrimination claims against private employers, the New Hanover Human Relations Commission for claims arising in New Hanover County, the Orange County Human Relations Commission for claims arising in Orange County, and the City of Durham Human Relations Commission for claims arising in Durham. The Durham and Orange County Commissions are still technically in existence but no longer process charges. Any company that receives a charge from these agencies should contact their employer association or attorney to determine whether to respond to the charge. In addition, the North Carolina State Office of Administrative Hearings is a designated deferral agency for charges involving State and local government employers (See Chapter 15).

The following is a summary of the procedures used by the EEOC in processing an individual's charge of discrimination.

(1) An employee or applicant claiming to have suffered unlawful discrimination must file a charge with the EEOC within 180 days of the alleged act of discrimination. A sample EEOC charge form can be accessed on the Public Portal https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/foia/forms/form_5.pdf

(2) Depending on the nature of the charge, the EEOC may offer both parties the opportunity to enter into mediation. Mediation is a form of Alternative Dispute Resolution (ADR) that is offered by the EEOC as a strictly voluntary alternative to the traditional investigative and litigation processes. Mediation is an informal process in which a trained mediator assists the parties to reach a negotiated resolution of a charge of discrimination. The mediator does not decide who is right or wrong and has no authority to

impose a settlement on the parties. If a charge is not resolved during the mediation process, the charge is returned to an investigative unit, and is processed just like any other charge.

(3) An administrative investigation is conducted by the EEOC. The employer is normally asked to submit a statement of its position on the allegations made in the charge and provide information pursuant to an "EEOC Questionnaire." The EEOC may also conduct an on-site investigation and ask to interview both employees and supervisors.

(4) After the investigation, determination is made by the EEOC as to whether the allegations contained in the charge are true. If the Commission determines that there is reasonable cause to believe that the allegations are true, it will then attempt to conciliate the case.

(5) If the employer rejects conciliation efforts, the EEOC then decides whether to litigate the charge itself by filing suit against the employer in federal court.

(6) If the EEOC decides not to file suit, it will issue a "right-to-sue notice" to the charging party. This notice is necessary before the charging party can file suit against the employer in federal court.

(7) If the EEOC finds that there is no merit to the allegations in the charge, it will issue an "administrative dismissal" of the claim.

(8) After receiving the EEOC's "right-to-sue notice," the charging party has 90 days to file an action in federal court.

Remedies Under Title VII: If the Title VII plaintiff is successful in federal court, the court or the jury can: (1) issue an injunction prohibiting the employer from committing future violations of Title VII; (2) grant remedial relief including reinstatement, promotions, etc.; (3) award back pay limited to a period beginning two years before the date the charge was filed, less any interim earnings; (4) award reasonable attorney's and expert witness fees. Plaintiffs who prove intentional discrimination may also recover compensatory and punitive damages. The amount of compensatory and punitive damages are currently limited by statutory "caps" but there is a move underway to take these caps out of Title VII. If the employer successfully defends the Title VII action, the court can award attorney's fees to the employer but only if the plaintiff's case was "frivolous, unreasonable or without foundation."

The 1991 Civil Rights Act added a new, potentially costly aspect to Title VII cases. Plaintiffs can now demand a trial by jury for claims of intentional discrimination. Previously, all Title VII cases were decided by a judge. Juries tend to decide cases more on emotion than a strict interpretation of the law making it more difficult for companies to win Title VII cases and making large damage awards more likely.

2. SECTION 1981 OF THE 1866 CIVIL RIGHTS ACT

a. *Scope and Coverage:* Section 1981 of the 1866 Civil Rights Act provides that all persons shall have the right "to make and enforce ontracts, and to full

and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens."

Although the 1866 Act does not specifically mention employment decisions, the courts have interpreted this law as prohibiting any employer from discriminating on the basis of race against an employee or applicant in any employment-related decision. In addition, the U.S. Supreme Court has confirmed that individuals may bring retaliation claims under Section 1981.

b. *Procedure Under Section 1981:* Section 1981 is separate and distinct from Title VII. For instance, there is no agency like the EEOC to administer its provisions. The procedural rules in Title VII cases (filing charge within 180 days, administrative investigations, etc.) are not applicable to claims under this Act. An individual may file a Section 1981 claim against an employer directly in the federal courts.

Instead of Title VII 180-day statute of limitations for filing a charge of discrimination, the courts apply the "most analogous state statute of limitations" in Section 1981 cases. In North Carolina, the statute of limitations is three years, meaning that the lawsuit must be instituted within three years from the date of the alleged act of discrimination. Another distinction—one which favors the employer—is that plaintiffs in Section 1981 cases must prove intentional discrimination on the basis of race. This can be a difficult burden in some cases.

c. *Remedies Under Section 1981:* The same remedies that may be imposed in Title VII cases can also be imposed in Section 1981 cases. However, unlike Title VII, there are no "caps" on the compensatory and punitive damages that may be awarded in a Section 1981 case.

3. EQUAL PAY ACT OF 1963

a. *Scope and Coverage:* The Equal Pay Act requires employers to pay male and female workers equal pay for work requiring equal "skill, effort and responsibility and performed under similar working conditions." However, the Equal Pay Act permits employers to pay different wages pursuant to bona fide seniority systems, merit systems and where wages are based on the quantity or quality of work produced.

The Equal Pay Act applies to employers of two or more employees when: (a) the employees are engaged in work involving interstate commerce; or in the production of goods for interstate commerce; or (b) the employer is engaged in interstate commerce. Independent contractors are not considered employees under the Act.

b. *Procedures Under the Equal Pay Act:* Violations of The Equal Pay Act also constitute violations of Title VII. However, unlike Title VII, there are no administrative rules applicable to The Equal Pay Act, and an individual may sue an employer directly in federal district court for claimed violations. This private right of action is extinguished if the EEOC files suit against the employer. Suits under The Equal Pay Act must generally be brought within two years of the claimed violation. However, the Act provides a three-year

statute of limitation period on cases of "willful" violations.

c. *Remedies Under the Equal Pay Act:* Under the Equal Pay Act, an individual may recover the amount of wages that would have been earned in the absence of discrimination. In addition, where the court finds the employer acted in bad faith, the individual may be awarded liquidated damages equal to the amount of back wages owed. Further, the courts can enjoin employers from committing future violations of the Act.

4. THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

a. *Coverage:* The Age Act applies to employers engaged "in an industry affecting commerce" who employ 20 or more employees. The Act prohibits: (1) discharging or discriminating against employees who are age 40 or older because of their age; (2) involuntarily retiring older employees who are satisfactorily performing their job with the exception of bona fide executive employees who may be required to retire at age 65; and (3) stopping accrual of pension benefits for employees who work beyond age 65.

There are several defenses available to employers in age discrimination cases. One defense exists where an employer can show a "bona fide occupational qualification" necessary to the safety and efficient operations of the business. This is a difficult defense to establish. Another valid defense to an age claim is that an adverse action was taken against an older employee based on reasonable factors other than age. "Reasonable factors other than age" include such things as:

- Employee tests that are specifically related to the requirements of the job.
- Evaluation factors such as quantity or quality of production or educational level, but only where such factors have a valid relationship to job requirements and are uniformly applied. As a result, an elderly production employee may be either reassigned or discharged when he becomes unable to fill his production quota.
- Physical fitness requirements based on preemployment or periodic examinations which are related to standards reasonably necessary for a specific job and are uniformly required.

The U.S. Supreme Court has held that a worker may sue under the ADEA even if his replacement is also 40 or over. The Supreme Court said that companies may still have violated the ADEA even if they replace a worker 40 or older with another worker who is also 40 or over. "The fact that one person in the protected class has lost out to another person in the protected class is . . . irrelevant, so long as he has lost out because of his age," said the court.

Recently, the U.S. Supreme Court held that: (i) individuals bringing disparate treatment claims under the ADEA must prove that age was the "but for" cause of the adverse employment action-- not just a motivating factor; and (ii) the burden of persuasion does not shift to the employer in mixed-motive ADEA cases. Prior Court precedent had developed a burden-shifting framework in mixed-motive Title VII cases whereby an individual could

prove discrimination simply by showing that a protected characteristic under Title VII was a motivating factor in the employer's decision. Thus, under the current law, the framework in mixed-motive Title VII cases is not applicable to mixed-motive ADEA cases.

b. *Procedures Under the Age Act:* The procedures used by the EEOC in processing charges of age discrimination are basically the same as those used in Title VII charges. Charges must be filed within 180 days of the alleged violation. After receipt of the charge, the EEOC conducts an investigation and then attempts to conciliate the charge. Under the Age Act, however, charging parties are not required to obtain right-to-sue letters before instituting court proceedings against the employer. Instead, the charging party may initiate a suit against an employer in federal court after a 60-day "waiting period" following the filing of the charge. The EEOC may preempt an individual's right to file suit by filing its own action against an employer in federal court. Initiation of a federal suit by either the charging party or the EEOC supersedes any state action. There is a two-year statute of limitations for non-willful Age Act violations. The statute of limitations for willful Age Act violations is three years. Individuals filing Age Act suits have a right to a trial by jury in federal court.

c. *Remedies Under the Age Act:* The Age Act gives courts the power to grant legal and equitable relief including orders compelling employment, reinstatement, promotion and the payment of back pay. "Double damages" may be awarded if the violation is determined to be willful. Further, successful plaintiffs are entitled to attorney's fees and costs.

d. *Older Workers Benefit Protection Act:* When offering early retirement incentive programs or severance packages during layoffs to older workers, many employers have requested the employee to sign a waiver or release of all potential claims against the company. The Older Workers Benefit Protection Act establishes strict guidelines for the enforceability of these types of waivers. Specifically, waivers of claims under the Age Discrimination and Employment Act are enforceable only if the following requirements are met: (1) the waiver is part of an agreement written in understandable language; (2) the waiver specifically refers to rights or claims arising under the ADEA; (3) the waiver extends only to past or present claims–not future claims; (4) the employer provides valuable consideration for the waiver above and beyond the benefits which the employee is already entitled; (5) the employee is advised, in writing, to consult with a lawyer before signing a waiver; (6) if the offer is made to a single employee, the employee must be given a period of 21 days within which to consider the offer. If the waiver is part of an exit incentive program offered to a group of employees (2 or more), each employee must be given at least 45 days to consider the offer; (7) for a period of 7 days following the execution of the waiver, the employee may revoke the agreement. The waiver is not effective until the revocation period has passed; and (8) if the waiver is requested in conjunction with an exit interview program offered to a group of employees, the employer must provide these employees with a written description of the class, unit or group of employees covered by the program, the eligibility factors for the program, the time limits applicable

to the program, the job title and ages of all eligible employees selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible for the program.

e. *Arbitrating ADEA Claims Pursuant to a Collective Bargaining Agreement:* The U.S. Supreme Court recently held that a collective bargaining agreement "clearly and unmistakably" requiring employees to arbitrate claims under the ADEA is enforceable.

5. THE CIVIL RIGHTS ACT OF 1991

The Civil Rights Act of 1991 amended various sections of Title VII, Section 1981 of the Civil Rights Act of 1866, the Americans with Disabilities Act and the Age Discrimination in Employment Act of 1967 and reversed several decisions of the U.S. Supreme Court regarding equal employment issues. The key provision of this Act was as follows:

a. *Jury Trials and Punitive Damages Under Title VII:* The Act created a right to a jury trial and to recover punitive/ compensatory damages under Title VII. The amount of possible punitive/compensatory damages is currently subject to "caps" depending on the size of the employer: 15 to 100 employees = $50,000 cap; 101 to 200 employees = $100,000 cap; 201 to 500 employees = $200,000 cap; and over 500 employees = $300,000 cap.

b. *"Race Norming":* The Act forbids adjustment to employment test scores, or using different cutoff test scores, based on race, color, religion, sex or national origin.

c. *Extraterritoriality:* The Act expanded the protection of Title VII and the Americans with Disabilities Act to U.S. citizens who are employed in a foreign country by a U.S. employer or a corporation that is "controlled" by a U.S. employer.

d. *Glass Ceiling:* The Act created a "Glass Ceiling Commission" to investigate, and make recommendations to remove "barriers" to the advancement of females and minorities to management and decision-making positions.

6. LILLY LEDBETTER FAIR PAY ACT

The Lilly Ledbetter Fair Pay Act of 2009 amended Title VII, the ADEA, the ADA and the Rehabilitation Act to clarify the time frame in which persons may challenge and recover for alleged discriminatory decisions or other discriminatory practices affecting compensation. Specifically, the Act amends the aforementioned statutes to provide that the charge-filing periods are triggered each time compensation is paid pursuant to a discriminatory compensation decision or practice.

The Act was passed in direct response to the U.S. Supreme Court's 2007 decision in Ledbetter v. Goodyear Tire & Rubber Co., where the Court held that the time limits for filing a discrimination charge with the EEOC start to run when the employer makes a discriminatory decision about an employee's compensation, not each time the employee receives a paycheck affected by discrimination.

7. GENETIC INFORMATION NONDISCRIMINATION ACT OF 2008

a. *Coverage:* Title II applies to private employers with 15 or more employees for each working day for 20 or more workweeks in the current or preceding year, employment agencies, labor unions, and joint labor-management training programs, among other entities.

b. *Scope of Protection:* Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008 was enacted in May, 2008 and became effective for employment practices on November 21, 2009. EEOC's Title II Final Rule regulations became effective on January 20, 2011. GINA protects applicants and employees from discrimination based on genetic information in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment. GINA also restricts employers' acquisition of genetic information and strictly limits disclosure of genetic information. Genetic information includes information about genetic tests of applicants, employees, or their family members; the manifestation of diseases or disorders in family members (family medical history); and requests for or receipt of genetic services by applicants, employees, or their family members.

GINA also protects applicants and employees from retaliation for opposing, filing a charge, or participating in an investigation or suit regarding genetic discrimination or harassment.

GINA also applies to former employees.

For definitions of genetic information, family members, genetic testing, acquisition of genetic information and other provisions see the final regulation at http://edocket.access.gpo.gov/2010/2010-28011.htm.

c. *Remedies:* The remedies under GINA Title II are the same as Title VII (see page 12.7i).

d. *Exceptions:* There are six limited exceptions to the prohibition on acquiring genetic information: 1) inadvertent requests for genetic information on the applicant/employee or his/her family (This is the "water cooler" exception encompassing a situation where, for example, a supervisor overhears an employee tell another employee that her father has Alzheimer's Disease.); 2) information acquired in connection with health or genetic services, or wellness plans; 3) need for family medical history in connection with certifying FMLA for a family member's serious health condition; 4) information disclosed through commercially and publicly available sources; 5) acquisition through biological monitoring for workplace toxic substance exposure; 6) for use by law enforcement forensic laboratories for quality control purposes.

8. THE AMERICANS WITH DISABILITIES ACT AND N.C. HANDICAPPED PROTECTION ACT (SEE CHAPTER 19)

9. PARALLEL NORTH CAROLINA LAWS

a. *North Carolina Equal Employment Practices Act:* The North Carolina Equal Employment Practices Act makes it a policy of the State to protect and

safeguard the right of all persons to "seek or hold employment" without discrimination based on race, religion, national origin, age, sex or handicap. N.C. Gen. Stat. §143-422.2. This Act applies to all employers who regularly employ 15 or more employees.

The North Carolina Equal Employment Practices Act is monitored by the North Carolina Human Relations Council which has authority to accept charges of discrimination filed by individuals, conduct investigations and attempt conciliation. There is no provision for court enforcement of the Equal Employment Practices Act and the Act fails to provide remedies or sanctions for violations. As a result, unsuccessful conciliation will lead to the charge being referred to the EEOC for possible enforcement action.

b. *Discrimination Based on Sickle-Cell Trait:* Section 95-28.1 of the North Carolina General Statutes prohibits any "person, firm, corporation, unincorporated association, state agency, unit of local government or any public or private entity" from denying or refusing employment to any person or discharging any person because the person possesses the sickle-cell trait or hemoglobin-C trait. Aggrieved individuals may file suit directly in the state courts for claimed violations of this statute.

c. *Genetic Information Non-Discrimination Act:* Section 95-28.1A of the North Carolina General Statutes prohibits any "person, firm, corporation, unincorporated association, state agency, unit of local government, or any public or private entity" from denying or refusing employment to any person or discharging any person: (i) because the person has requested genetic testing or counseling services; or (ii) on the basis of genetic information concerning the person or a member of the person's family.

d. *Discrimination Based On Lawful Use Of Lawful Products During Nonworking Hours:* Section 95-28.2 of the North Carolina General Statutes prohibits an employer from denying employment, discharging or otherwise discriminating against a person for engaging in "the lawful use of lawful products if the activity occurs off the premises of the employer during nonworking hours and does not adversely affect the employee's job performance or the person's ability to properly fulfill the responsibilities of the position in question or the safety of other employees."

e. *Discrimination in Public Employment:* All state departments and agencies and all local political subdivisions are required to extend equal employment opportunities, without regard to race, religion, color, creed, national origin, sex, age or physical disability to all qualified individuals except where age, sex or physical ability constitute a bona fide occupational qualification. N.C. Gen. Stat. §126-16. Another state statute prohibits discrimination in the hiring policies of the State Personnel System against any applicant for employment on the basis of physical handicap, unless the handicap prevents the applicant from performing the duties of the job sought. N.C. Gen. Stat. §128-15.3. These laws are also discussed in Chapter 15 of this Manual.

f. *Handicapped Protection Act:* It is unlawful to discriminate against qualified handicapped applicants, require them to identify themselves as handicapped

prior to employment, fail to reasonably accommodate them or retaliate against persons exercising their rights under the Act. This law is discussed in Chapter 19.

C. ACTIONS REQUIRED BY EMPLOYERS

1. EEO CONSOLIDATED POSTER

Employers covered by Title VII, the Equal Pay Act, the Age Discrimination Act, The Genetic Information Nondiscrimination Act of 2008, Executive Order 11246, the Rehabilitation Act or Vietnam Veteran's Readjustment Act are required to post official EEO notices to employees. The EEOC consolidated the information that is required to be displayed by these laws on one poster. A copy of this poster, entitled "Equal Employment Opportunity is the Law," is found in Chapter 17. This poster must be displayed in conspicuous places available to employees and applicants for employment. Copies of this poster may be obtained from your Employer Association or local EEOC office.

2. RECORDKEEPING

All of the federal equal employment laws discussed in this Chapter contain certain recordkeeping requirements. These requirements are detailed in Chapter 17 of this manual – Recordkeeping & Posters.

EEO-1 Employer Information Report

An EEO-1 report must be filed annually by all employers with 100 or more employees. Federal contractors or subcontractors with 50 or more employees and contracts/subcontracts of $50,000 or more must also file an EEO-1 report. Employers doing business at more than one establishment must file a report covering the principle headquarters office plus a separate report for each establishment employing 50 or more persons. Multi-establishment employers must also file a consolidated report covering all employees in establishments with 50 or more employees as well as establishments with fewer than that amount. They must also submit a list with the consolidated report, showing the name, address, total employment and major activity for each establishment employing fewer than 50 persons.

Information reported on the EEO-1 report includes workforce date classified by one of nine EEO job categories (Executive/Senior Level Officials and Managers; First/Mid-Level Officials and Managers; Professionals; Technicians; Sales; Administrative Support; Craft Workers; Operatives; Laborers & Helpers; Service Workers). The workforce is further divided by ethnicity (Hispanic; White; Black or African American; Asian; American Indian or Alaskan Native; Native Hawaiian or Other Pacific Islander; Two or More Races) and gender (Male or Female).

The preferred method for completing the EEO-1 report is the web-based filing system available at http://www.eeoc.gov/eeo1survey/. Employers may submit

a paper version but by request only.

3. COLLECTING DATA FOR THE EEO-1 REPORT

Employers should obtain information about an employee's ethnicity/race using a survey form as found in the back of this chapter. Federal contractors or subcontractors are required to obtain this information during the hiring process, but all other employers are recommended to obtain the information after an offer of employment or during the orientation phase of employee engagement.

4. UPON RECEIPT OF AN EEOC CHARGE:

Upon receiving notice that an EEOC charge has been filed, an employer should not answer any EEOC questionnaire and should not discuss the charge with any EEOC official without first seeking professional advice. In the past, the EEOC has often attempted to expand the scope of its investigation well beyond the allegations contained in the charge it is investigating. Since the permissible scope of an EEOC lawsuit against an employer is limited by the scope of its investigation and reasonable cause determination, every effort should be made to restrict the information provided to the EEOC to that which is relevant to the charge being investigated. Legal counsel can assist employers in this regard.

5. COLLECTING DATA FOR THE REVISED EEO-1 REPORT:

When collecting data for the revised EEO-1 report, employers should first ask if an employee is Hispanic or Latino (ethnicity), and second what race/races the employee considers himself to be. This approach is called the "Two Question Format."

On April 4, 2019, the EEOC confirmed that it would begin to require salary data as part of the EEO-1 report, referred to as "Component 2" data, by September 30, 2019. The data included pay bands broken down by race, ethnicity and sex, and the agency has requested that the data be collected by a third-party vendor. As of September of 2019, the EEOC has stated that it will not request approval to collect Component 2 data in 2020.

D. TIPS FOR EMPLOYERS

1. PREVENTIVE MAINTENANCE

As in other areas of the law, employers must practice preventive maintenance to avoid costly Title VII litigation. All employers should:

- **Emphasize company's commitment to comply with applicable equal employment laws.**
- **Provide periodic training to supervisors on Title VII and other EEO laws, and ensure compliance with all state/municipal laws related to training**
- **Document all personnel actions (discharges, warnings, promotions,**

demotions, etc.) when they are taken. This is critical because many EEO cases may not be investigated for months or even years after an initial charge has been filed. Since comparative data is usually necessary when defending EEO charges, this data should also be maintained. The difference between winning and losing a discriminatory discharge case may depend on an employer's ability to present documentary proof that other employees were discharged in the past for the same offense or reason.

- **Periodically audit employment practices and policies to make sure they are in compliance with the existing EEO laws and regulations.**
- **Apply policies and make employment related decisions in a uniform manner. Remember, Title VII, the Age Act, Section 1981 and the Equal Pay Act do not require special treatment; these laws only prohibit discrimination in employment matters because of the individual's race, sex, age, etc.**
- **Consider how a jury would view an adverse employment action. Remember, Title VII plaintiffs can now demand a jury trial and seek punitive damages. Accordingly, you should take extra care when disciplining or discharging a member of a protected group to ensure that your decision is**
  - **Fair**
  - **Based on accurate facts**
  - **Consistent with past practice**
  - **Documented**

2. PERFORMANCE Appraisals as Evidence of Discrimination

The most damaging piece of evidence to an employer in an employment discrimination case is often an employee's performance appraisal. Performance appraisals are usually prepared with an eye to salary increases and employee morale rather than actual performance. As a result, some appraisals may grossly overstate an employee's performance. It is difficult to defend a case where an employee discharged for poor performance has a file full of "exceptional" and "superior" performance evaluations. This is especially true in age discrimination cases where an older employee, normally having long service with the company, is discharged or included in a reduction of force for poor performance. In such a case, it's not hard for a plaintiff's lawyer to persuade a jury that old age was the real reason for the plaintiff's separation when his performance reports were as good as or better than younger employees who were retained on the job. For these reasons, employers should insist that supervisors and managers with responsibility for making performance appraisals do so in a fashion that truly reflects the individual's performance.

3. POTENTIAL COST OF SEXUAL HARASSMENT CLAIMS

Supervisors should understand that sexual harassment in the workplace can no longer be ignored or tolerated. A case in point is the federal court case of Kyriazi v. Western Electric. In that case, a female employee complained to her supervisor that her fellow employees were harassing her sexually. They shot rubber bands at her, boisterously speculated about her sex life and circulated obscene cartoons of her. No sexual favors or advances were made, the conduct was limited to what some would consider "horseplay." When her supervisors failed to take action to stop this harassment, Kyriazi sued the employer under Title VII. Eventually, the case was expanded into a class action where Kyriazi became the representative of all females in the company. The employer ended up settling the class claims in the case for 7 million dollars. In addition, each of the supervisors who failed to stop the harassment directed at the plaintiff were ordered to pay her $1,500 and the court instructed the employer not to repay the supervisors for the damages—it came out of their own pockets.

4. AVOIDING SEXUAL HARASSMENT CLAIMS

In order to avoid liability for acts of sexual harassment a company must show that it took immediate and appropriate action to eliminate the offensive conduct. Prevention is the best tool for avoiding sexual harassment charges. For this reason, employers should:

a. Maintain a written policy on sexual harassment incorporating the principles listed below. This policy must be disseminated to all employees and must provide multiple avenues for employees to bypass a harassing supervisor to register complaints.

b. Provide training to supervisors on a regular basis.

c. Make it clear to all supervisors and employees that sexual harassment on the job will not be tolerated. Particular emphasis should be placed on the company's strong disapproval of this conduct.

d. Require members of management to report any known sexual harassment.

e. Thoroughly investigate any claims of sexual harassment.

f. Provide appropriate discipline in cases of sexual harassment.

5. EEO LAWS APPLIED TO CONTINGENT WORKERS

EEO laws may also apply to temporary employees hired through agencies. The EEOC maintains that in many situations, both the agency and the contracting client will be considered "employers" of the temporary workers. The primary test centers around who has the "right to control" the worker. If both control the worker, and each has the statutory minimum number of employees, then they are covered as joint

employers and may be jointly liable for damages, such as back pay, front pay, compensatory and punitive damages.

6. NON-WAIVABLE RIGHTS

The EEOC maintains that laws such as Title VII and the ADEA prohibit employers from interfering "with the protected right of an employee to file a charge, testify, assist or participate in any manner in an investigation, hearing or proceeding …" The EEOC holds that any provision in a settlement agreement which limits an individual's right to file a charge or participate in an EEOC proceeding is null and void. Further, the EEOC maintains that the severance agreement may be a form of retaliation. Despite the EEOC's position, many courts have allowed such waivers to stand, provided they are drafted correctly. Employers should seek professional counsel before drafting a waiver into a severance agreement.

7. LILLY LEDBETTER FAIR PAY ACT

To help combat potential claims under the Lilly Ledbetter Fair Pay Act, employers should: (i) conduct compensation self-audits. These audits should consist of statistical analyses of recent pay decisions, including starting pay, merit pay increase and promotional pay increases. The audits also should encompass a review of pending pay discrimination cases before the EEOC and the courts; (ii) be sure to protect the confidentiality of any self-audit; (iii) review and revise record retention policies. Ideally, employers should modify their policies to indefinitely retain records and e-mails involving pay decisions; and (iii) review and update pay/performance management practices, policies and records. In particular, employers should consider adopting policies that ensure consistency across decision-makers and benchmarks for fairness.

8. Genetic Information Nondiscrimination Act

***Genetic information* should be added to the handbook EEO, non-discrimination policy.**

Managers and supervisors should be trained to understand the requirements and practical application of GINA.

Any genetic information received, whether inadvertent or to support an employee's request for FMLA to care for a family member, must be maintained separate from the personnel file and confidentially. It may be maintained in a file with other medical information.

The EEOC has issued safe harbor language for employers to use when requesting employment-related medical information to protect them from inadvertent acquisition of genetic information. A notice with his language should be attached to the FMLA Certification of Health Care Provider as well as other requests for employee medical information.

Safe Harbor Language

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

9. EEOC Guidance on Background Checks

On April 25, 2012, the EEOC issued an Enforcement Guidance on Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964.

The Guidance is based on the EEOC's position that in some cases the consideration of information on criminal record checks may result in discrimination in employment under Title VII based on race or national origin.

Where a background check is conducted for employment purposes (hires, promotions, etc.), companies should have a policy that only job-related convictions may eliminate an applicant or employee from employment consideration.

The Guidance recommends a two-part plan on evaluating a criminal background check. The first part is to apply what the EEOC calls the Green Factors and then apply an Individualized Assessment.

The Green Factors are based upon a 1975 federal court case, and help you determine if the negative information contained in a report is relevant by asking standard of "is job related and consistent with business necessity:"

1. Consider the severity of the conviction

2. How long ago was the conviction

3. And how does the conviction related to the job sought or held.

The Individualized Assessment is an opportunity for your applicant to explain the circumstances of their conviction, and how they have reformed. Some of the determining factors could be:

1. Facts or circumstances surrounding the record

2. The number of offenses the individual was convicted

3. Character references

4. **Rehabilitation efforts**

5. **The age of the candidate at the time of the offense**

These factors may also be considered if information is obtained through other sources such as an explanation by the candidate of conviction(s) acknowledged on the employment application.

10. **EEOC Guidance on Pregnancy Discrimination**

The EEOC issued an ENFORCEMENT GUIDANCE: PREGNANCY DISCRIMINATION AND RELATED ISSUES on June 25, 2015 (see http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm) This is guidance and not law; however, you should review the content as the EEOC will pursue complaints covered by the Guidance. Expansions include treating normal pregnancy as a disability under ADAAA and requiring employers who offer light duty to workers injured on the job to offer light duty for pregnant employees who are similar in ability or inability to work.

EEOC also issued a Q&A on the Guidance (see http://www.eeoc.gov/laws/guidance/pregnancy_qa.cfm).

Relevant Links:

Form 5, Charge of Discrimination (EEOC): https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/foia/forms/form_5.pdf

Form 161, Dismissal and Notice of Rights (EEOC): https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/foia/forms/form_161.pdf

VEVRA Veteran's Voluntary Self-Identification Form: https://www.dol.gov/agencies/ofccp/vevraa/self-id-form

Voluntary Self-Identification of Disability Form: https://www.dol.gov/agencies/ofccp/self-id-forms

Applicant Affirmative Action Program
Self Identification Form

Required Information

Name: _____Date of Application:_____

Position(s) for which you are applying: _____

Voluntary Information

(Organization name) is a government contractor and to comply with the regulations for equal employment opportunity and affirmative action (EEO/AA), we must track our applicants by gender and race/ethnicity and the position they applied for to the government. We are an organization that values diversity and encourages women and minorities to apply. For this reason, we invite you to indicate your gender and race/ethnicity below. This information is kept separate from your application.

Submission of this information is voluntary and refusal to provide it will not subject you to any adverse treatment. Responses will remain confidential within the Human Resources Department; and will be used only for the necessary information to include in our Affirmative Action Program and reporting requirements to the government. When reported, data will not identify any specific individuals.

Gender: ☐ Male ☐ Female

Definitions of race/ethnicity are on the next page (as defined by the Equal Employment Opportunity Commission).

Race/Ethnic Identification (check one):

Are you Hispanic or Latino? ☐ Yes ☐ No

If you answered "Yes" you have completed this form. If you answered "No" please select a race from the options below.

☐ **White (Not Hispanic or Latino)**

☐ **Black or African American (Not Hispanic or Latino)**

☐ **Native Hawaiian or Other Pacific Islander (Not Hispanic or Latino)**

☐ **Asian (Not Hispanic or Latino)**

☐ **American Indian or Alaska Native (Not Hispanic or Latino)**

☐ **Two or More Races (Not Hispanic or Latino)**

☐ **I do not wish to disclose.**

Definitions of race/ethnic categories

Hispanic or Latino - A person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin regardless of race.

White (Not Hispanic or Latino) - A person having origins in any of the original peoples of Europe, the Middle East, or North Africa.

Black or African American (Not Hispanic or Latino) - A person having origins in any of the black racial groups of Africa.

Native Hawaiian or Other Pacific Islander (Not Hispanic or Latino) - A person having origins in any of the peoples of Hawaii, Guam, Samoa, or other Pacific Islands.

Asian (Not Hispanic or Latino) - A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian Subcontinent, including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam.

American Indian or Alaska Native (Not Hispanic or Latino) - A person having origins in any of the original peoples of North and South America (including Central America), and who maintain tribal affiliation or community attachment.

Two or More Races (Not Hispanic or Latino) - All persons who identify with more than one of the above five races.

EEOC Form 5 (11/09)

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.

Charge Presented To: ☐ FEPA ☐ EEOC

Agency(ies) Charge No(s):

_____ and EEOC

State or local Agency, if any

Name (Indicate Mr., Ms., Mrs.)	Home Phone *(Incl. Area Code)*	Date of Birth
Street Address / City, State and ZIP Code		

Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. *(If more than two are named, list under PARTICULARS below.)*

Name	No. Employees, Members	Phone No. (Incl. Area Code)
Street Address / City, State and ZIP Code		
Name	No. Employees, Members	Phone No. (Incl. Area Code)
Street Address / City, State and ZIP Code		

DISCRIMINATION BASED ON *(Check appropriate box(es).)*

☐ RACE ☐ COLOR ☐ SEX ☐ RELIGION ☐ NATIONAL ORIGIN

☐ RETALIATION ☐ AGE ☐ DISABILITY ☐ GENETIC INFORMATION

☐ OTHER *(Specify)*

DATE(S) DISCRIMINATION TOOK PLACE

Earliest Latest

☐ CONTINUING ACTION

THE PARTICULARS ARE *(If additional paper is needed, attach extra sheet(s)):*

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the above is true and correct.

_____ _____

Date *Charging Party Signature*

NOTARY – *When necessary for State or Local Agency Requirements*

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(month, day, year)

EEOC Form 5 (11/09)

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.

Charge Presented To: Agency(ies) Charge No(s):

☐ FEPA

☐ EEOC

and EEOC

State or local Agency, if any

THE PARTICULARS ARE *(If additional paper is needed, attach extra sheet(s)):*

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the above is true and correct.

Date *Charging Party Signature*

NOTARY – *When necessary for State or Local Agency Requirements*

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(month, day, year)

PRIVACY ACT STATEMENT: Under the Privacy Act of 1974, Pub. Law 93-579, authority to request personal data and its uses are:

1. FORM NUMBER/TITLE/DATE. EEOC Form 5, Charge of Discrimination (11/09).

2. AUTHORITY. 42 U.S.C. 2000e-5(b), 29 U.S.C. 211, 29 U.S.C. 626, 42 U.S.C. 12117, 42 U.S.C. 2000ff-6.

3. PRINCIPAL PURPOSES. The purposes of a charge, taken on this form or otherwise reduced to writing (whether later recorded on this form or not) are, as applicable under the EEOC anti-discrimination statutes (EEOC statutes), to preserve private suit rights under the EEOC statutes, to invoke the EEOC's jurisdiction and, where dual-filing or referral arrangements exist, to begin state or local proceedings.

4. ROUTINE USES. This form is used to provide facts that may establish the existence of matters covered by the EEOC statutes (and as applicable, other federal, state or local laws). Information given will be used by staff to guide its mediation and investigation efforts and, as applicable, to determine, conciliate and litigate claims of unlawful discrimination. This form may be presented to or disclosed to other federal, state or local agencies as appropriate or necessary in carrying out EEOC's functions. A copy of this charge will ordinarily be sent to the respondent organization against which the charge is made.

5. WHETHER DISCLOSURE IS MANDATORY; EFFECT OF NOT GIVING INFORMATION. Charges must be reduced to writing and should identify the charging party and respondent and the actions or policies complained of. Without a written charge, EEOC will ordinarily not act on the complaint. Charges under Title VII, ADA or GINA must be sworn to or affirmed (either by using this form or by presenting a notarized statement or unsworn declaration under penalty of perjury); charges under the ADEA should ordinarily be signed. Charges may be clarified or amplified later by amendment. It is not mandatory that this form be used to make a charge.

NOTICE OF RIGHT TO REQUEST SUBSTANTIAL WEIGHT REVIEW

Charges filed at a state or local Fair Employment Practices Agency (FEPA) that dual-files charges with EEOC will ordinarily be handled first by the FEPA. Some charges filed at EEOC may also be first handled by a FEPA under worksharing agreements. You will be told which agency will handle your charge. When the FEPA is the first to handle the charge, it will notify you of its final resolution of the matter. Then, if you wish EEOC to give Substantial Weight Review to the FEPA's final findings, you must ask us in writing to do so within 15 days of your receipt of its findings. Otherwise, we will ordinarily adopt the FEPA's finding and close our file on the charge.

NOTICE OF NON-RETALIATION REQUIREMENTS

Please **notify** EEOC or the state or local agency where you filed your charge **if retaliation is taken against you or others** who oppose discrimination or cooperate in any investigation or lawsuit concerning this charge. Under Section 704(a) of Title VII, Section 4(d) of the ADEA, Section 503(a) of the ADA and Section 207(f) of GINA, it is unlawful for an *employer* to discriminate against present or former employees or job applicants, for an *employment agency* to discriminate against anyone, or for a *union* to discriminate against its members or membership applicants, because they have opposed any practice made unlawful by the statutes, or because they have made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the laws. The Equal Pay Act has similar provisions and Section 503(b) of the ADA prohibits coercion, intimidation, threats or interference with anyone for exercising or enjoying, or aiding or encouraging others in their exercise or enjoyment of, rights under the Act.

EEOC Form 161 (11/09) **U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

DISMISSAL AND NOTICE OF RIGHTS

To: From:

☐ *On behalf of person(s) aggrieved whose identity is CONFIDENTIAL (29 CFR § 1601.7(a))*

Charge No.	EEOC Representative	Telephone No.

THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

☐ The facts alleged in the charge fail to state a claim under any of the statutes enforced by the EEOC.

☐ Your allegations did not involve a disability that is covered by the Americans with Disabilities Act.

☐ The Respondent employs less than the required number of employees or is not otherwise covered by the statues.

☐ Your charge was not timely filed with the EEOC; in other words, you waited too long after the date(s) of the alleged discrimination to file your charge.

☐ The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

☐ The EEOC has adopted the findings of the state or local fair employment practices agency that investigated this charge.

☐ Other *(briefly state)* _____

- NOTICE OF SUIT RIGHTS -

(See the additional information attached to this form.)

Title VII, the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, or the Age Discrimination in Employment Act: This will be the only notice of dismissal and of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit **must be filed WITHIN 90 DAYS from your receipt of this Notice**; or your right to sue based on this charge will be lost. (The time limit for filing suit based on a claim under state law may be different.)

Equal Pay Act (EPA): EPA suits must be filed in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that **backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible.**

On behalf of the Commission

_____ _____
(Date Mailed)

Enclosure(s)

cc:

Enclosure with EEOC
Form 161 (11/09)

INFORMATION RELATED TO FILING SUIT UNDER THE LAWS ENFORCED BY THE EEOC

(This information relates to filing suit in Federal or State court under Federal law. If you also plan to sue claiming violations of State law, please be aware that time limits and other provisions of State law may be shorter or more limited than those described below.)

PRIVATE SUIT RIGHTS -- Title VII of the Civil Rights Act, the Americans with Disabilities Act (ADA), the Genetic Information Nondiscrimination Act (GINA), or the Age Discrimination in Employment Act (ADEA):

In order to pursue this matter further, you must file a lawsuit against the respondent(s) named in the charge **within 90 days of the date you *receive* this Notice**. Therefore, you should **keep a record of this date**. Once this 90-day period is over, your right to sue based on the charge referred to in this Notice will be lost. If you intend to consult an attorney, you should do so promptly. Give your attorney a copy of this Notice, and its envelope, and tell him or her the date you received it. Furthermore, in order to avoid any question that you did not act in a timely manner, it is prudent that your suit be filed **within 90 days of the date this Notice was *mailed* to you** (as indicated where the Notice is signed) or the date of the postmark, if later.

Your lawsuit may be filed in U.S. District Court or a State court of competent jurisdiction. (Usually, the appropriate State court is the general civil trial court.) Whether you file in Federal or State court is a matter for you to decide after talking to your attorney. Filing this Notice is not enough. You must file a "complaint" that contains a short statement of the facts of your case which shows that you are entitled to relief. Your suit may include any matter alleged in the charge or, to the extent permitted by court decisions, matters like or related to the matters alleged in the charge. Generally, suits are brought in the State where the alleged unlawful practice occurred, but in some cases can be brought where relevant employment records are kept, where the employment would have been, or where the respondent has its main office. If you have simple questions, you usually can get answers from the office of the clerk of the court where you are bringing suit, but do not expect that office to write your complaint or make legal strategy decisions for you.

PRIVATE SUIT RIGHTS -- Equal Pay Act (EPA):

EPA suits must be filed in court within 2 years (3 years for willful violations) of the alleged EPA underpayment: back pay due for violations that occurred **more than 2 years (3 years) before you file suit** may not be collectible. For example, if you were underpaid under the EPA for work performed from 7/1/08 to 12/1/08, you should file suit before 7/1/10 -- *not* 12/1/10 -- in order to recover unpaid wages due for July 2008. This time limit for filing an EPA suit is separate from the 90-day filing period under Title VII, the ADA, GINA or the ADEA referred to above. Therefore, if you also plan to sue under Title VII, the ADA, GINA or the ADEA, in addition to suing on the EPA claim, suit must be filed within 90 days of this Notice and within the 2- or 3-year EPA back pay recovery period.

ATTORNEY REPRESENTATION -- Title VII, the ADA or GINA:

If you cannot afford or have been unable to obtain a lawyer to represent you, the U.S. District Court having jurisdiction in your case may, in limited circumstances, assist you in obtaining a lawyer. Requests for such assistance must be made to the U.S. District Court in the form and manner it requires (you should be prepared to explain in detail your efforts to retain an attorney). Requests should be made well before the end of the 90-day period mentioned above, because such requests do not relieve you of the requirement to bring suit within 90 days.

ATTORNEY REFERRAL AND EEOC ASSISTANCE -- All Statutes:

You may contact the EEOC representative shown on your Notice if you need help in finding a lawyer or if you have any questions about your legal rights, including advice on which U.S. District Court can hear your case. If you need to inspect or obtain a copy of information in EEOC's file on the charge, please request it promptly in writing and provide your charge number (as shown on your Notice). While EEOC destroys charge files after a certain time, all charge files are kept for at least 6 months after our last action on the case. Therefore, if you file suit and want to review the charge file, **please make your review request within 6 months of this Notice**. (Before filing suit, any request should be made within the next 90 days.)

IF YOU FILE SUIT, PLEASE SEND A COPY OF YOUR COURT COMPLAINT TO THIS OFFICE.

13. Affirmative Action Requirements

A. BACKGROUND

There are three major laws that require federal government contractors and subcontractors to take affirmative action to employ and advance in employment individuals in certain protected categories. These are: (1) Executive Order 11246; (2) The Rehabilitation Act of 1973; and (3) the Vietnam Era Veterans' Readjustment Assistance Act of 1974. All three of these laws apply only to employers who have federal contracts or subcontracts (hereinafter "federal contractors") in excess of certain specified amounts.

B. HOW THESE LAWS WORK

1. EXECUTIVE ORDER 11246

a. Coverage: Executive Order 11246 requires employers who enter into contracts with the federal government, or that are subcontractors on federal contracts, worth in excess of $10,000 annually to refrain from employment discrimination based upon race, color, religion, sex, sexual orientation, gender identity or national origin.

Under Executive Order 11246, non-construction federal contractors must also develop a written affirmative action program which outlines affirmative action that the employer will take to ensure equal employment opportunity for minority and female applicants and employees if: (1) they have 50 or more employees, and (2) they hold a federal government contract or subcontract of $50,000 or more annually, have federal government bills of lading which total $50,000 or more in any 12-month time period, serve as a depository of federal funds in any amount or if they are a financial institution which is a paying agent for US savings bonds and savings notes in any amount. (As of January 1, 2012, U.S. savings bonds are no longer issued through financial institutions.) Certain federal construction contractors also have affirmative action obligations, but affirmative action for construction contractors differs in some material respects from the affirmative action obligations imposed on supply and service contractors. Please contact the Association if you have questions about the obligations imposed on federal construction contractors.

b. *Regulation Updates:*

i. President Obama signed Executive Order 13672, amending Executive Order 11246, to prohibit federal contractors and subcontractors from discriminating on the basis of sexual orientation or gender identity. The Final Rule amends the OFCCP's regulations and requires federal contractors and subcontractors to treat applicants and employees without regard to their sexual orientation or gender identity. Sexual orientation and gender identity are now protected groups under E.O. 11246. The amended regulations took effect on April 8, 2015.

ii. Final Rules regarding Pay Transparency became effective on January 11, 2016. These rules amend Executive Order 11246 and are intended to promote pay transparency by prohibiting federal contractors and subcontractors from discharging or otherwise discriminating against their employees or applicants for discussing, disclosing, or inquiring about compensation. This change affects new federal contracts and subcontracts or modifications of existing contracts after the effective date of January 11, 2016. Below are the major changes announced in the final rule.

1. Applies to any employee or job applicant for a company that has covered contracts with the federal government.

2. Includes a broad definition of "compensation" to include more than just salary. The definition of compensation includes but is not limited to salary, wages, overtime pay, shift differentials, bonuses, commissions, vacation and holiday pay, allowances, insurance and other benefits, stock options and awards, profit sharing, and retirement.

3. Modifies the equal opportunity clause included in contracts to specify that federal contractors and subcontractors must refrain from discharging, or otherwise discriminating against, employees or applicants who inquire about, discuss, or disclose their compensation or the compensation of other employees or applicants. An exception exists where the employee or applicant makes the disclosure based on information obtained in the course of performing his or her essential job functions.

4. Requires federal contractors to incorporate a prescribed nondiscrimination provision into existing employee manuals or handbooks and disseminate the nondiscrimination provision to employees and job applicants.

5. OFCCP has also provided a supplement to the "EEO is the Law" poster that addresses the Pay Transparency rules as well as the new sexual orientation and gender identity protections. This supplement must be used alongside the current "EEO is the Law" poster until the revised poster is available.

c. *Affirmative Action Requirements:* Employers with annual federal contracts exceeding $10,000 must:

(1) Prohibit discrimination in employment against applicants and employees based upon race, color, religion, sex, sexual orientation, gender identity or national origin;

(2) Indicate in all solicitations and advertisements for employment that the company is an "Equal Opportunity Employer;"

(3) Post in conspicuous places available to employees and applicants the U.S. Department of Labor's "Equal Employment Opportunity is the Law" poster (41 C.F.R. Section 60-1.4)

(4) Provide notification of its commitment to E.O. 11246 to each labor union representing workers with which it has collective bargaining agreement or other contract;

(5) Include the provisions of the "Equal Opportunity Clause" [set forth in 41 C.F.R. Section 60-1.4(a)] in all subcontracts or purchase orders with third parties of $10,000 or more that involve the procurement of supplies or services necessary for the completion of the employer's government contract or subcontract;

(6) Ensure that facilities provided for employees are not segregated on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin (41 C.F.R. Section 60-1.8).

If the contractor has fewer than 150 employees, it must maintain any personnel or employment record for one year from the date of making the personnel decision or taking action on the personnel issue, whichever occurs later. Covered contractors with 150 employees or more must maintain personnel and employment records for two years (41 C.F.R. Section 60-1-12(a)).

d. *Written Affirmative Action Programs:* Employers with 50 or more employees and a federal supply or services contract or subcontract of $50,000 or more annually must develop and maintain a written affirmative action program (AAP) in accordance with the requirements of 41 C.F.R. Section 60-2.1(a) covering all U.S. employees (41 C.F.R. Section 60-1.5(b)(2)). An acceptable affirmative action program must include a "utilization analysis" of affirmative action job groups and provide written explanations if this analysis shows that minorities or women are underutilized in any job group. "Underutilization" generally means that there are fewer females or minorities in a job group than would normally be expected based on the availability of minorities and/or women in the employer's workforce and recruiting area. If an underutilization exists in any job group, the contractor must adopt goals and take affirmative action to address the underutilization.

In addition to utilization analysis, an AAP must contain other provisions including: (1) job group analysis; (2) workforce/department analysis or organizational profile for each department; (3) assignment of responsibilities for implementing the equal opportunity policy; (4) internal audit and reporting system to measure effectiveness; (5) report on progress of last year's goals; and (6) identification of problem areas to include (a) an evaluation of personnel activity (applicant flow, hires, terminations, promotions and other personnel actions) to determine whether there are selection disparities based upon race/ethnicity or gender; (b) a compensation analysis; and, (c) an analysis of selection, recruitment, referral and other personnel procedures to evaluate the impact of those systems on women and minorities; (7) development and execution of action-oriented programs to eliminate problem areas and achieve goals, if any.

e. *Procedures For Compliance Reviews:* The Office of Federal Contract Compliance Programs (OFCCP), an agency within the U.S. Department of

Labor, is responsible for monitoring the employment practices and affirmative action programs of federal contractors and subcontractors. Generally, the OFCCP initiates a compliance review of a contractor by first requesting a copy of the employer's affirmative action plan and information about its "personnel activity" for the prior AAP year and possibly for the then-current year (hiring, promotion and discharge decisions), among other things. The OFCCP's review may be limited to a "desk audit" of the AAP (i.e., the agency simply reviews the company documents requested) or the review could include: (1) a "compliance check," where OFCCP requests a copy of the contractors progress against goals for the prior AAP plan year; examples of job advertisements; and examples of reasonable accommodations provided at the location; (2) a "focused review," which involves an in-depth analysis of specific employment practices (i.e., compliance with the Rehabilitation Act of 1973 or VEVRAA or an investigation of hiring, promotion, or compensation issues, etc.) or (3) a "compliance review," which may involve an extended investigation at the facility, review of records, and interviews with employees. These options are not necessarily mutually exclusive. For example, a desk audit may lead to a focused review.

f. *Penalties Under Executive Order 11246:* Where it is determined that the contractor's AAP is not in compliance with Executive Order 11246 or if the OFCCP finds discrimination (based upon race, sex, sexual orientation, gender identity, religion, or national origin), the agency will require the federal contractor to take steps to remedy the identified issues. This is usually achieved in a "conciliation agreement" with the OFCCP which can require the employer to make victims of discrimination whole through the payment of back wages plus interest, preferential hiring, and providing training to employees on non-discrimination, for example. A conciliation agreement also typically requires periodic reports to the OFCCP for purposes of monitoring the federal contractor's compliance with the agreement. If the federal contractor refuses to enter into a conciliation agreement, the OFCCP can bring an enforcement action against the contractor. Other remedies available to the OFCCP include: (1) recommending a criminal action by the Justice Department against the federal contractor in instances where the contractor knowingly furnished the OFCCP with false information; (2) canceling the contract of a non-complying employer; or (3) blacklisting or debarring a non-complying employer from future government contract work for either a fixed period of 6 months or "indefinitely," until the employer has demonstrated a willingness to comply with the Executive Order.

2. THE REHABILITATION ACT OF 1973

a. *Coverage:* The Rehabilitation Act of 1973 prohibits discrimination against disabled individuals by federal contractors and subcontractors with federal contracts or subcontracts valued in excess of $15,000 annually for the purchase, sale or use of personal property or non-personal services (including construction, or fund depository). As a part of a contract with the federal government, contractors are required to agree not to discriminate against the disabled and to take affirmative action to provide employment opportunities

for disabled individuals. Further, employers holding a federal government contract or subcontract of $50,000 or more annually who have 50 or more employees must prepare a written affirmative action plan for disabled workers. Changes to the regulations promulgated under the Rehabilitation Act became effective March 24, 2014. The new regulations now mandate data collection and assessment components to affirmative action plans for the disabled.

b. *What is a Disability?* The term "disabled" is defined to include any person:

- Who has a physical or mental impairment that substantially limits one of more of such person's major activities; or
- Has a record of such impairment; or
- Is regarded as having such impairment whether he or she actually has it or not.

The Act does not require the employment of all disabled persons regardless of whether they can perform the essential functions of the position. Instead, the Act essentially mirrors the Americans with Disabilities Act and only protects "qualified" disabled persons who are capable of performing the essential functions of a particular job or who could perform the job with or without "reasonable accommodations" for their disability (i.e., modifying controls on machines, providing time off for rehabilitation or to obtain medical treatment, etc.). Employers must make "reasonable accommodations" to the physical and mental limitations of an employee or applicant for employment unless the contractor can demonstrate that such accommodation would impose an undue hardship on its business. (See also Chapter 19 State and Federal Disability Laws).

c. *Current Points of Emphasis for the OFCCP:* In audits, the agency is regularly requiring federal contractors to produce documentation showing that it has invited applicants and current employees to voluntarily self-identify as disabled, engaged in outreach to groups and agencies likely to be able to refer qualified disabled applicants as positions become available at the site, and to provide training to managers on nondiscrimination and the reasonable accommodation process. In addition, the OFCCP is requesting documentation showing that any on-line application system contains the tag-line that the contractor is an "Equal Opportunity/Affirmative Action Employer of disabilities" and that the contractor's application system provides contact information for disabled job seekers to use in the event that they need a reasonable accommodation in order to submit an application or otherwise participate in the hiring process.

d. *Individual Complaint Procedures:* The OFCCP is the federal agency with responsibility for enforcement of Section 503 of the Rehabilitation Act. The procedures used in processing complaints alleging disability discrimination are as follows:

(1) The disabled person alleging discrimination under the Act must file a complaint with the OFCCP within 300 days of the alleged discriminatory act.

(2) If the employer has an internal grievance or review procedure, the OFCCP will allow the complaint to be processed through that procedure for 60 days before it will consider the complaint.

(3) If the complaint is not resolved in the employer's grievance or review procedure, the OFCCP will begin an administrative investigation of the charge.

(4) If no violation is found, the charging party will be notified and given 30 days to appeal the decision to the Director of the OFCCP.

(5) If a violation is found, the OFCCP will attempt to conciliate the matter, usually by asking the employer to sign a written agreement describing the corrective action that must be taken to remedy the unlawful conduct. This may include providing additional training to managers on non-discrimination and reasonable accommodation or providing lost pay, benefits and interest to employees and/or applicants who suffered discrimination.

(6) If a settlement cannot be reached, the OFCCP can institute administrative enforcement proceedings against the contractor or it can bring an action in federal court to enforce the Act.

e. *Available Remedies for Noncompliance Uncovered in a Routine OFCCP audit:* Noncompliance under the Rehabilitation Act can result in the same remedies described above in the section on the Executive Order 11246 (i.e., debarment from future government contracts, contract termination, or the withholding of contract payments until violations are corrected, reinstatement to individuals who have suffered discrimination and back pay plus interest paid to those same individuals, etc.).

REGULATION CHANGES

Rule changes affecting affirmative action for individuals with disabilities became effective on March 24, 2014. These new rules require federal contractors to make significant changes to current practices and require numerical assessments not previously required. Below are the major changes in the announced final rules.

A. *Equal Opportunity Clause in advertisements:* Each covered contractor must state in solicitations and advertisements that it is an equal opportunity employer of individuals with disabilities.

B. *Equal Opportunity Clause in Sub-Contracts on Federal Contracts:* The Equal Opportunity Clause reference in sub-contracts must include specific, mandatory language provided by the OFCCP. (Text below in bold type)

"This contractor and subcontractor shall abide by the requirements of 41 CFR 60-741.5(a). This regulation prohibits discrimination against qualified individuals on the basis of disability, and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified individuals with disabilities."

C. *Invitation to Self-Identify as Disabled:*

a. Pre-Offer: Contractors must invite all applicants to voluntarily self-identify as an individual with a disability during the application process. Contractors may collect this information at the same time they invite applicants to self-identify for ethnicity, race and gender information pursuant to EO 11246. The OFCCP has issued a self-identification form and has mandated that contractors use it without making any changes to the form. In cases where an applicant or employee has declined to self-ID but a disability is obvious, the regulations allow the contractor to make a visual identification and count the individual as disabled. However, contractors should proceed with extreme care in this situation so as not to impermissibly regard an individual as "disabled".

b. Post-Offer: Contractors must also continue to provide an invitation to self-identify post job offer and prior to beginning work.

c. Employees: Contractors must also invite employees to voluntarily self-identify every five years. Additionally, contractors must remind employees at least once in that five-year span that they can update their disability status at any time.

d. Contractors must maintain the self-identification information in a confidential manner separate from other application or personnel records.

CI. *Self-Assessments:* Contractors must conduct annual self-assessments of disabled outreach and recruitment efforts. If the self-assessment indicates efforts weren't effective in identifying and hiring qualified disabled candidates, the contractor must identify and implement alternative efforts.

Contractors must document and maintain records on outreach activities and assessments for three years.

Specific data collection requirements for analysis include:

a. Record of all outreach and recruitment efforts;

b. Total number of applicants and the number of applicants who self-identified or who are known as an individual with disability;

c. Total number of job openings and total number of jobs filled;

d. Total number of applicants who are hired and the number of applicants with disabilities hired.

CII. *Utilization Goals:* Under the new regulations, federal contractors have a 7% utilization goal for employees with disabilities.

a. The 7% utilization goal will apply to each AAP job group. For contractors with 100 or fewer employees, the goal will apply to the total workforce rather than by job group.

b. Contractors must calculate and compare annually the representation of individuals with disabilities in each job group to the 7% utilization goal.

c. If the 7% goal is not met, contractors must take steps to determine whether impediments to equal employment exist. If problem areas are found, contractors must develop and execute action-oriented programs to correct identified problems.

d. The 7% utilization goal is not a quota. Failure of contractors to meet the goal is not a violation.

3. THE VIETNAM ERA VETERANS READJUSTMENT ASSISTANCE ACT OF 1974, AS AMENDED

a. *Coverage:* The Vietnam Era Veterans Readjustment Assistance Act ("VEVRAA or the Act") requires employers with government contracts or subcontracts in the amount of $150,000 or more annually and entered into on or after December 1, 2003 to take affirmative action "to employ and advance in employment" "protected veterans." It also prohibits covered employers from discriminating against protected veterans in all employment matters.

If the employer has 50 or more employees and a government contract or subcontract of $150,000 or more annually, a written affirmative action program must be developed and maintained that sets forth the contractor's policies and procedures on employing covered veterans and advancing them in employment. As of March 30, 2021, contractors have a hiring benchmark of 5.6% at each establishment. The OFCCP has authority to audit AAPs covering protected veterans and enforce the Act.

The Act protects "disabled veterans," other protected veterans (veterans who served on active duty during a war or in a campaign for which a campaign badge was authorized), Armed Forces Service Medal veterans, and recently separated veterans (veterans within 3 years of their release from active duty). Each of these categories is defined in the regulations. 41 C.F.R. Section 60-300. Contractors should ensure that they are using the current definitions of protected veterans in their form documents.

b. *Procedures for Enforcement and Remedies for Noncompliance:* The procedure used by the OFCCP in processing complaints alleging violations of VEVRAA and for auditing a federal contractor's compliance with VEVRAA are essentially the same as those used when processing claims of discrimination and auditing compliance under Executive Order 11246. Similarly, the available remedies for noncompliance are the same as those available in the Rehabilitation Act and Executive Order 11246.

REGULATION CHANGES

Rule changes affecting affirmative action for protected veterans were published in the Federal Register became effective on March 24, 2014. These rules require federal contractors to make significant changes to prior practices and they mandate numerical assessments. Below are the major changes in the final rule.

A. *Rescinds Section 60-250 of the regulations.* This section covered contractors with contracts entered into prior to December 1, 2003. This rescission

includes the VETS-100 report. However, veterans that were formerly protected only under Part 60-250 will still be protected from discrimination under the revised 41 CFR Part 60-300.

B. *Equal Opportunity Clause for advertisements:* A covered contractor must state in solicitations and advertisements that it is an equal opportunity employer of protected veterans.

C. *Equal Opportunity Clause:* The Equal Opportunity Clause referenced in subcontracts of federal work must include specific, mandatory language provided by the OFCCP. (Text below in bold type)
This contractor and subcontractor shall abide by the requirements of 41 CFR 60-300.5(a). This regulation prohibits discrimination against qualified protected veterans, and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified protected veterans.

D. *Invitation to Self-Identify:* Contractors must invite all applicants to voluntarily self-identify as a "protected veteran." It is no longer necessary to invite applicants to self-identify for specific protected veteran categories. Instead, the job seeker is invited to answer "yes", "no", or "I do not wish to disclose" in response to a question as to whether or not the individual is a protected veteran. Contractors may solicit this information from job seekers at the same time they invite them to self-identify for ethnicity/race and gender pursuant to EO 11246.
After extending a job offer, but before the individual begins work, contractors are required to invite newly hired employees to self-identify as protected veterans. Again, it is no longer necessary to invite employees to self-identify for specific categories of protected veterans The OFCCP has provided sample forms for contractors.
Note: The former veterans report (VETS-100A) has been retired. The VETS-4212 report takes its place and requires only aggregate reporting of the protected veteran categories. Contractors may continue to solicit the specific veteran categories post job offer or may choose to ask a "yes" or "no" question as to whether or not the individual is a protected veteran as they do pre-offer. However, job seekers and new hires who self-identify in more than one category of protected veteran (disabled veteran and recently separated veteran, for example), are only counted as one protected veteran for purposes of the hiring benchmark.

E. *Annual Hiring Benchmarks:* Contractors must establish annual hiring benchmarks to measure success of veteran outreach and recruitment efforts. Contractors will have the option of using one of two methods to establish hiring benchmarks:

a. Contractors may use the national percentage of veterans in the civilian labor force. As of March 2021, this is 5.6%. This will be revised and posted annually on the OFCCP's website., or

b. Contractors may establish an individual benchmark by considering five specified factors which are: (1) the average percentage of veterans in the civilian labor force in the states where the contractor is located over the preceding three years (to be published on OFCCP's website); (2) the number of veterans, over the previous four quarters, who were participants in the employment service delivery system in the state where the contractor is located (to be published on OFCCP's website); (3) the applicant ratio and hiring ratio for the previous year; (4) the contractor's assessments of the effectiveness of its external outreach and recruitment efforts; and (5) any other factors, including but not limited to, the nature of the contractor's job openings and/or location.

c. Contractors will apply the hiring benchmarks for the establishment as a whole, not by job group. This is a true hiring benchmark, meaning that federal contractors should aspire to hire the specified percentage of veterans each year at each job site. It is in contrast to the utilization analysis required by the disability regulations, which requires an analysis of the contractor's workforce on a specific date each year and which assesses the utilization of self-identified disabled workers in each job group at the contractor's establishment.

d. The hiring benchmark is not a quota and failure to meet the benchmark is not a violation.

e. Records pertaining to the benchmark must be maintained for three years.

F. *Data Collection and Analysis:* Contractors must document and update annually the following data, and retain it for a period of three years:

a. Total number of applicants and the number of applicants who self-identified as protected veterans;

b. Total number of job openings and total number of jobs filled;

c. Total number of applicants who are hired and the number of applicants hired who are protected veterans.

G. *Affirmative Action Policy Statement:* OFCCP requires the contractor's top U.S. executive to indicate his or her support in writing for the Affirmative Action Policy Statement. Contractors typically comply with this requirement by having the CEO or President sign the Affirmative Action Policy Statement and then post it on employee bulletin boards and/or the company intranet.

H. *Mandatory Job Listings:* The regulations clarify that contractors must provide information about the job vacancy in any manner and format required by the applicable employment service delivery system. In addition, when the contractor posts the first job opening of the year with the local employment service delivery system ("ESDS") (i.e., unemployment office), the contractor must notify the ESDS that it is a federal contractor or subcontractor and that it requests priority referrals of protected veterans. This notice must also include the name and address of each hiring location within the state and contact information for the hiring official in each location; and, if the contractor uses

an outside job search company to assist in hiring, it must provide to the ESDS the contact information for that search company.

C. ACTION REQUIRED BY EMPLOYERS

In addition to the actions required by federal contractors that are outlined above, covered employers should be aware of the following:

1. POSTERS

Covered federal government contractors are required to post the joint EEOC-OFCCP poster "Equal Employment Opportunity is the Law" together with the supplement covering sexual orientation and gender identity and pay transparency, in places where it can easily be seen by job applicants and employees. This is the same poster that is required by the EEOC for posting pursuant to Title VII. Covered federal government contractors subject to the National Labor Relations Act (NLRA) are required to post the "Employee Rights "poster.

2. RECORDKEEPING

Recordkeeping requirements under Executive Order 11246, the Rehabilitation Act, and the VEVRAA are set forth in Chapter 17. NOTE: Pursuant to the OFCCP's September 18, 1997 regulations, covered employers must retain their AAPs and all supporting documentation for 2 full plan years. Under the new VEVRAA and Rehabilitation Act regulations that became effective on March 24, 2014, a 3-year record-keeping requirement will apply to data collected by contractors pursuant to those regulations. Data subject to the 3-year requirement includes information on disability and protected veteran self-identification, the number of jobs filled each year in total and those filled by either protected veterans or the disabled and information demonstrating outreach and recruiting efforts.

3. RECORD OF COMPLAINTS

Employers covered by the Rehabilitation Act and/or the VEVRAA must retain records regarding complaints and actions taken under the law for one year. Covered contractors must also allow the OFCCP access to these records during normal business hours.

4. MANDATORY JOB POSTING

Regulations implementing VEVRAA require employers to list all "employment openings" with the appropriate ESDS. "Employment openings" are defined as all positions except executive and "top management" jobs, including temporary and part time employment. However, this requirement does not apply to positions for which the employer proposes to consider only employees within its own organization or to jobs that will last three days or less.

To access the job entry system at the North Carolina Department of Commerce,

employers should go to the following site:

https://www.ncworks.gov/loginintro.asp

Federal contractors must keep records establishing that they are in compliance with the job posting requirement.

5. **EEO SELF-IDENTIFICATION**

Pursuant to 41 C.F.R Section 60-1.12 (c), covered employers are required to identify, where possible, the gender, race, and ethnicity of each applicant. The OFCCP requires employers to provide a vehicle for applicants to voluntarily self-identify their gender and race/ethnicity. At a minimum, employers should add an EEO Self-Identification tear off sheet to their employment application. Completed forms should be filed separately and should not be kept with the job seeker's application.

6. **EEO-1 EMPLOYER INFORMATION REPORT**

An EEO-1 report must be filed annually by federal contractors or subcontractors with 50 or more employees and contracts/subcontracts of $50,000 or more. Employers doing business at more than one establishment must file a report covering the principle headquarters office plus a separate report for each establishment employing 50 or more persons. Multi-establishment employers must also file a consolidated report covering all employees in establishments with 50 or more employees as well as establishments with fewer than that amount.

Information recorded on the EEO-1 report includes workforce data classified by one of ten EEO job categories (Executive/Senior Level Officials and Managers, First/Mid Level Officials and Managers, Professionals, Technicians, Sales, Administrative Support, Craft Workers, Operatives, Laborers & Helpers, Service Workers). The workforce is further divided by ethnicity/race (Hispanic, White, Black or African American, Asian, American Indian or Alaskan Native, Native Hawaiian or Other Pacific Islander, Two or More Races) and gender (Female or Male).

The preferred method for completing the EEO-1 report is the web-based filing system available at http://www.eeoc.gov/eeo1survey/. Employers may submit a paper version by request only. For assistance with filing this report, call 877-392-4647 or email e1.techassistance@eeoc.gov. Employers are encouraged to monitor the EEO-1 report website for the announced deadline for submitting 2021 data.

7. **VETS-4212 REPORTS**

Certain federal contractors and subcontractors are required to file VETS 4212 Reports by September 30th each year showing the total number of covered veterans: (1) employed in each EEO-1 job group and (2) hired in each EEO-1 job group during the preceding year.

Federal contractors or subcontractors that have contracts valued at $150,000 or

more annually must complete a VETS-4212 Report Unlike the prior VETS-100A report, which required contractors to invite employees to self-identify in four categories of protected veteran, the new report only requires the employer to state total number of veterans at the establishment. The categories of protected veterans remains the same: disabled veterans; other protected veterans (veterans who served on active duty during a war or in a campaign for which a campaign badge was authorized); Armed Forces service medal veterans; and recently separated veterans (veterans within 3 years of their release from active duty).

Employers doing business in more than one hiring location must file (a) one form covering the headquarters office; (b) a separate form for each hiring location employing 50 or more persons; and (c) EITHER, (1) a separate form for each hiring location employing fewer than 50 persons, OR (2) consolidated reports that cover hiring locations within one State that have fewer than 50 employees. Unlike the EEO-1 report, company consolidated reports are not required.

For more information on the VETS-4212 form go to the website: https://www.dol.gov/vets/vets4212.htm. For further assistance, you may call (866) 237-0275 or email vets4212-customersupport@dolncc.dol.gov. Completed forms may be mailed to:

VETS-4212 Service Center C/O Department of Labor National Contact Center (DOL-NCC)
15000 Conference Center Drive, Suite B0132
Chantilly, VA 20151.

8. EXECUTIVE ORDERS

a. *"Economy in Government Contracting"*: This Executive Order prohibits federal contractors from seeking reimbursement from the government for expenses incurred in attempting to persuade employees to exercise or not exercise their rights to organize and bargain collectively. Because many federal government contracts are awarded on a cost-reimbursement basis, a contractor's profit margin often hinges on costs that can be reimbursed under the contract. This Executive Order specifically "prevent[s] taxpayer dollars from going
to reimburse federal contractors who spend money trying to influence the formation of unions." Notably, the Executive Order does not prohibit federal contractors from engaging in "persuader" activities; the prohibition attaches only to claims for reimbursement for such activities from the federal government.

b. *"Notification of Employee Rights"*: Executive Order 13496 requires federal contractors and subcontractors subject to the National Labor Relations Act (NLRA) to post a notice advising employees of their right to organize under the NLRA. The Secretary of Labor has developed a notice which federal contractors are required to post. Federal contractors with contracts of $100,000 or more annually and subcontractors with subcontracts of at least $10,000 are affected by this requirement. The new poster has to be physically and electronically displayed (technology permitting) where

notices to employees are normally posted. The physical posting must be in a "conspicuous place" to be visible by all employees working on a federal contract.

c. *"Nondisplacement of Qualified Workers"*: Employers assuming federal government contracts covered by the Service Contract Act must offer the predecessor's employees jobs for which they are qualified.

D. TIPS FOR EMPLOYERS

1. AFFIRMATIVE ACTION PROGRAM DEVELOPMENT

Your Employer Association can assist you in preparing affirmative action programs required under Executive Order 11246, the Rehabilitation Act and Vietnam Era Veterans Readjustment Assistance Act. Please call the association office for more information.

2. DISABILITY DISCRIMINATION

The OFCCP has broadly interpreted the provisions of the Rehabilitation Act. The OFCCP, for example, regards alcoholics and drug addicts who have been rehabilitated to be persons with disabilities under the statute, and covered employers are prohibited from discharging an alcoholic or recovering drug addict solely because of his or her addiction (current illegal drug users or drug abusers are not protected). If, however, an employee's job performance suffers significantly because of alcohol, that employee can be terminated after documenting the performance problems and, in appropriate cases, engaging in the interactive process with the employee concerning possible reasonable accommodations. Other conditions such as high blood pressure, obesity, back injuries, etc. can also qualify as "disabilities" in certain situations. Since charges alleging disability discrimination have increased dramatically in recent years, the employer should closely monitor employment decisions to ensure compliance with the Rehabilitation Act and seek professional guidance when questions arise. See also N.C. Handicapped Protection Act and Americans with Disabilities Act, Chapter 19.

3. COMPLIANCE EVALUATIONS

The OFCCP continues to collect financial remedies for victims of hiring discrimination, particularly in entry-level jobs. In order to identify discriminatory practices, the agency will investigate contractor compliance with the regulations it enforces as directed using the Federal Contract Compliance Manual (FCCM). The following are key evaluation terms utilized by the OFCCP:

- ***A compliance evaluation*** **is the investigation and review process used by OFCCP to determine if a federal contractor is complying with the nondiscrimination and affirmative action employment guidelines outlined in the regulations. A compliance evaluation consists of any**

one or any combination of the following investigative procedures: compliance review; offsite review of records compliance check; or focused review.

- ***A compliance review* is the most common investigative procedure used by OFCCP when conducting a compliance evaluation. It is a comprehensive analysis of the employment practices of the contractor, the written affirmative action program (AAP), and the results of the affirmative action efforts undertaken by the contractor. A compliance review may proceed in three stages: desk audit, onsite review and offsite analysis.**
- ***An off-site review* of records consists of an analysis and evaluation of part or all of the affirmative action programs, supporting documentation, and other documents relevant to a determination of whether the contractor has complied with the requirements of the regulations implementing Executive Order 11246, VEVRAA and Section 503. Employers have 30 days to respond to the OFCCP's compliance review scheduling letter.**
- ***A compliance check* is conducted to ascertain whether the contractor has a current Executive Order 11246 AAP; whether it is listing its jobs with the employment service delivery system; and whether it is regularly assessing the efficacy of its outreach and recruiting efforts directed towards minorities, women, individuals with disabilities, and protected veterans. Employers have 30 days to prepare a response and submit it to OFCCP electronically or allow OFCCP to come on-site to review the response.**
- ***A focused review* consists of an on-site review restricted to one or more components of the contractor's organization (Executive Order 11246, Section 503, or VEVRAA) or one or more aspects of the contractor's employment practices. The focused review could be directed at pay practices, hiring, promotions or a "glass ceiling" review to determine if minorities and females have been barred from reaching top management positions. The focused review could last a couple of months to years.**

Additional guidance provided by the OFCCP states:

- **OFCCP will publish its scheduling methodology to disclose how it neutrally selects contractor establishments for compliance evaluations.**
- **Contractor establishments that have undergone a compliance review will be exempt from another review for 24 months from the date of closure or from the final progress report acceptance date.**
- **OFCCP committed to comprehensively ensuring compliance by increasing the number of compliance evaluations, shortening desk audits and conciliating issues more efficiently.**

- **While onsite, OFCCP may evaluate all aspects of contractor compliance under the three statutory or regulatory programs it enforces, limiting onsite reviews to the nature or scope of the indicators or concerns that triggered the onsite review.**
- **The OFCCP Compliance Officer should work with the contractor to obtain proactive corrections to deficiencies at the desk audit when it identifies non-material violations with no additional indicators of discrimination.**

4. ADVERSE IMPACT ANALYSIS (OR IMPACT RATIO ANALYSIS)

One area that year after year gets a lot of attention from the OFCCP are disparity analyses of hires, promotions, and terminations. A selection disparity exists when minorities/females are either passed over for hire or promotion or are discharged or resign at rates that are different to a statistically significant extent from their representation in the underlying population. To determine adverse impact, employers can use a 2 standard deviation test. Failure to adequately explain adverse impact during the AAP year could result in "affected class" claims for back pay, lost benefits, interest, and preferential hiring. Additionally, the OFCCP is paying particular attention to whether men or certain races, including white employees or applicants, are being treated adversely. OFCCP will review the contractor's data to identify the "favored" race/ethnicity or gender and then will compare all other races/ethnicities or gender to the favored group. Properly designed selection processes, along with strategically designed disposition codes for tracking applicant data, are critical elements to defensible employment practices. Contractors also should analyze their personnel decisions and pay practices regularly to ascertain whether employees in certain classes (i.e., women or Asians, for example) are being treated less favorably than similarly situated employees who are male or white, for instance, and if so, they must further investigate to determine whether unlawful discrimination is occurring.

5. I-9 REVIEW

The OFCCP issued a directive on November 16, 2010 announcing that it will no longer be verifying I-9's as part of its compliance reviews.

6. COMPENSATION ANALYSIS

Companies are required to analyze their compensation systems to determine whether there are gender-, race- or ethnicity-based disparities. Compensation gets a lot of attention in OFCCP audits. If you can't convince the agency that pay differences are attributable to non-discriminatory factors such as experience, seniority, skill, education, job functions, etc., the OFCCP can ask for up to two years of back pay for impacted employees in addition to making going forward pay adjustments.

7. E-VERIFY

Federal government contractors that enter contracts worth $100,000 or more annually after September 9, 2009 must use E-Verify to electronically verify the employment eligibility of employees hired during the contract term and of employees who perform services for the federal government. Companies awarded a contract containing the E-Verify clause will have 30 days from the date of the award to enroll in E-Verify. Contracts for commercially available off-the-shelf items are exempt from the E-Verify clause.

14. Veteran's Employment & Reemployment Rights

A. BACKGROUND

The Uniformed Services Employment and Reemployment Rights Act (USERRA) provides certain reemployment rights and benefit protections for military personnel including members of the National Guard and reservists. Pursuant to a January 5, 2021 amendment, this includes National Guard members performing certain duties under the authority of a state governor, not just under federal authority. The Act protects applicants and employees who serve in the military, who previously served, or who apply to serve, from employment discrimination, and provides employment and reemployment rights after completion of military service or training, or application for service.

USERRA restores the employee returning from uniformed service to his/her previous employment position with all seniority, pay, status and benefits that would have accrued but for military leave. This right to reemployment applies to uniformed service, whether voluntary or involuntary, and with equal force to private employers, state and local governments, and, with a few exceptions, to the federal government. A poster (see chapter 17) must be displayed by all employers under this law.

Enforcement of USERRA is primarily handled by the Department of Labor's Veterans Employment and Training Administration. This office is authorized to advise veterans of their rights under the Act, investigate claims of discrimination and refer claims of unlawful treatment to the Attorney General for prosecution.

North Carolina law also affords certain preferences and protections to returning veterans (see Chapter 9).

In January 2008 and October 2009, Congress enacted changes to the federal Family and Medical Leave Act to create certain military family leave requirements (see Chapter 24).

B. HOW THE LAW WORKS

1. FACTORS GIVING RISE TO REEMPLOYMENT RIGHTS

Employers are required to reemploy a returning employee in his/her former job or a position of like seniority, status and pay provided that:

- the employee (or an appropriate military officer) provides advance notice, oral or written, of his/her service obligation where possible;
- the individual's cumulative military leave with the employer does not exceed five years absent an exception under the Act;
- the employee reports to or applies for reemployment in accordance with the Act; and

- the individual has satisfactorily completed his/her service and was released under honorable conditions. Discharge or separation from service that is dishonorable, based on bad conduct, less than honorable grounds, AWOL or ends in a court martial disqualifies a person from receiving the rights afforded under the Act.

2. APPLICATION FOR REEMPLOYMENT

The time in which a returning employee must apply for reemployment or report to work is based on the length of service. Failure to timely return to work or apply for reemployment does not cause the employee to forfeit reemployment rights. Rather, the employee is subject to the employer's rules of conduct and established policies and practices pertaining to any absence from scheduled work.

a. *Uniformed service of less than 31 days:*

A returning employee who has served from one to 30 days must report to work on the next regular work shift that is scheduled 8 hours after returning home. If reporting within this time period is impossible or unreasonable through no fault of the employee, then the Act simply requires notification as soon as possible after the 8-hour period expires.

For example, a reservist who returns home from weekend duty at 10:00 p.m. on Sunday is excused from reporting to work at 12:00 a.m. on Monday, even if it is the beginning of the next regularly scheduled working period.

b. *Uniformed service of more than 30 days but less than 181 days:*

An employee serving 31 to 180 days has up to 14 days after release from service to apply or report to work. If meeting this deadline is impossible or unreasonable through no fault of the employee's own, the returning employee may apply for reemployment the next full calendar day or when application becomes possible.

c. *Uniformed service of more than 180 days:*

An employee serving 181 days or more has 90 days to report to work or apply for reemployment after release from service.

d. *Absence from employment for purposes of medical examination:*

An employee who is absent from work for a service-related fitness examination must report for work in the same manner as a returning employee who served less than 31 days.

e. *Injury occurring during uniformed service:*

An employee who is hospitalized for or recuperating from a service-related injury or illness may extend the reporting period for up to two years. At the end of the recovery period, the employee must:

(1) Report to work at the end of the recovery period if the employee's tour of duty was for less than 31 days, or

(2) Submit an application for reemployment at the end of the necessary recovery period if the service was over 30 days.

3. FACTORS WHICH RELIEVE EMPLOYERS OF THE REEMPLOYMENT OBLIGATION

Assuming the factors giving rise to reemployment rights stated above are all satisfied, an employer is required to reemploy a person under the Act unless it can prove that: (a) a change in the employer's circumstances makes reemployment impossible or unreasonable; (b) in certain situations (e.g., disability incurred in service), the employee would not be able to perform his/her essential duties with a reasonable accommodation or, even if an accommodation is available, reemployment would impose an undue hardship upon the employer; or (c) the position from which the person left was for a brief, nonrecurrent period for which there was no reasonable expectation that the job would continue indefinitely or for a significant period.

C. ACTION REQUIRED BY EMPLOYERS

USERRA gives an employee returning from military service under honorable conditions an unqualified right to reemployment. Depending upon the length of service, the returning employee must be reinstated to the position that the employee would have held but for leave.

Generally, if the returning employee is not qualified for this job, and cannot become qualified after a reasonable effort, the employee has a right, if qualified, to be returned to his pre-service position. If unqualified for that job, the employee must be reemployed in a position for which the person is qualified.

1. REEMPLOYMENT RIGHTS

a. An employee whose service is less than 91 days is to be promptly reemployed:

(1) in the position the employee would have held absent military leave, or

(2) if the employee is not qualified to perform the duties of that job, and cannot become qualified after reasonable efforts by the employer to qualify him/her, in the position in which the person was employed on the date leave commenced.

b. Uniformed service of more than 90 days: The returning employee may be reemployed:

(1) in the position the employee would have held absent leave or a job of like seniority, pay and status, or

(2) if the employee is not qualified to perform the duties of that position, and cannot become qualified after reasonable efforts by the employer, in the job in which he/she was employed on the date leave began or one of like seniority, status and pay.

2. INCURRED DISABILITY DURING UNIFORMED SERVICE

A person whose disability was incurred or aggravated during service, who after reasonable efforts by the employer to accommodate his disability, is no longer qualified for the position that the person would have held but for leave, must be reemployed promptly in either:

a. a position of equivalent seniority, pay or status for which the individual is qualified, or would become qualified, to perform with reasonable effort by the employer, or

b. the position which most closely approximates the position referred to above consistent with the circumstances of the particular case.

3. SPECIAL PROTECTION FROM DISCHARGE AFTER REEMPLOYMENT

An employer may not discharge the employee, without cause, for at least:

a. One year after reemployment date if service was for more than 180 days, or

b. 180 days after the date of reemployment if the period of military service was for 31 to 180 days.

4. USE OF VACATION, ANNUAL AND SIMILAR LEAVE

An employee on military leave is entitled to use any vacation, annual or other similar paid or unpaid accrued leave, but may not be required to use accrued vacation, annual or similar leave.

5. SENIORITY

A returning employee is entitled to full seniority and seniority rights and benefits that he/she would have accrued but for military leave.

6. HEALTH AND BENEFIT PLANS

An employee may elect to continue individual and dependent health care coverage during his/her tour of duty. The plan must allow the employee to elect to continue coverage for a period of time that is the lesser of: (1) The 24-month period beginning on the date on which the employee's absence for the purpose of performing service begins; or (2) The period beginning on the date on which the employee's absence for the purpose of performing service begins, and ending on the date on which he or she fails to return from service or apply for a position of employment. A returning employee and his/her dependents whose coverage was terminated by reason of military service are not subject to an exclusion or waiting period in connection with reinstatement of such coverage. Each period of military leave may be deemed to constitute continuous service with the employer under a pension plan. Please consult the Act and its regulations for details.

D. TIPS FOR EMPLOYERS

1. **The employer has a right to require a certificate evidencing satisfactory completion of military service as a precondition to reemployment if such documentation exists or is readily available.**
2. **An employee is entitled to the restoration of employee benefits he/she participated in at the time of his/her service as well as benefits that the employee would have attained if he/she had remained continuously employed. The Act sets out separate rules for health, pension and other benefits. The human resource manager should consult the appropriate USERRA provisions for guidance on a particular entitlement.**
3. **Post the Required Notice of Rights.**

15. Public Employers in North Carolina

A. BACKGROUND

Federal and state employment laws that cover private employers may not apply to public employers in North Carolina. Additionally, certain employment laws apply to public employers but not to private employers. The applicability of federal and state employment laws to public employers is discussed below

B. HOW THE LAW WORKS

1. EXCLUSION FROM NATIONAL LABOR RELATIONS ACT.

The National Labor Relations Act does not cover employees employed by any state or political subdivision of a state. In determining whether an entity is exempt from the NLRA as a "political subdivision," the NLRB considers such factors as whether the entity: (1) has authority to exercise the power of eminent domain; (2) is created directly by the state, or administered by state-appointed or elected officials; (3) is administered by individuals who are responsible to public officials or to the general electorate; (4) was created by governmental act; (5) is being financed with government funds; and (6) maintains a tax status comparable to the state or other political subdivisions. Examples of "political subdivisions" which have been exempted from NLRB jurisdiction include counties, cities, school boards, school districts, public hospitals, component universities comprising a state's university system, city-operated gas and electric utilities, and certain urban development agencies and community service organizations. Additionally, certain government contractors have been found to be outside the jurisdiction of the NLRB because of their contractual relationship with a state or political subdivision of a state.

2. RIGHT TO JOIN A UNION/NO RIGHT TO BARGAIN COLLECTIVELY

A North Carolina law which prohibited public employees from becoming members of a trade union or labor organization was struck down by the federal courts as an unconstitutional abridgement of the freedom of association protected by the First and Fourteenth Amendments to the U.S. Constitution. Thus, public sector employees in North Carolina have a constitutionally protected right to join a union. However, North Carolina has a law which has been upheld by the federal courts which forbids the state or any of its subordinate bodies from entering into a collective bargaining agreement with a labor organization. A federal district court ruled that this law extends to professional organizations acting as unions and would bar a school board or school district from negotiating with a teacher's union. Thus, while public sector employees in North Carolina are free to join labor unions, the state cannot enter into a collective bargaining agreement with a union [N.C. Gen. Stat. § 95-98].

Dues Deductions

State law provides that any employee of the state or any of its institutions,

departments, bureaus, agencies or commissions, or any of its local boards of education or community colleges, who is a member of a state employees' association with a membership of at least 2,000 members may authorize in writing the deduction of a designated sum from his or her salary or wages to be paid to the employees' association.

3. RIGHT TO PICKET/NO RIGHT TO STRIKE

State law prohibits strikes by public sector employees [N.C. Gen. Stat. § 95-98-1]. Peaceful picketing is, however, lawful.

4. EMPLOYMENT DISCRIMINATION

a. *Federal Law:* Generally, all federal job discrimination statutes that apply to private-sector employees also apply to public employees (See Chapter 12). One exception is that state employees may not sue for monetary damages under the Age Discrimination in Employment Act (ADEA). Additionally, Section 1983 of the 1871 Civil Rights Act has been interpreted to apply to state and local government employers. Section 1983 makes liable "every person" who, under color of statute, ordinance, regulation, custom, or usage, subjects or causes to be subjected any person within the jurisdiction of the United States to the deprivation of any rights, privileges, and immunities secured by the Constitution and laws. The law prohibits discrimination in employment because of race, but like Section 1981 of the 1866 Civil Rights Act, does not apply to discrimination because of sex, religion, age or disability status.

b. *North Carolina Law:* All state departments and all local political subdivisions are required by statute to provide equal opportunity in employment without regard to race, religion, color, creed, national origin, sex, age, disability or genetic information to all persons otherwise qualified [N.C. Gen. Stat. § 126-16]. In addition, Executive Order No. 24 adds that one may not discriminate, harass or retaliate on the basis of ethnicity, veteran's status, sexual orientation, gender identity or expression in state employment, services, and contracts under the jurisdiction of the Office of the Governor.

Another statute bans discrimination in the state's hiring policies with regard to any applicant for employment based upon any disability or impairment, unless the defect or impairment to some degree prevents the applicant from performing the required duties. Finally, no individual, public or private entity is permitted to deny or refuse employment to any person, or discharge any person, because the person possesses a sickle cell trait or hemoglobin C trait, or requested genetic testing or counseling, or on the basis of genetic information obtained concerning that person or a family member. Public employees are also protected from AIDS discrimination.

The North Carolina State Office of Administrative Hearings is recognized by the EEOC as a deferral agency for all charges of discrimination filed by applicants or employees of the state and its political subdivisions. As such, the department has the authority to receive charges of discrimination from the EEOC and to investigate and conciliate such charges. By statute, the state agency will only accept and timely process charges of discrimination which

were filed with the EEOC. Employees of state departments, the university system, and county government are covered.

5. VETERANS

By state statute, veterans are granted preferences in employment with many state departments, agencies and institutions.

Eligible veterans include war veterans, spouses of disabled veterans, surviving spouses or dependents of a veteran who died during a war as a result of such service, a veteran who suffered a service-related disability during peacetime and his/her spouse, as well as the surviving spouse and dependents of a service person who died during active duty, other than training, for service-related reasons during peacetime.

An eligible veteran receives credit for job-related military training and experience. If he/she meets the minimum qualifications of the job receiving a service credit, he/she will also receive an experience credit for additional related and unrelated service; and will receive credit for military service during a reduction-in-force if seniority or length of service is a factor. An eligible veteran who reasonably believes that he/she was not accorded a preference may appeal to the State Human Resources Commission.

North Carolina law also prohibits public employers from discriminating against or firing any person because he/she was an officer, warrant officer, or an enlisted person in the armed services. The penalty for violation includes a fine up to $500, imprisonment for up to 6 months, or both.

Public employers may have additional obligations with regard to employment and reemployment of veterans under federal law (see Chapter 14).

6. WAGE AND HOUR LAW

The U.S. Supreme Court has ruled that state and local governments are covered by the Fair Labor Standards Act. Federal minimum wage and overtime requirements therefore apply (see Chapter 3). Special provisions may apply to hospital, fire protection, and law enforcement employees. Public employers must also comply with certain provisions of the North Carolina Wage and Hour Act (see Chapter 4).

7. FEDERAL AND STATE SAFETY LAW

The definition of "employer" in the federal Occupational Safety and Health Act of 1970 (OSHA) specifically excludes state and local governments from its coverage. However, North Carolina's occupational safety and health plan includes public sector employers and employees (See Chapter 2). Unlike private employers, civil or criminal penalties may not be imposed against any state agency or political subdivision for violations of the state job safety and health plan.

8. WORKERS' COMPENSATION

Most public sector employees are covered by the North Carolina Workers' Compensation Act (See Chapter 5).

9. EMPLOYMENT SECURITY LAW

Most public sector employees are covered by the North Carolina Employment Security Act (See Chapter 6).

10. STATE EMPLOYEE GRIEVANCE PROCEDURE

Any state employee having a grievance arising out of, or due to, the employee's employment must first discuss the problem or grievance with the employee's supervisor, unless the problem or grievance is with the supervisor. Then the employee shall follow the grievance procedure approved by the state Human Resources Commission. A grievance or complaint must be filed within 15 calendar days of the alleged event or action that is the basis of the grievance. The proposed agency final decision cannot not be issued nor become final until reviewed and approved by the Office of State Human Resources. The agency grievance procedure and Office of State Human Resources review must be completed within 90 days from the date the grievance is filed.

It is important to note that any grievance or complaint that alleges unlawful discrimination, harassment or retaliation must first be addressed and completed through the particular agency's Equal Employment Opportunity (EEO) Informal Inquiry process before being considered in the formal internal grievance process. These complaints shall be filed with the agency EEO officer or Affirmative Action (AA) officer within 15 calendar days of the alleged unlawful act. The agency has 45 days to respond to the complaint. At the conclusion of the investigation, if the complaint is not successfully resolved, the complainant may file a formal grievance within 15 calendar days of the written response from the EEO Informal Inquiry. Disciplinary action grievances as well as non-disciplinary separation due to unavailability should proceed directly to the formal internal grievance process. Disciplinary action grievances and non-disciplinary separation due to unavailability that also include an allegation of unlawful discrimination, harassment, or retaliation must first be addressed through the EEO Informal Inquiry process. At any point in the EEO grievance process, the complainant has the right to discontinue the EEO Informal Inquiry and file a charge directly with the Equal Employment Opportunity Commission (EEOC). After the EEO Informal Inquiry process is completed, all remaining grievance issues may be considered in the formal grievance process.

Grievance appeal process; grounds:

a. Once a final agency decision has been issued, an applicant for state employment, a state employee, or former state employee may file a contested case in the Office of Administrative Hearings. The contested case must be filed within 30 days of receipt of the final agency decision. Except for cases of extraordinary cause, the Office of Administrative Hearings must hear and issue a final decision within 180 days from the commencement of the case. In deciding cases under this section, the Office of Administrative Hearings may grant the following relief:

(1) Reinstate any employee to the position from which the employee has been removed.

(2) Order the employment, promotion, transfer, or salary adjustment of any individual to whom it has been wrongfully denied.

(3) Direct other suitable action to correct the abuse which may include the requirement of payment for any loss of salary which has resulted from the improper action of the appointing authority.

An aggrieved party in a contested case under this section may appeal a final decision by filing a petition for judicial review by the Court of Appeals. The appeal must be taken within 30 days of receipt of the written notice of final decision. A notice of appeal must be filed with the Office of Administrative Hearings and served on all parties to the contested case hearing.

b. The following issues may be heard as contested cases after completion of the agency grievance procedure and the Office of State Human Resources review:

(1) Discrimination or harassment – An applicant for state employment, a state employee, or former state employee, may allege discrimination or harassment based on race, religion, color, national origin, sex (including sexual orientation, gender identity and expression, and pregnancy), age, disability, genetic information or political affiliation if the employee believes that he or she has been discriminated against in his or her application for employment or in the terms and conditions of the employee's employment, or in the termination of his or her employment.

(2) Retaliation – An applicant for state employment, a state employee, or former state employee may allege retaliation for protesting (objecting to or supporting another's objection to) discrimination based on race, religion, color, national origin, sex (including sexual orientation, gender identity and expression, and pregnancy), age, disability, political affiliation or genetic information if the employee believes that he or she has been retaliated against in his or her application for employment or in the terms and conditions of the employee's employment, or in the termination of the employee's employment.

(3) Just cause for dismissal, demotion, or suspension – A career state employee may allege that he or she was dismissed, demoted, or suspended for disciplinary reasons without just cause. A dismissal, demotion, or suspension which is not imposed for disciplinary reasons cannot be considered a disciplinary action. However, in contested cases conducted pursuant to this section, an employee may appeal an involuntary non-disciplinary separation due to an employee's unavailability in the same fashion as if it were a disciplinary action, but the agency can only have the burden to prove that the employee was unavailable. In cases of such disciplinary action the employee must, before the action is taken, be furnished with a statement in writing setting forth the specific acts or omissions that are the reasons for the disciplinary action and the employee's appeal rights. The employee must

be permitted 15 days from the date the statement is delivered to appeal under the agency grievance procedure. However, an employee may be suspended without warning pending the giving of written reasons in order to avoid undue disruption of work, to protect the safety of persons or property, or for other serious reasons.

(4) Veteran's preference – An applicant for state employment or a state employee may allege that he or she was denied veteran's preference in violation of the law.

(5) Failure to post or give priority consideration – An applicant for state employment, or a state employee, may allege that he or she was denied hiring or promotion because a position was not posted in accordance with the State Personnel Act or because he or she was denied hiring or promotion as a result of a failure to give priority consideration for promotion or reemployment.

(6) Whistleblower – A whistleblower grievance as provided for in the State Personnel Act.

c. Any issue for which an appeal to the Office of Administrative Hearings has not been specifically authorized by the State Personnel Act is not grounds for a contested case hearing.

d. In contested cases, the burden of showing that a career state employee was discharged, demoted, or suspended for just cause rests with the employer. In all other contested cases, the burden of proof rests on the employee.

e. The Office of Administrative Hearings may award attorneys' fees to an employee where reinstatement or back pay is ordered or where an employee prevails in a whistleblower grievance.

f. The Office of Administrative Hearings shall report to the Office of State Human Resources and the Joint Legislative Administrative Procedure Oversight Committee on the number of cases filed under this section and on the number of days between filing and closing of each case. The report shall be filed on a semiannual basis.

Local Government Employees:

County and municipal governments are authorized by law to establish and maintain their own grievance procedure. Upon request, however, they may bring their employees under the grievance procedure established by the State Personnel Act.

11. RIGHT TO KNOW ACT/HAZARD COMMUNICATION STANDARD/ TITLE III

North Carolina state and local governments are covered by the Hazardous Chemicals Right to Know Act as well as the OSHA Hazard Communication Standard (Chapter 2). Title III of the Superfund Amendments may also apply to state agencies.

12. PERSONS WITH DISABILITIES PROTECTION ACT

The state government and its political subdivisions are covered by the North Carolina Persons with Disabilities Protection Act (Chapter 19).

13. AMERICANS WITH DISABILITIES ACT

State and local government are covered by the Americans with Disabilities Act (Chapter 19).

14. FAMILY AND MEDICAL LEAVE ACT

The provisions of the Family and Medical Leave Act of 1993 apply to state and local governments. However, certain special rules apply to employees of local educational agencies including school boards and elementary and secondary schools under their jurisdiction, and private elementary and secondary schools.

15. PAID PARENTAL LEAVE

On September 1, 2019, Governor Roy Cooper's Executive Order No. 95 went into effect, which offers paid parental leave to qualifying employees. The Paid Parental Leave benefit is triggered for eligible employees by the qualifying event of becoming a parent by birth, adoption, foster care or other legal placement of a child. Eligible state employees who give birth will receive eight weeks of paid leave to recover from the birth and to bond with and care for their newborn. Other eligible state employees will receive four weeks of paid leave to bond with and care for the child. Paid Parental Leave will be paid at 100 percent of the eligible employee's regular pay.

Not every state employee is eligible to receive the Paid Parental Leave benefit. In addition to the employees of any North Carolina department, agency, board or commission under the Governor's oversight, the following non-Cabinet agencies have voluntarily agreed to provide Paid Parental Leave to eligible employees: Office of Administrative Hearings, Department of Agriculture and Consumer Services, Office of the Commissioner of Banks, Office of the Secretary of State, Office of the State Auditor, Office of the State Controller, the Community College System Office, the UNC System Office, Department of Public Instruction and Department of Justice. Administrative Office of the Courts and the State Education Lottery, which operate as independent branches of state government, also participate.

The Department of Labor, Department of Insurance, and the Office of the State Treasurer have opted out.

16. ACCESS TO PERSONNEL RECORDS

Unlike employees in the private sector, state law provides that certain items in a public employee's personnel file are a matter of public record and subject to inspection. This public access to personnel records applies to applicants for employment, current employees, and former employees. The following items in a public employee's personnel file are a matter of public record and available to persons who request the information: name; age; date of original employment; current position and title; any employment contract; current salary; date and

amount of most recent increase or decrease in salary; date and type of most recent promotion, demotion, transfer, suspension, separation, or other change in position classification; date and general description of the reasons for each promotion with that department; date and type of each dismissal, suspension, or demotion for disciplinary reasons taken by the department, and if the disciplinary action was a dismissal, a copy of the written notice of the final decision of the head of the department setting forth the specific acts or omissions that are the basis of the dismissal; and the office to which the employee is currently assigned. All other employment-related and personal information in an employee's personnel file is confidential. These provisions apply equally to former employees and applicants as they do to present employees.

The above information must be made available for inspection and examination, and copies thereof made during regular business hours. Employers must maintain a written record, for a period of two years, accounting for all disclosures. Each agency shall establish administrative, technical, and physical controls to prevent unauthorized access or disclosure of confidential information.

Notwithstanding the previous parts of this section, all information in an employee's personnel file must be open for inspection by the employee's supervisor, members of the General Assembly, a party by authority of a proper court order, an official of an agency of the federal government, state government, or any political subdivision thereof, a party of a quasi-judicial hearing of a state agency, or the employee or his/her properly authorized agent.

C. ACTION REQUIRED BY PUBLIC EMPLOYERS

1. POSTERS

Covered public employers are required to display state and federal posters in the same manner as covered private employers. A list of required posters is found at the end of Chapter 17.

2. STATE AND LOCAL GOVERNMENT REPORT, FORM EEO-4

Report Form EEO-4 must be filed biennially (every odd numbered year) with the EEOC by all state and local government jurisdictions with 100 or more employees and by a rotated sample of political jurisdictions with 15 to 99 employees. Every political jurisdiction with 15 or more employees must retain the information required on the EEO-4 report for three years, even if they are not required to file a report. The EEO-4 report generally covers the payroll period ending June 30.

Although union activities of public-sector employees are not covered by the NLRA, certain union activities by public employees are protected under the U.S. Constitution. Specifically, the First Amendment protects the right of an individual to speak freely, to advocate ideas, and to associate with other persons to further their personal beliefs. Additionally, the Equal Protection clause of the Fourteenth Amendment protects public employees from being denied a benefit for reasons that infringe on the employee's constitutionally protected interests — particularly the employee's freedom of speech. Thus, while the Constitution does not impose any obligation on a public sector employer to bargain with a labor organization, the public employer is prohibited from infringing upon these Constitutional guarantees or imposing sanctions for the expression of particular views it may oppose. For example, a public employer may not prohibit an employee from speaking openly about unionization because that would constitute an infringement of the employee's First Amendment right of free speech. Similarly, while a public employer has no obligation to provide the use of its facilities (e.g., bulletin boards, meeting places) for use by employee organizations, once it does so, or allows the public to use the facilities, it may not be able to single out a particular employee organization and deny it the use of such facilities because of that group's interest in organizing employees.

The search and seizure prohibitions of the Fourth Amendment apply to drug testing of public employees as well as searches of their person, possessions, or work areas and surveillance of their on-the-job activities. Accordingly, public employers should keep current with developments in this rapidly changing area of law.

16. Health Care Institutions

A. BACKGROUND

The application of federal and state employment laws to health care institutions depends to a large degree on whether the institution is public or private. The laws applicable to public health care institutions are reviewed in Chapter 15 of this Employment Law Guide. Private health care institutions are generally subject to the same laws as other private employers except that special rules apply to private health care facilities under the National Labor Relations Act and Fair Labor Standards Act. There is also a state statute requiring certain health care related employers to perform criminal background checks on certain applicants. These special rules are outlined below.

B. HOW THE LAW WORKS

1. NATIONAL LABOR RELATIONS ACT

Prior to 1974, the NLRB asserted jurisdiction over proprietary hospitals and nursing homes but was precluded by statute from asserting jurisdiction over nonprofit hospitals. In 1974, Congress amended the NLRA to eliminate the exclusion for nonprofit hospitals. The 1974 amendments also set forth stringent notice procedures that must be met before a collective bargaining agreement can be terminated or a strike called in the health care industry.

a. *Coverage:* Section 2(14) of NLRA was added by the 1974 amendments and establishes a category of employers known as "health care institutions." The term "health care institution" is broadly defined and includes "any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person." Both proprietary and nonprofit health care institutions are included within this definition. Such institutions are subject to the Board's jurisdiction if they meet or exceed the following gross income tests: (1) Hospitals—$250,000 gross annual income; (2) Nursing homes—$100,000 gross annual income; (3) Other health care facilities—$250,000 gross annual income. Federal, state and municipal hospitals are exempt from coverage, but the NLRB has found that private health care institutions run by religious organizations are covered by the Act.

b. *Notice to Terminate or Modify a Contract:* Any party wishing to terminate or modify a collective bargaining agreement involving a covered health care institution must notify the other party 90 days before the proposed termination or modification is to take effect. Within 30 days of that notice, the party must notify the Federal Mediation and Conciliation Service (FMCS) and state mediation service if there has been no agreement. Where the bargaining is for an initial agreement, the FMCS must be given a 30-day notice to an existing dispute. Upon receiving any such notice, the FMCS can invoke a 30-day "cooling-off" period during which striking and lockouts are prohibited.

c. *Notice of Intent to Strike or Picket:* If no agreement is reached during the cooling-off period, employees of a health care institution are not necessarily free to strike. A union is required to give the FMCS and the employer a 10-day written notice of its intent to strike or picket a health care institution. The notice must state the date and time such action will begin.

In Alexandria Clinic, the NLRB clarified that the precise date and time identified by a union in a strike notice can only be extended "by the written agreement of both parties." In this case, the NLRB found it to be unprotected when a group of unionized nurses went on strike four hours after the time noted in their strike notice. In doing so, the Board upheld the employer's decision to terminate 45 striking nurses.

d. *Appropriate Bargaining Units:* The NLRB has issued a rule establishing eight separate bargaining units in acute care hospitals. While the rule was initially the subject of much litigation, it is now well settled that the rule was a proper exercise of NLRB authority. Facilities that are primarily nursing homes, rehabilitation hospitals or psychiatric hospitals are excluded from the rule.

The rule states that eight units, or combinations of units, are the only appropriate units for collective bargaining in acute care hospitals. All other health care units are determined on a case-by-case basis. The eight are:

(1) All registered nurses

(2) All physicians

(3) All "professionals" except registered nurses and physicians

(4) All technical employees

(5) All skilled maintenance employees

(6) All business office clerical employees

(7) All guards

(8) All nonprofessional/service employees except technical, skilled maintenance, business office clericals and guards

Extraordinary circumstances may justify a non-conforming unit (e.g. prior bargaining history, fewer than five employees in a unit, etc.). Non-conforming units may be stipulated by the employer and union if the NLRB approves. A labor union can but an employer cannot seek to combine two or more of the eight units. The bargaining unit rules do not apply, however, to nonacute care health institutions such as nursing homes, rehabilitation hospitals, or psychiatric hospitals. Bargaining units in these types of institutions are determined case-by-case using the standard community of interest analysis.

e. *Application of Other NLRB Procedures:* In all other respects, the NLRA applies to health care institutions as set forth in Chapter 11 of this Guidebook.

2. FAIR LABOR STANDARDS ACT

The FLSA provides that for the purpose of overtime computation, employees of hospitals and other institutions engaged in the care of sick, aged or mentally ill resident patients may, pursuant to an agreement or understanding arrived at before the performance of work, utilize a work period of 14 consecutive days instead of the standard 7-day workweek for the purpose of computing overtime provided that employees are paid one and one-half times their regular hourly rate for all hours worked in excess of 8 in a day or 80 in the 14-day work period.

a. *Requirement for An Agreement or Understanding:* In order to utilize the 14-day work period there must be an agreement or understanding entered into before employees perform work under the 14-day arrangement. The 14-day arrangement must be intended as a permanent policy and frequent changes back to a 7-day workweek are not permitted. Furthermore, the agreement or understanding should be in writing, or if there is an oral agreement, a special record concerning it must be kept.

b. *The 14 Day Period:* The special 14-day work period applicable to health care institutions must consist of 14 consecutive 24-hour periods. However, the 14-day work period may begin at any hour or day of the week.

c. *Computation of Overtime:* Overtime must be paid to employees on a 14-day work period for all hours worked in excess of 8 in a day or 80 in the 14-day period. Payments of overtime for hours worked in excess of 8 in a day may be credited to overtime payments due for hours worked in excess of 80 so that no double payments are required.

d. *In-Home Services:* Historically, domestic service workers providing limited in-home care, fellowship, and protections of persons who, because of advanced age or physical or mental infirmity, could not care for themselves were exempted from the FLSA requirements. This exemption applied to individuals providing "companionship" services whether employed directly by a family or through a third-party provider. Effective January 1, 2015, third-party employers will no longer be able to avail themselves of the companionship exemption. Further, direct care workers who perform medically-related services for which training typically is a prerequisite, are not companionship workers and therefore not exempted from the FLSA.

3. MANDATORY CRIMINAL HISTORY CHECKS

State law (N.C.G.S. 131D-40; 131E-265) requires certain health care-related employers to check the criminal histories of non-licensed applicants for employment. Specifically, a licensed adult care home or nursing home must make job offers to non-licensed applicants conditioned on consent to a criminal records check. A nursing home or home care agency also must perform these checks on applicants (or current employees with new job assignments) for jobs which include entering a patient's home. An applicant who refuses cannot be hired. The employer must request the criminal check from the North Carolina Department of Justice within five business days of the conditional offer of employment. The results of the check must be held confidential.

If the criminal check reveals one or more "relevant" convictions, the employer shall consider these factors in deciding whether to hire the applicant: 1) level and seriousness of the crime; 2) date of the crime; 3) person's age at conviction; 4) circumstances of the crime; 5) connection between the criminal conduct and the job to be filled; 6) the prison, jail, probation, parole, rehabilitation and employment records of the person since the crime; and 7) subsequent crime(s) and relevant offense(s). A "relevant" offense is defined by lengthy statutory references to such crimes as homicide, assault, kidnapping, burglary, arson, rape, larceny, embezzlement, fraud, prostitution, perjury, illegal drugs, driving while impaired, etc. In general, a crime is "relevant" if it "bears upon an individual's fitness to have responsibility for the safety and well-being" of the clients. The fact there is a conviction shall not be a bar to employment without due consideration of these factors.

C. ACTION REQUIRED BY EMPLOYERS

Private health care institutions must take the same actions as other private employers with respect to the laws discussed in Chapters 1 through 14 of the Guidebook. Public health care institutions must take the actions listed in Chapter 15.

Requests for mandatory criminal checks must be placed with the N.C. Department of Justice within 5 business days of making a conditional offer of employment.

D. TIPS FOR HEALTH CARE EMPLOYERS

1. PUBLIC VS. PRIVATE

Employers in the health care industry should obtain a legal opinion from a trained professional concerning their status as a public or private employer. Quasi-public institutions that assume they are "public" could find themselves subject to NLRB jurisdiction unless they meet certain standards. Private hospitals may be considered public for state public records purposes depending on such things as receipt of certain government funds.

2. SOLICITATION RULES

As a general rule, employers can ban solicitations by employees during "working time." Hospitals and certain other health care institutions can go further and ban solicitation on nonworking time in immediate "patient care areas" including patients' rooms, therapy and X-ray areas. However, broad bans against employee solicitations in "visitor access" and "patient access" areas such as cafeterias and lounges may be unlawful. There is also a serious question on whether employee solicitation can be banned in corridors and sitting areas on floors where patients' rooms or therapy areas are located. For these reasons, health care employers should review their solicitation/ distribution rules to

ensure that they are not overly broad. An overly broad no solicitation rule, by itself, constitutes an unfair labor practice and is grounds for setting aside an NLRB election.

17. Required Recordkeeping & Posters

A. BACKGROUND

As discussed throughout this Handbook, most North Carolina and federal employment laws contain recordkeeping and posting requirements. It is important for employers to keep abreast of these requirements since penalties may be assessed for noncompliance.

B. HOW THE LAWS WORK

Various laws require the retention of employment records for different periods of time. Posting requirements also vary. A chart of all federal and state posting requirements follows.

C. ACTION REQUIRED BY EMPLOYERS

In addition to ensuring compliance with the recordkeeping requirements, employers should have a policy or practice of destroying outdated records which are no longer required to be maintained by law and no longer useful for other purposes. (See Chapter 9 regarding the North Carolina Identity Theft Protection Act and Chapter 18 regarding the federal Fair Credit Reporting Act for information on state and federal requirements for destruction of certain documents.)

D. TIPS FOR EMPLOYERS

There are certain types of information that need to be maintained separately from the employee's main file. Each company can have a different filing system, as long as confidential documents are kept separate from the main general personnel file.

Overall, the most important aspect of maintaining compliance with personnel files is securing the access to the files. The files should be kept in a secure location (behind "lock and key") and access should only be granted to specific employees (probably within the HR department). Specific information may be made available to supervisors as outlined in your personnel file policy. On that note, it is important to remember that access to the files should even be restricted within the HR department on a "need to know" basis: the benefit specialist doesn't need access to the confidential file, the recruiting specialist doesn't need access to the medical file, etc. This may be managed through paper files, through access limitations on electronic files, or through HCM permissions set-up.

It is also important to have a record destruction process in place to ensure records are being destroyed in a timely manner. Bearing in mind record destruction while

creating your personnel file system is helpful in the longer term, as you may choose to place items that require a longer retention period in a separate section of the file. However, there may be times that record destruction timeframes may be suspended due to investigations or litigation holds.

If you believe, or Management informs you, that records are relevant to current litigation, potential litigation (that is, a dispute that could result in litigation), a government investigation, audit, or other event, you must preserve and not delete, dispose, destroy, or change those records, including emails, until Management determines those records are no longer needed. This exception is referred to as a litigation hold or legal hold and replaces any previously or subsequently established destruction schedule for those records. If you believe this exception may apply, or have any questions regarding whether it may possibly apply, discuss with your Management.

In addition, you may be asked to suspend any routine document disposal procedures in connection with certain other types of events, such as mergers, acquisitions, or information system upgrades.

Note that employers covered by federal Department of Transportation drug and alcohol testing regulations must retain certain records for specific periods as described in the regulations. The USDOT's Office of Drug and Alcohol Policy and Compliance has prepared a useful summary of the many recordkeeping requirements that can be found at: https://www.transportation.gov/sites/dot.dev/files/docs/ODAPC%20Recordkeeping%20Requirements.pdf

Record retention schedules should list all categories of records employers typically create and receive, as well as those they may handle infrequently. Each category should include examples of records the category covers and list the minimum length of time employees must retain each type of record. Certain regulations requiring the retention of specific records apply only to particular types of companies. In addition to the rules and regulations listed in the record retention schedule below, there are more specific recordkeeping requirements that narrowly affect certain companies according to their industry, regulators, and member organizations (such as the New York Stock Exchange). For example, the legal requirement to retain records on company-sponsored employee benefit plans subject to the Employment Retirement Income Security Act of 1974 (ERISA) applies only to companies designated as plan administrators (ERISA, § 7). Some of the regulations listed in this sample schedule may not apply to all companies, due to the number of employees they have or their industry type. Under the Americans with Disabilities Act (ADA), for example, employers with 15 or more employees must keep employment application forms and hiring records for at least one year from the date the record was made, in addition to one year from when the employee is involuntarily terminated (29 C.F.R. § 1602.14). Counsel should consult the recordkeeping rules of their relevant states, regulators, and member organizations to prepare a record retention schedule as comprehensive as possible.

The following version of the records retention schedule includes a third column to indicate the regulations covering the respective type of records. This third column does not need to be part of a company's document retention policy, and in practice is

not. Certain retention periods have evolved over time and are highly recommended as best practices, and do not originate in a federal or state law. These are indicated in the third column as "Best Practice"

RECORD	RETENTION PERIOD	REASON
Personnel Records		
Collective bargaining agreements	3 years.	29 C.F.R. § 516.5(b) (also Equal Pay Act)
Notices of job opportunities	(Retention period begins at the later of document creation or hire/no-hire decision.) 1 year. 2 years for certain Federal contractors/subcontractors with 150 or more employees and contract of $150,000 or more.	29 C.F.R. § 1602.14 (Title VII, ADA) 29 CFR § 1627.3(b)(1)(i), (iii), (vi) (ADEA) 41 C.F.R. § 60-741.80
Employee applications and resumes	1 year from the date of the personnel action to which any records relate to the list provided in § 1627.3(b)(1) (for example, from date of promotion, transfer, hire, or posting date if no hire completed.) 2 years for certain Federal contractors/subcontractors with 150 or more employees and contract of $150,000 or more.	29 C.F.R. § 1627.3(b) (1) (ADA; Title VII; Age Discrimination in Employment Act of 1967(ADEA); and (GINA); 28 U.S.C. Section 1658(a); Jones v. R.R. Donnelly & Sons Co., 541 U.S. 369, 124 S. Ct. 1836 (2004); 41 C.F.R. § 60-741.80
Employee offer letters (and other documentation regarding hiring, promotion, demotion, transfer, lay-off, termination or selection for training)	1 year from date of making record or action involved, whichever is later, or 1 year from date of involuntary termination. 2 years for certain Federal contractors/subcontractors with 150 or more employees and contract of $150,000 or more.	29 C.F.R. § 1602.14 41 C.F.R. § 60-741.80

RECORD	RETENTION PERIOD	REASON
Records relating to background checks on employees	5 years from when the background check is conducted.	15 U.S.C. § 1681p
Pre-employment tests and test results	At least one year after the creation of the document or the personnel action involved, whichever is later. 2 years from the date of the making of the personnel record or the personnel action, whichever occurs later for certain Federal contractors/subcontractors with 150 or more employees and contract of $150,000 or more.	29 C.F.R. § 1627.3(b)(1) (ADEA); 29 C.F.R. § 1602.14. 41 C.F.R. § 60-741.80(a).
Employment contracts and employment agreements	3 years from their last effective date.	29 C.F.R. § 516.5(b)
I-9 Forms	3 years after date of hire or 1 year after employment is terminated, whichever is later [for employers]; 3 years after date of hire [for recruiters and referrers for a fee].	8 U.S.C. § 1324a(b)(3); 8 C.F.R. § 274a.2(b)(2);
NC Youth Employment Certificate	3 years after the youth turns 18 or separates from employment. Regulations for youth vary from state to state.	N.C.G.S § 95-25.5
Employee records with information on pay rate or weekly compensation.	*3 years.	29 C.F.R. § 1627.3(a)
Job descriptions, performance goals and reviews; garnishment records	[Termination + 7 years or, if records are not related to an individual employee:2 years].	BEST PRACTICE; 29 C.F.R. § 1620.32
Employee polygraph test records	3 years.	29 U.S.C. § 2005 (Employee Polygraph Protection Act); 29 C.F.R. § 801.30

RECORD	RETENTION PERIOD	REASON
Employee tax records	4 years from the date tax is due or paid.	26 C.F.R. 31.6001-1(e)(2); 26 U.S.C. § 3101-3128 (Federal Insurance Contribution Act); 26 U.S.C. §§ 3301-11(Federal Unemployment Tax Act); IRS Publication 15 (2017), (Circular E), Employer's Tax Guide
Personnel or employment records other than specific to pay rate [made or kept by a contractor or subcontractor with at least 150 employees or at least $150,000 in federal government contracts]	2 years from the date the record was made or personnel action was taken, whichever is later.	41 C.F.R. § 60-1.12(a); 41 C.F.R. § 60-741.80(a)
Personnel or employment records other than specific to pay rate [applicable to contractors or subcontractors with less than 150 employees or less than $150,000 in federal government contracts]	1 year from the date the record was made or personnel action was taken, whichever is later.	41 C.F.R. § 60-1.12(a); 41 C.F.R. § 60-741.80(a)
Salary schedules; ranges for each job description	*2 years.	29 C.F.R. § 1620.32(c)
Time reports	Termination + 3 years.	BEST PRACTICE; 29 C.F.R. §516.6
Workers' compensation records	Duration of employment + 30 years.	29 C.F.R. § 1910.1020
Medical		
Hazardous material exposures	Duration of employment + 30 years.	29 C.F.R § 1910.1020(d) (Occupational Safety and Health Act (OSHA))
Injury and Illness Incident Reports (OSHA Form 301) and related Annual Summaries (OSHA Form 300A); Logs of work-related injuries and illnesses (OSHA Form 300)	5 years following the end of the calendar year that these records cover.	29 C.F.R. § 1904.33 *NC OSH Follows Federal Guidelines

RECORD	RETENTION PERIOD	REASON
Supplemental record for each occupational injury or illness (OSHA Form 101); Log and Summary of Occupational Injuries and Illnesses (OSHA Form 200)	5 years following the year to which they relate.	29 C.F.R. § 1904.44
Medical exams required by law	Duration of employment + 30 years	29 C.F.R. § 1910.1020
FMLA required records	3 years	29 CFR § 825.500(b)
Reasonable Accommodation	1 year from record creation or 1 year post involuntary termination – Includes requests and records of accommodation. 2 years for certain Federal contractors/subcontractors with 150 or more employees and contract of $150,000 or more and for public employers.	29 C.F.R. § 1602.14 (ADA; Title VII) 41 C.F.R. § 60-741.80
Benefits		
Description of benefits per employee (which benefits is each employee elected/is eligible for)	Permanent. (These records should be kept until they are no longer relevant; may be simplest to just retain indefinitely.)	BEST PRACTICE
Pension plan and retirement records	Permanent. (See above.)	BEST PRACTICE
Employee benefit plans subject to ERISA (includes plans regarding health and dental insurance, 401K, long-term disability, and Form 5500) This includes records of COBRA continuation notices.	6 years from when the record was required to be disclosed. (All records must be retained for as long as relevant, therefore permanent retention may be simplest.)	29 U.S.C. § 1027

RECORD	RETENTION PERIOD	REASON
Payroll Records		
Payroll registers (gross and net)	[Permanent/3 years from the last date of entry.]	BEST PRACTICE; 29 C.F.R. § 516.5(a)
Federal procurement contract and related weekly payroll documents	4 years from completion of contract.	48 C.F.R. § 4.705-2
Time cards; piece work tickets; wage rate tables; pay rates; work and time schedules; earnings records; records of additions to or deductions from wages; records on which wage computations are based	2 years. ***3 years per NCDOL.**	29 C.F.R. § 516.6 (FLSA and Equal Pay Act)
W-2 and W-4 Forms and Statements	As long as the document is in effect + 4 years.	26 C.F.R. § 31.6001-5; IRS Publication 15
Records relevant to an audit or review, including memoranda, correspondence, and other communications	7 years after conclusion of audit or review.	17 C.F.R. § 210.2-06
Accounting and Finance		
Accounts Payable and Receivables ledgers and schedules	7 years.	BEST PRACTICE
Annual audit reports and financial statements	Permanent.	BEST PRACTICE
Annual plans and budgets	2 years.	BEST PRACTICE
Bank statements, cancelled checks, and deposit slips	7 years.	BEST PRACTICE
Business expense records	7 years.	BEST PRACTICE
Cash receipts	3 years.	BEST PRACTICE
Check registers	Permanent.	BEST PRACTICE
Electronic fund transfer documents	7 years.	BEST PRACTICE
Employee expense reports	7 years.	BEST PRACTICE

RECORD	RETENTION PERIOD	REASON
General ledgers	Permanent.	BEST PRACTICE
Journal entries	7 years.	BEST PRACTICE
Invoices	7 years.	BEST PRACTICE
Petty cash vouchers	3 years.	BEST PRACTICE
Tax Records		
Annual tax filing for the organization (IRS Form 990 in the US)	[Permanent/7 years.]	BEST PRACTICE
Filings of fees paid to professionals (IRS Form 1099 in the US)	7 years.	BEST PRACTICE
Payroll tax withholdings	7 years.	BEST PRACTICE
Earnings records	7 years.	BEST PRACTICE
Payroll tax returns	7 years.	BEST PRACTICE
State unemployment tax records	Permanent.	BEST PRACTICE
Legal and Insurance Records		
Insurance claims/ applications	Permanent.	BEST PRACTICE
Insurance disbursements and denials	Permanent.	BEST PRACTICE
Insurance policies (Directors and Officers, General Liability, Property, Workers' Compensation)	Permanent.	BEST PRACTICE
Leases	6 years after expiration.	BEST PRACTICE
Patents, patent applications, supporting documents	Permanent.	BEST PRACTICE
Real estate documents (including loan and mortgage contracts, deeds)	Permanent.	BEST PRACTICE
Stock and bond records	Permanent.	BEST PRACTICE

RECORD	RETENTION PERIOD	REASON
Other		
EEO-1 Reports (Employer Information Report) Written affirmative action program (AAP) and supporting documents [applicable to contractors required to maintain one under 41 C.F.R. § 60-1.40] AAP records related to external dissemination of policy, outreach and recruitment activities; audit/reporting system; data collection analysis; hiring benchmarks	Filed annually, most recent kept on file. For immediately preceding AAP year, unless it was not then covered by the AAP year. 3 years.	29 C.F.R. § 1602.7 (Title VII of the Civil Rights Act of 1964 (Title VII); ADA; and Genetic Information Nondiscrimination Act of 2008 (GINA)) 41 C.F.R. § 60-1.12(b) Vietnam Era Veterans Readjustment Assistance Act (VEVRAA) Section 503 of the Rehabilitation Act of 1973
USERRA/Military Leave Records	No statute – maintain indefinitely.	Uniform Services Employment and Reemployment Rights Act (USERRA)

*The law requires records around pay and pay practices be retained for three years. But employers should consider lengthening their record retention policies in light of the Lily Ledbetter Fair Pay Act. This Act allows the filing of charges alleging pay discrimination for each issuance of a paycheck tainted with alleged past discrimination. An employee may claim that each new paycheck constitutes an unlawful employment practice, even if the allegedly discriminatory pay decision occurred many years prior. Consequently, an individual may challenge a pay decision that occurred long ago. Employers should balance the risk of lacking documents necessary to defend decisions made years prior against the cost of a longer record retention policy.

Required Posters:

Below is a listing of required posters for employers. Posters can be found at applicable DOL sites. Poster updates may occur throughout the year and your employer association/legal counsel can provide assistance if you need help determining applicable posters/updates.

Federal

https://www.dol.gov/general/topics/posters

POSTER	COVERAGE
FLSA "Employee Rights Under the Fair Labor Standards Act" WH Pub. 1088 https://www.dol.gov/agencies/whd/posters/flsa	All employers subject to the Fair Labor Standards Act.
Equal Employment Opportunities "Equal Employment Opportunity is the Law" EEOC-P/E-1 https://www.eeoc.gov/employers/eeo-law-poster	All employers covered by Title VII, ADEA, ADA and EPA as well as covered federal contractors and subcontractors.
Employee Polygraph Protection Act "Polygraph Protection Act Notice" WH1462 https://www.dol.gov/whd/regs/compliance/posters/eppac.pdf	Employers engaged in interstate commerce.
USERRA "Your Rights Under USERRA" https://www.dol.gov/vets/programs/userra/USERRA_Private.pdf	All employers
FMLA "Employee Rights Under the FMLA" WH1420 https://www.dol.gov/whd/regs/compliance/posters/fmlaen.pdf	All FMLA covered employers

Other Additional Required Federal Posters

*Specific to Industry or Situation

https://www.dol.gov/general/topics/posters

POSTER	COVERAGE
FLSA: State and Local Government Employees "Employee Rights Under the FLSA" WH1385 https://www.dol.gov/whd/regs/compliance/posters/wh1385State.pdf	State and local government employers
FLSA: Agricultural Employees "Employee Rights Under the FLSA" WH1386 https://www.dol.gov/whd/regs/compliance/posters/wh1386Agrcltr.pdf	Covered agricultural employers
FLSA: Notice to Workers with Disabilities/Special Minimum Wage "Employee Rights for Workers with Disability Paid at Special Minimum Wages" WH 1284 https://www.dol.gov/whd/regs/compliance/posters/disabc.pdf	Every employer of workers with disabilities under special minimum wage certificates authorized by the Fair Labor Standards Act, the McNamara-O'Hara Service Contract Act, and/or the Walsh-Healey Public Contracts Act
Migrant and Seasonal Agricultural Worker Protection Act Notice (MSPA) WH 1376 https://www.dol.gov/whd/regs/compliance/posters/mspaensp.pdf	Each farm labor contractor, agricultural employer and agricultural association subject to the MSPA and who employs any migrant or seasonal agricultural worker(s)

Federal Contractors

https://www.dol.gov/general/topics/posters

POSTER	COVERAGE
Equal Employment Opportunities "EEO is the Law" Supplement https://www.dol.gov/ofccp/regs/compliance/posters/pdf/OFCCP_EEO_Supplement_Final_JRF_QA_508c.pdf	Employers holding federal contracts or subcontracts
Pay Transparency Nondiscrimination Provision Poster https://www.dol.gov/sites/dolgov/files/ofccp/pdf/pay-transp_%20English_formattedESQA508c.pdf	Employers covered by Executive Order 11246
Federally Financed Construction "Notice to Employees Working on Federal or Federally Financed Construction Projects" WH Pub. 1321 https://www.dol.gov/whd/regs/compliance/posters/davis.htm	All firms subject to the Davis-Bacon Act , or federal laws applicable to federal or federally assisted construction and repair of public building or for public works.
Government Contracts "Employee Rights on Government Contracts" WH Pub. 1313 https://www.dol.gov/agencies/whd/posters/government-contracts/sca https://www.dol.gov/whd/regs/compliance/posters/sca.htm	Required for any establishment performing government contract work subject to the Walsh-Healey Contracts Act.
"Worker Rights Under Executive Order 13706" https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/wh1090.pdf	Required for employers with federal contracts formed on or after Jan. 1, 2017 for construction and many types of federal service contracts.
"Worker Rights Under Executive Order 13658" WH1089 https://www.dol.gov/whd/regs/compliance/posters/mw-contractors.htm	Minimum Wage for Federal Construction and Service Contracts
"Employee Rights Under the NLRA" https://www.nlrb.gov/news-publications/publications/employee-rights-poster	Required for Federal contractors and subcontractors subject to the National Labor Relations Act

Required Posters: North Carolina

https://www.labor.nc.gov/safety-and-health/publications/state-and-federal-workplace-poster-requirements

POSTER	COVERAGE
NC Labor Laws Poster/OSH Notice *must be posted together https://files.nc.gov/ncdol/osh/publications/Labor_Law_Poster_English.pdf?epd5Di85KCA.HEihLtz.yjHVwUQ6UvC6	All employers
NCUI 524 "Certificate of Coverage and Notice to Workers as to Benefit Rights" https://files.nc.gov/des/documents/Downloads/ncdes_524e.pdf	All employers
Workers' Compensation Notice http://www.ic.nc.gov/forms/form17.pdf	All employers
Human Trafficking Poster https://www.nccourts.gov/assets/2018-07/HTC-Poster_final_eng.jpg?dWFmIeP9w_BGpI2BQxnuBWK_zXA8siQG=	ABC Permittees, Hospitals, Adult Establishments, Job Link Centers, Rest Areas/ Transportation Stations and Welcome Centers

• All NC Employers with 25+ employees must participate in E-Verify. E-Verify Participation and the Department of Justice, Immigrant and Employee Rights Section (IER) Right to Work posters must be displayed in English and Spanish by participating employers to inform their current and prospective employees of their legal rights and protections.

After enrolling and completing the online tutorial, the employer will be prompted to download; print and display the English and Spanish Notice of E-Verify Participation and the Right to Work posters. https://www.e-verify.gov/employers/employer-resources?resource=32

18. Fair Credit Reporting Act

A. BACKGROUND

Employers who use consumer reporting agencies for information when evaluating applicants or employees for employment, promotion, reassignment, or retention are subject to significant disclosure requirements under the Consumer Credit Reporting Reform Act of 1996, which amended the Fair Credit Reporting Act ("FCRA"). The FCRA applies to all employers, regardless of size.

In 2012, some responsibility for enforcing the FCRA shifted from the Federal Trade Commission to include the new Consumer Financial Protection Bureau (CFPB). Updated forms reflecting the change became effective January 1, 2013. The most significant of the revised forms for employers is the Summary of Rights, which was updated again in 2018. See end of this chapter.

B. HOW THE LAWS WORK

1. TYPES OF CONSUMER REPORTS

The requirements vary depending upon whether the report is a "consumer report" or an "investigative consumer report." A "consumer report" is one that bears on an individual's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living. Examples of consumer reports are credit reports, criminal record reports, driving records, educational history, professional licensing verification and social security verifications. An "investigative consumer report," on the other hand, includes a consumer report that bears on an individual's character, general reputation, personal characteristics, or mode of living, and is obtained through personal interviews with a consumer's neighbors, friends or associates, or others with whom the employee is acquainted or who may have information about these matters. Examples of an "investigative consumer report" are employment background checks and information obtained from personal references. Both are obtained from "consumer reporting agencies," which are in the business of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing it to third parties.

2. CONSUMER REPORTING AGENCIES

The FCRA defines a "consumer reporting agency" as any person or entity who or which for monetary fees regularly engages in assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, including employers seeking information on applicants for employment or existing employees. This includes any private company that offers background check services for employers. The FCRA does not apply in situations where an applicant or employee provides

background information directly to an employer or where an employer uses its own resources to obtain background information directly from the primary source.

3. DISCLOSURE REQUIREMENTS

The FCRA amendments set rigorous conditions for furnishing and using both types of consumer reports for employment purposes. The employer must disclose in writing to the employee or applicant that a report may be obtained and secure the applicant or employee's written consent prior to obtaining a consumer report. The document containing this disclosure cannot include any other information and cannot be part of an employment application, though may be combined with the applicant or employee's required authorization. In addition, the employer must certify to the consumer reporting agency that it will comply with the Act's disclosure requirements and that the information obtained will not be used in violation of any applicable federal or state equal employment opportunity law or regulation.

The use of investigative consumer reports triggers additional disclosure requirements. An employer must mail or otherwise deliver written notice to the applicant or employee that it may obtain such a report no later than three (3) days after requesting the report. The notice must advise the applicant or employee of his/her rights under the FCRA, including the right to request additional information regarding the nature and scope of the investigation that may be conducted. For the sake of convenience, employers may provide this notice at the same time that they obtain the advance written consent of the employee or applicant for a consumer report as described above.

If an applicant or employee requests in writing, within a reasonable period of time, information regarding the nature and scope of the investigation that may be performed, the employer must respond. This disclosure should be in writing, mailed or otherwise delivered to the applicant or employee no later than five days after the date on which the request for such disclosure was received from the applicant or employee, or such report was first requested, whichever is later.

Before employment may be denied based in whole or in part on information contained in a "consumer/investigative consumer report," the applicant or employee must be advised that this report was the basis for such adverse action being taken (i.e., a notice of proposed adverse action) and the applicant or employee must be supplied with a copy of the report and a statement of his or her rights under the FCRA. Effective September 21, 2018, the statement of rights must include notice that the employee may obtain a "security freeze" or place a fraud alert on his/her credit files. Likewise, employers should be aware that pursuant to Section 75-63(p) of the North Carolina General Statutes (the North Carolina Identity Theft Protection Act), they are required to provide a written notice of an individual's right to place a "security freeze" on his/her credit report any time they are obligated to provide an individual with a summary of his/her rights under the FCRA.

This is referred to as a pre-adverse action notification. See end of this chapter.

After a reasonable period of time, the employer must provide oral, written or electronic notice of the adverse action (i.e., a notice of adverse action) stating that the individual will not be given any further consideration as a result of information contained in a "consumer/ investigative consumer report." The name, address and phone number of the consumer reporting agency that performed the search must also be included in the adverse action notification, along with a statement that the consumer reporting agency was not the entity that decided to implement adverse action and is not in a position to advise why the employer took adverse action, an explanation that the employee or applicant has the right to receive a free copy of the consumer report or investigative consumer report if he/she makes a request within 60 days, and a statement that the employee or applicant has the right to dispute any piece of information in the consumer report or investigative consumer report. If the employer relied on a credit score, in whole or in part, to make the adverse action decision, it must also provide written or electronic notice of the credit score used, the date the credit score was created, the name of the entity that provided the credit score, the range of possible credit scores, and the key factors that affected the individual's credit score. At least one federal court, in the Fourth Circuit, has suggested that an employer may have violated the FCRA by providing a notice of adverse action only five (5) days after providing a pre-adverse action notification. In reaching its decision, the court stated that weekends and holidays must be considered, as well as where the notices are sent, in determining what constitutes a "reasonable period of time" between providing a pre-adverse action notification and a notice of adverse action.

4. PENALTIES

Plaintiffs who prove willful noncompliance with the Act may recover actual damages, punitive damages, costs and attorney's fees. Plaintiffs who prove negligent noncompliance with the Act may recover actual damages, costs and attorney's fees.

C. ACTION REQUIRED BY EMPLOYERS

1. AMENDMENTS TO THE FCRA

a. *Fair and Accurate Credit Transaction Act of 2003:* On December 4, 2003, Congress passed the Fair and Accurate Credit Transaction Act ("FACTA"). The thrust of FACTA is aimed at preventing individual identity theft by placing certain restrictions on consumer reporting agencies and creating new rights for individuals who are victims of identity theft that allow the individuals to correct problems created by identity theft. The Act, however, contains several important provisions that affect how employers must deal with consumer report information and when a consumer report is required.

b. *Disposal of Consumer Report Information and Records:* FACTA directed the Federal Trade Commission ("FTC") and certain other governmental agencies

to develop rules regarding the proper disposal by businesses and individuals of information derived from consumer reports. The disposal requirements apply to consumer report information obtained by employers as part of background investigations of applicants and employees. On June 1, 2005, the FTC's Disposal of Consumer Report Information and Records rule became effective. Generally, the rule requires entities that possess consumer report information to take "reasonable measures" to protect against "unauthorized access to or use of the information in connection with its disposal."

Under the rule, "consumer information" that must be properly disposed of includes any record about an individual, whether on paper or electronic form, that is a consumer report or comes from a consumer report. The rule is flexible in identifying the types of measures an employer should take to ensure proper disposal of sensitive information about applicants or employees. Instead of specifying proper disposal measures, the rule provides examples of such measures, including:

- Implementing and complying with policies requiring burning, pulverizing, or shredding papers containing consumer information.
- Implementing and complying with policies requiring the destruction or erasure of consumer information stored in electronic form.
- Following a due diligence analysis, entering into contracts with parties engaged in the business of document destruction. "Due diligence" includes independently auditing the disposal companies' operations, checking references regarding the disposal companies, and reviewing the information security policies of the disposal companies.

The rule provides that financial institutions that are subject to the Safeguards Rule of the Gramm-Leach-Bliley Act should incorporate proper disposal measures into their policies implementing the Safeguards Rule. Finally, the rule does not affect requirements for the maintenance or disposal of records required by other laws (such as wage and hour or equal opportunity employment laws).

c. *Employee Misconduct Investigations*: In April 1999, the FTC issued a staff opinion letter (commonly called the "Vail letter") that stated that if an employer used an outside organization (such as outside counsel) for assistance in investigating employee misconduct (particularly harassment investigations), the organization would be considered a consumer reporting agency that would subject the employer to the consent and disclosure requirements of the FCRA. Following significant complaints by employer organizations and employer defense attorneys regarding the constraints such a ruling would place on being able to conduct thorough and confidential investigations of misconduct, Congress included an amendment in FACTA that excluded any communications made during such investigations from the FCRA where the investigation involved (i) suspected misconduct; or (ii) compliance with federal, state, or local laws and rules (including antidiscrimination laws and rules). Communications are further excluded

if they do not involve an investigation of an employee's credit and if they are provided only to the employer or agent of the employer, to governmental agencies, to self-regulatory organizations with authority over the employer, or as otherwise provided by law.

If an employer takes an adverse action against an employee based on a communication obtained during a misconduct investigation, the FTC rule requires that the employer disclose to the employee after the action is taken a summary of the nature and substance of the communication upon which the adverse action was based. Sources of information used in the investigation do not have to be disclosed.

D. TIPS FOR EMPLOYERS

When an employer uses an outside, third-party entity for collecting applicant or employee background information, the employer should ensure that it follows the prescribed steps in the FCRA for obtaining consent for the background check and providing both the notice of proposed adverse employment action and notice of adverse action to the applicant or employee. Failure to do so may result in significant liability and penalties.

Under the FTC Disposal Rule, employers should (i) identify any records that are consumer reports and any information that is derived from consumer reports; (ii) develop (or modify) any records retention and destruction policies to ensure that procedures are in place for proper disposal of information contained in consumer reports; (iii) review agreements with outside document destruction companies to ensure that their policies and practices conform to the requirements of the Disposal Rule; and (iv) provide training to the appropriate employees who handle consumer report information to ensure they are familiar with the proper destruction of information contained in such reports.

Note that while Title VII of the Civil Rights Act of 1964 ("Title VII") does not regulate the collection of employee background information, Title VII does prohibit discrimination when employers make use of such information, including criminal history information. Employers that treat individuals with similar criminal records differently based on their race, national origin, or some other protected characteristic may violate Title VII. The EEOC has also taken the position that policies or practices that screen individuals based on criminal history may violate Title VII if doing so significantly disadvantages certain protected classes and does not assist the employer in accurately determining whether someone is likely to be a good employee.

Importantly, several states and municipalities impose additional background check requirements or restrictions. North Carolina, for example, prohibits employers from inquiring about an applicant's expunged criminal history.

State and local regulations should be considered before proceeding.

Refer to Chapter 12, Tips for Employers

REFERENCE AND BACKGROUND CHECKING SERVICES

FAIR CREDIT REPORTING ACT DISCLOSURE & AUTHORIZATION

DISCLOSURE

In considering you as an applicant for employment or as a current employee, (Company Name) may choose to secure and use information contained in either a consumer report or investigative consumer report about you obtained from a consumer reporting agency when: (1) considering your application for employment (2) making a decision whether to offer you employment, (3) deciding whether to continue your employment or (4) making other employment-related decisions directly affecting you.

For explanation purposes, a "consumer reporting agency" is a person or business which, on a cooperative nonprofit basis, or for monetary fees or dues, regularly assembles or evaluates consumer credit information or other information on consumers for a person who has a legitimate business need for the information or intends to use the information for employment purposes.

A "consumer report" means any written, oral or other communication of any information by a consumer reporting agency bearing on your credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing your eligibility for employment purposes.

An "investigative consumer report" means a consumer report or portion thereof in which information on your character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with your neighbors, friends, or associates reported on or with others with whom you are acquainted or who may have knowledge concerning any such items of information.

In the event an investigative consumer report is prepared, you may request additional disclosures regarding the nature and scope of the investigation requested as well as a written summary of your rights under the Fair Credit Reporting Act.

AUTHORIZATION

By your signature below, you hereby authorize us to obtain a consumer report and/or an investigative report about you in order to consider you for employment. If hired, this authorization shall remain on file and shall serve as an ongoing authorization for us to procure consumer reports at any time during the employment period.

_____ _____

(Signature) (Date)

(Printed name)

Para información en español, visite www.consumerfinance.gov/learnmore o escribe a la Consumer Financial Protection Bureau, 1700 G Street N.W., Washington, DC 20552.

A Summary of Your Rights Under the Fair Credit Reporting Act

The federal Fair Credit Reporting Act (FCRA) promotes the accuracy, fairness, and privacy of information in the files of consumer reporting agencies. There are many types of consumer reporting agencies, including credit bureaus and specialty agencies (such as agencies that sell information about check writing histories, medical records, and rental history records). Here is a summary of your major rights under FCRA. **For more information, including information about additional rights, go to www.consumerfinance.gov/learnmore or write to: Consumer Financial Protection Bureau, 1700 G Street N.W., Washington, DC 20552.**

- **You must be told if information in your file has been used against you.** Anyone who uses a credit report or another type of consumer report to deny your application for credit, insurance, or employment – or to take another adverse action against you – must tell you, and must give you the name, address, and phone number of the agency that provided the information.

- **You have the right to know what is in your file.** You may request and obtain all the information about you in the files of a consumer reporting agency (your "file disclosure"). You will be required to provide proper identification, which may include your Social Security number. In many cases, the disclosure will be free. You are entitled to a free file disclosure if:

    - a person has taken adverse action against you because of information in your credit report;
    - you are the victim of identity theft and place a fraud alert in your file;
    - your file contains inaccurate information as a result of fraud;
    - you are on public assistance;
    - you are unemployed but expect to apply for employment within 60 days.

    In addition, all consumers are entitled to one free disclosure every 12 months upon request from each nationwide credit bureau and from nationwide specialty consumer reporting agencies. See www.consumerfinance.gov/learnmore for additional information.

- **You have the right to ask for a credit score.** Credit scores are numerical summaries of your credit-worthiness based on information from credit bureaus. You may request a credit score from consumer reporting agencies that create scores or distribute scores used in residential real property loans, but you will have to pay for it. In some mortgage transactions, you will receive credit score information for free from the mortgage lender.

- **You have the right to dispute incomplete or inaccurate information.** If you identify information in your file that is incomplete or inaccurate, and report it to the consumer

reporting agency, the agency must investigate unless your dispute is frivolous. See www.consumerfinance.gov/learnmore for an explanation of dispute procedures.

- **Consumer reporting agencies must correct or delete inaccurate, incomplete, or unverifiable information.** Inaccurate, incomplete, or unverifiable information must be removed or corrected, usually within 30 days. However, a consumer reporting agency may continue to report information it has verified as accurate.

- **Consumer reporting agencies may not report outdated negative information.** In most cases, a consumer reporting agency may not report negative information that is more than seven years old, or bankruptcies that are more than 10 years old.

- **Access to your file is limited.** A consumer reporting agency may provide information about you only to people with a valid need – usually to consider an application with a creditor, insurer, employer, landlord, or other business. The FCRA specifies those with a valid need for access.

- **You must give your consent for reports to be provided to employers.** A consumer reporting agency may not give out information about you to your employer, or a potential employer, without your written consent given to the employer. Written consent generally is not required in the trucking industry. For more information, go to www.consumerfinance.gov/learnmore.

- **You may limit "prescreened" offers of credit and insurance you get based on information in your credit report.** Unsolicited "prescreened" offers for credit and insurance must include a toll-free phone number you can call if you choose to remove your name and address form the lists these offers are based on. You may opt out with the nationwide credit bureaus at 1-888-5-OPTOUT (1-888-567-8688).

- The following FCRA right applies with respect to nationwide consumer reporting agencies:

  CONSUMERS HAVE THE RIGHT TO OBTAIN A SECURITY FREEZE

  You have a right to place a "security freeze" on your credit report, which will prohibit a consumer reporting agency from releasing information in your credit report without your express authorization. The security freeze is designed to prevent credit, loans, and services from being approved in your name without your consent. However, you should be aware that using a security freeze to take control over who gets access to the personal and financial information in your credit report may delay, interfere with, or prohibit the timely approval of any subsequent request or application you make regarding a new loan, credit, mortgage, or any other account involving the extension of credit.

  As an alternative to a security freeze, you have the right to place an initial or extended fraud alert on your credit file at no cost. An initial fraud alert is a 1-year alert that is

placed on a consumer's credit file. Upon seeing a fraud alert display on a consumer's credit file, a business is required to take steps to verify the consumer's identity before extending new credit. If you are a victim of identity theft, you are entitled to an extended fraud alert, which is a fraud alert lasting 7 years.

A security freeze does not apply to a person or entity, or its affiliates, or collection agencies acting on behalf of the person or entity, with which you have an existing account that requests information in your credit report for the purposes of reviewing or collecting the account. Reviewing the account includes activities related to account maintenance, monitoring, credit line increases, and account upgrades and enhancements.

- **You may seek damages from violators.** If a consumer reporting agency, or, in some cases, a user of consumer reports or a furnisher of information to a consumer reporting agency violates the FCRA, you may be able to sue in state or federal court.

- **Identity theft victims and active duty military personnel have additional rights.** For more information, visit www.consumerfinance.gov/learnmore.

States may enforce the FCRA, and many states have their own consumer reporting laws. In some cases, you may have more rights under state law. For more information, contact your state or local consumer protection agency or your state Attorney General. For information about your federal rights, contact:

TYPE OF BUSINESS:	CONTACT:
1.a. Banks, savings associations, and credit unions with total assets of over $10 billion and their affiliates	a. Consumer Financial Protection Bureau 1700 G Street, N.W. Washington, DC 20552
b. Such affiliates that are not banks, savings associations, or credit unions also should list, in addition to the CFPB:	b. Federal Trade Commission Consumer Response Center 600 Pennsylvania Avenue, N.W. Washington, DC 20580 (877) 382-4357
2. To the extent not included in item 1 above: a. National banks, federal savings associations, and federal branches and federal agencies of foreign banks	a. Office of the Comptroller of the Currency Customer Assistance Group 1301 McKinney Street, Suite 3450 Houston, TX 77010-9050
b. State member banks, branches and agencies of foreign banks (other than federal branches, federal agencies, and Insured State Branches of Foreign Banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act.	b. Federal Reserve Consumer Help Center P.O. Box 1200 Minneapolis, MN 55480
c. Nonmember Insured Banks, Insured State Branches of Foreign Banks, and insured state savings associations	c. FDIC Consumer Response Center 1100 Walnut Street, Box #11 Kansas City, MO 64106
d. Federal Credit Unions	d. National Credit Union Administration Office of Consumer Financial Protection (OCFP) Division of Consumer Compliance Policy and Outreach 1775 Duke Street Alexandria, VA 22314
3. Air carriers	Asst. General Counsel for Aviation Enforcement & Proceedings Aviation Consumer Protection Division Department of Transportation 1200 New Jersey Avenue, S.E. Washington, DC 20590
4. Creditors Subject to the Surface Transportation Board	Office of Proceedings, Surface Transportation Board Department of Transportation 395 E Street, S.W. Washington, DC 20423
5. Creditors Subject to the Packers and Stockyards Act, 1921	Nearest Packers and Stockyards Administration area supervisor
6. Small Business Investment Companies	Associate Deputy Administrator for Capital Access United States Small Business Administration 409 Third Street, S.W., Suite 8200 Washington, DC 20416
7. Brokers and Dealers	Securities and Exchange Commission 100 F Street, N.E. Washington, DC 20549
8. Federal Land Banks, Federal Land Bank Associations, Federal Intermediate Credit Banks, and Production Credit Associations	Farm Credit Administration 1501 Farm Credit Drive McLean, VA 22102-5090
9. Retailers, Finance Companies, and All Other Creditors Not Listed Above	Federal Trade Commission Consumer Response Center 600 Pennsylvania Avenue, N.W. Washington, DC 20580 (877) 382-4357

[date]

[applicant's name]
[applicant's street address]
[city, state and zip code]

Dear [applicant's name]:

In evaluating your application for employment with [company's name goes here], [background checking company name goes here] has provided us with a consumer report to assist us with our employment process.

We are forwarding you a copy of the consumer report you authorized in connection with your application for employment, together with a Summary of Your Rights under the Fair Credit Reporting Act. The content of the enclosed report is currently under review in consideration of your employment.

You have the right to dispute any information contained in the report, that you believe may be inaccurate or incomplete by contacting [background checking company name goes here] at the following address or phone number. Please understand, [background checking company name goes here] does not make decisions to approve or deny your employment application and is not able to explain why any employment decisions are made.

[background checking company name and address goes here]
[background checking company's toll-free number goes here]

If the consumer report includes a financial credit report, you may directly contact the credit bureau that furnished the report:

Equifax	Experian	TransUnion
P.O. Box 740241	P.O. Box 2104	P.O. Box 2000
Atlanta, GA 30374	Allen, TX 75013	Chester, PA 19022
(800) 685-1111	(888) 397-3742	(800) 888-4213
www.equifax.com	www.experian.com	www.transunion.com

Thank you for your interest in our company.

Sincerely,

[date]

[applicant's name]
[applicant's street address]
[city, state and zip code]

Dear [applicant's name]:

In reference to your application for employment with [company's name goes here], we regret to inform you that we are unable to further consider you for employment at this time. This decision was made in part from the information we received from [background checking company name goes here], our employment screening vendor. [Background checking company name goes here] did not make this decision and cannot give specific reasons for it.

You have the right to dispute the accuracy or completeness of any information contained in the report, a copy of which has previously been provided to you. You are also entitled to an additional free copy of your report from [background checking company name goes here] upon request within 60 days of your receipt of this letter. You may contact [background checking company name goes here] at the following address or phone number. If you choose to contact [background checking company name goes here] by mail, please include your full name, current address, social security number and date of birth.

[background checking company name and address goes here]
[background checking company's toll-free number goes here]

If the consumer report includes a financial credit report, you may directly contact the credit bureau that furnished the report:

Equifax	Experian	TransUnion
P.O. Box 740241	P.O. Box 2104	P.O. Box 2000
Atlanta, GA 30374	Allen, TX 75013	Chester, PA 19022
(800) 685-1111	(888) 397-3742	(800) 888-4213
www.equifax.com	www.experian.com	www.transunion.com

Thank you for your interest in our company.

Sincerely,

19. State & Federal Disability Laws

A. BACKGROUND

Both federal and North Carolina law prohibit discrimination against individuals with disabilities.

North Carolina prohibits discrimination against the disabled under the North Carolina Persons with Disabilities Protection Act. Two federal laws specifically protect disabled individuals: the Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1973.

The ADA prohibits discrimination against people with disabilities in employment, public services and transportation, public accommodations, and telecommunication services. All employers with 15 or more employees are obligated to comply with the Act. On September 25, 2008, then-President George W. Bush signed into law the ADA Amendments Act of 2008 (P.L. 110-325). This legislation overturned four U.S. Supreme Court decisions that Congress believed had misconstrued the ADA and unduly restricted the ADA's coverage.

The Rehabilitation Act of 1973 prohibits discrimination and requires an employer to take affirmative action to employ the disabled. However, the Rehabilitation Act applies only to federal government contractors and recipients of federal grants. The affirmative action aspect of the Rehabilitation Act is discussed in Chapter 13. Section 504 of the Act prohibiting discrimination against people with disabilities in programs that receive federal financial assistance follows the same scheme as the ADA as outlined below.

B. HOW THE LAWS WORK

1. AMERICANS WITH DISABILITIES ACT (ADA)

a. Coverage

The ADA applies to all private employers engaged in an industry affecting commerce who have 15 or more employees working in at least 20 calendar weeks in the current or preceding calendar year.

Employment agencies, labor organizations and joint labor movement committees are considered to be "employers" covered by the employment provisions of the ADA. The ADA also covers Congress and public services provided by state/local governments.

Exemptions -- Private clubs and religious organizations are exempt from coverage under the public accommodations, but not the employment, sections of the ADA. Religious entities, however, may give preference in employment to individuals of a particular religion.

b. What is Required and Prohibited

The provisions of the ADA are quite similar to the North Carolina Persons with Disabilities Act discussed below. In general, the ADA prohibits covered employers from discriminating against a "qualified individual with a disability" in regard to job applications, hiring, advancement, discharge, compensation, training, or other terms, conditions, or privileges of employment. Like the North Carolina Act, the ADA requires employers to make "reasonable accommodations" to the known physical or mental limitations of an otherwise qualified individual with a disability, unless to do so would impose an "undue hardship" upon the employer. The Act specifically prohibits the use of qualification standards, employment tests, or other selection criteria that tend to screen out individuals with disabilities, unless the standard is job-related.

The ADA Amendments Act significantly changed the ADA's definition of a "disabled person." The Act instructs courts that the ADA's definition of disability "shall be construed in favor of broad coverage under the Act, to the maximum extent permitted by the Act." A summary of key provisions from the ADA Amendments Act is provided below.

(1) The ADA Amendments Act Expands the Definition of "Major Life Activities"

Prior to the ADA Amendments Act, the U.S. Supreme Court held that a "major life activity" must be an activity that is "of central importance to most people's daily lives." In addition, some lower courts had held that episodic or intermittent impairments, such as epilepsy and post-traumatic stress disorder, were not covered by the ADA.

The ADA Amendments Act rejected this narrow reading of "major life activities." In addition, the Act provides a non-exhaustive list of major life activities, including seeing, hearing, eating, sleeping, walking, learning and concentrating. Moreover, the Act states that major life activities also include the operation of "major bodily functions," such as the immune system, normal cell growth and the endocrine system. Further, the Act states that impairments that are episodic or in remission are considered disabilities if the impairment would substantially limit a major life activity when the condition is considered in its active state.

(2) The ADA Amendments Act Relaxes the "Substantially Limits" Requirement

Prior to the ADA Amendments Act, the U.S. Supreme Court held that an impairment "substantially limits" a major life activity only if it "prevents or severely restricts the individual" from performing the activity.

The ADA Amendments Act rejected this standard and states that the term "substantially limits" must be interpreted consistently with the Act's findings and purposes. The ADA Amendments Act's findings state that the EEOC and the U.S. Supreme Court had incorrectly interpreted the

term "substantially limits" to establish a greater degree of limitation than had been intended by Congress.

(3) The ADA Amendments Act states that "Mitigating Measures" are Not to be considered in Determining Whether a Person Is "Disabled"

Prior to the ADA Amendments Act, the U.S. Supreme Court narrowed the ADA's coverage by ruling that mitigating measures (such as medication or devices) were to be considered in determining whether a person was substantially limited in a major life activity.

The ADA Amendments Act states that the ameliorative effects of mitigating measures should not be considered in determining whether an individual has an impairment that substantially limits a major life activity. The Act does contain an exception for "ordinary eyeglasses or contact lenses," which may be considered.

(4) The ADA Amendments Act makes it easier for individuals to establish a "Regarded As" Disabled Claim

The ADA covers people with impairments who are "regarded as" disabled. Prior to the ADA Amendments Act, an individual had to show that the employer viewed him/her as "substantially limited" in a "major life activity" to prevail on a "regard as" disabled claim.

The ADA Amendments Act states that an individual can establish coverage under the "regarded as" prong by showing that he/she was subjected to an action prohibited by the ADA based on an actual or perceived impairment, regardless of whether the impairment limits a major life activity. The Act states, however, that the "regarded as" prong does not cover people with "impairments that are transitory and minor."

c. Definition of "Disabled Person"

A "disabled" individual is generally defined under the ADA as one who has a physical or mental impairment that substantially limits one or more major life activities, who has a record of such an impairment, or who is regarded as having such an impairment.

The ADA specifically excludes from its definition of "disabled" homosexuality and bisexuality, as well as sexual behavior disorders such as transvestitism, pedophilia, exhibitionism, etc. Similarly, the ADA excludes those who are currently engaged in the illegal use of drugs. However, current alcoholics are covered so long as the alcoholics can perform their job duties and do not present a threat to the health and safety of others.

d. "Qualified Individual with a Disability"

The ADA, like the North Carolina Act, prohibits discrimination only with respect to qualified disabled persons. The ADA defines a "qualified individual with a disability" as one who, with or without reasonable accommodation, can perform the essential functions of the job. Determining what constitutes a job's essential functions is to be made on a case-by-case basis, with written

job descriptions considered primary evidence of the employer's intent. An individual who poses a "direct threat to the health or safety" of others is not protected by the Act's provisions.

Food Handlers -- The Secretary of Health and Human Services published a list of infectious and communicable diseases that can be transmitted through the handling of food. 57 Fed. Reg. 40,917 (1992). Employers may transfer individuals infected with such diseases from food handling jobs if the danger to public health and safety cannot be eliminated by some other reasonable accommodation.

e. "Reasonable Accommodation"

The ADA specifies types of "reasonable accommodation" that an employer must make for an individual with a disability. The list includes making existing facilities readily accessible, job restructuring, modifying work schedules, leave of absence, reassigning to vacant positions, acquiring or modifying equipment or devices, adjusting or modifying examinations, training materials, or policies and providing readers or interpreters.

Under the ADA, an employer must notify applicants and employees of its obligation under the Act to make reasonable accommodations. However, absent a request from an employee, an employer may not provide an accommodation where it would have an adverse impact upon the individual. (For example, an employer could not transfer unilaterally a person with HIV from a job as a teacher to a job where such a person has no contact with people.) After a request for accommodation has been made, employers should first consult with and involve the individual with the disability in deciding the appropriate accommodation.

Where the individual cannot identify an appropriate accommodation, the employer should follow four informal steps to identify and provide the accommodation required. First, identify barriers to equal opportunity, i.e., between essential and non-essential tasks of the job. (Employers may require the employee to perform only the essential tasks.) Second, identify possible types of accommodation by consulting with state vocational service agencies, accommodation networks, or other employers who have experience in accommodating individuals with disabilities. Third, assess the reasonableness of possible accommodations. Fourth, implement the accommodation that is most appropriate and does not impose an "undue hardship" on the employer.

f. "Undue Hardship"

In situations where there are two effective accommodations, the Act allows the employer to choose the accommodation that is less expensive or easier for the employer to implement so long as the selected accommodation provides meaningful employment opportunity. However, express choice of the applicant or employee should be given primary consideration by the employer.

Accommodation is not required under the ADA if it would impose an "undue

hardship" on the employer's business. This means a significant difficulty or expense. Under the ADA, the determination of whether an accommodation would impose an undue hardship is a balancing approach that is done on a case-by-case basis. The Act provides that certain factors should be considered in making such a balancing decision:

- the nature and cost of the accommodation;
- the size, type and financial resources of the specific facility where the accommodation would be made;
- the size, type and financial resources of the covered employer; and
- the covered employer's type of operation, including the composition, structure and functions of its workforce and the geographic separateness and administrative or fiscal relationship between the specific facility and the covered employer.

g. Preemployment Physicals

Like the North Carolina Persons with Disabilities Act, the ADA prohibits preemployment screening physical examinations. Under the federal act, employers may require medical examinations only after an offer of employment has been made to a job applicant. Such an offer may be conditioned on the results of a medical examination if (1) all employees are subjected to examinations; and (2) the information obtained is kept confidential and maintained in separate medical files. An employer may deny employment to a job applicant based upon the results of a conditional offer medical exam only if the exam reveals that the applicant could not perform the essential functions of the job in a safe manner.

The ADA also allows employers to conduct voluntary medical examinations that are part of an employee health program, but, as with other types of medical examinations, they must be kept confidential and in separate medical files.

Preemployment inquiries concerning whether an applicant has a disability or severity of that disability are clearly prohibited under the ADA. Employers, however, may ask questions which relate to the ability to perform job-related functions. For example, an employer may ask whether an applicant has a driver's license, but not whether that individual has a visual disability.

h. Drugs and Alcohol

The ADA specifically allows employers to prohibit the use of alcohol or illegal drugs in the workplace and require that employees not be under the influence. Employees may also be required to conform to the requirements of the Drug Free Workplace Act of 1988.

Also, employers may test for the use of illegal drugs and such tests will not be considered medical examinations under the ADA. The alcohol and illegal drug standards adopted by the Defense Department, Nuclear Regulatory Commission, and Transportation Department will continue to apply to

employees in industries subject to those regulations.

While current illegal drug users and alcoholics who cannot safely perform their jobs are not protected by the ADA, those who have been rehabilitated or are participating in a supervised rehabilitation program and are not currently using drugs or who are erroneously regarded as engaging in the illegal use of drugs, are covered. Thus, an employer may be required to make reasonable accommodation to recovering alcoholics, for example, by allowing time off to attend self-help meetings or treatment.

i. Collective Bargaining Agreements

The duty to comply with the provisions of the ADA is not lessened by any inconsistent term in a collective bargaining agreement. A collective bargaining agreement that contains physical criteria which causes a disparate impact on individuals with disabilities and are not job-related and consistent with business necessity could be challenged under the Act. Hence, in order to avoid conflicts between a collective bargaining agreement and an employer's duty under the Act, the agreement should contain provisions permitting an employer to take all actions necessary to comply with the requirements of the ADA.

j. Insurance

The ADA does not affect insurance per se. The Act specifically permits insurers to continue to underwrite and classify risks consistent with state law and allows employers to provide bona fide benefit plans based on risk classifications. However, an employer may not avoid the requirements of the Act because of the difficulties an employee may have in obtaining insurance. For example, an employer may not deny a qualified applicant a job because the employer's current insurance plan does not cover the applicant's disability or because of an increased cost of the insurance.

An employee benefit plan will not be found to be in violation of the Act simply because the plan does not address the specific needs of every person with a disability. The ADA does not prohibit health insurance or other benefit plans from treating disabled persons differently because they represent an increased hazard of death or illness. Such classifications, however, must be in accordance with accepted principles of insurance risk classifications; otherwise, they may be found discriminatory.

k. Enforcement

The ADA adopts all the powers, remedies and procedures set forth in Title VII. The ADA is enforced by the EEOC in the same manner as existing discrimination laws that provide protection based upon race, gender and other minority status. The EEOC has issued detailed regulations implementing the various provisions of the ADA.

l. Other Provisions of the Americans with Disabilities Act

(1) *Public Services*

Title II of the ADA prohibits discrimination or exclusion of qualified individuals with disabilities from participation in services, programs, or activities of state and local governments, with particular emphasis on accessibility of public transportation.

Public transit authorities are required to have wheelchair lifts on new buses and have paratransit for those who cannot use fixed route systems. In addition, specific accessibility standards are established for inner city, light, rapid and commuter rail systems and their stations.

(2) *Public Accommodations and Commercial Facilities*

Title III of the ADA prohibits discrimination against individuals with disabilities in the full and equal enjoyment of the goods, services, and advantages of any place of public accommodation. The Title requires that accommodation for the disabled be offered "in the most integrated setting appropriate to the needs of the individual."

Place of "public accommodation" is defined as a privately-operated establishment that is used by the general public whose operations affect commerce and fall within one of the following categories: places of lodging; establishments serving food and drink; places of entertainment; gathering places; retail sales and service establishments; cultural facilities; parks; zoos; museums; places of education; social service centers; and places of exercise or recreation. "Commercial facility" is defined to include virtually all private, nonresidential facilities and includes office buildings, factories, and warehouses.

Existing Buildings -- Public accommodations and commercial facilities must remove from existing facilities architectural and communication barriers that are structural in nature where such removal is "readily achievable." This term is defined as meaning easily accomplished and carried out without much difficulty or expense.

New Construction -- All newly constructed commercial facilities must be "readily accessible to and useable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to do so." Thus, employers may not construct buildings that will be inaccessible to people with disabilities. Importantly, the provision concerning the construction of new facilities is not limited to potential places of employment of 15 or more employees, but applies to all commercial facilities. The U.S. Department of Justice has issued regulations implementing Title III. These regulations are consistent with the guidelines and requirements implemented by the Architectural and Transportation Barriers Compliance Board.

Title III incorporates sections of the Fair Housing Act, providing for enforcement through private lawsuits and actions brought by the U.S. Attorney General, including pattern and practice lawsuits, and for civil

fines of up to $50,000 for a first offense and $100,000 for subsequent offenses.

(3) *Telecommunications*

Title IV of the ADA requires companies providing telephone services to the public to provide telecommunication relay devices for the deaf and nonvoice terminal devices. Such devices allow hearing impaired persons and hearing persons to communicate through a relay operator, who receives typed messages from hearing impaired persons and speaks their contents to hearing persons.

2. NORTH CAROLINA PERSONS WITH DISABILITIES PROTECTION ACT

a. Coverage

North Carolina's Persons with Disabilities Protection Act applies to all employers with 15 or more full-time employees working within the state. Employment agencies, labor organizations, and all departments, agencies, and political subdivisions of state government are also covered. The Act contains special provisions for places of public accommodation and providers of public transportation and public services.

b. *What is Prohibited*

With respect to employment, the Persons with Disabilities Protection Act makes it unlawful for an employer to:

(1) Fail to hire or promote or to otherwise discriminate against a qualified disabled person on the basis of the person's disabling condition;

(2) Require disabled applicants for employment to identify themselves as disabled prior to making a conditional offer of employment;

(3) Fail to reasonably accommodate the disabling condition of a qualified disabled person; or

(4) Retaliate against an individual who has exercised any right granted by the Persons with Disabilities Protection Act.

c. *Definition of Disabled Person*

A disabled person is defined in the Act as any person who (1) has a physical or mental impairment which substantially limits one or more major life activities; (2) has a record of such impairment; or (3) is regarded as having such an impairment. "Physical or mental impairment" excludes sexual preferences, active alcoholism, drug addiction or abuse, and any condition that is temporary lasting six months or fewer and leaving no residual impairment.

d. *Qualified Disabled Person*

Only qualified disabled persons are protected by the Act. A qualified disabled person, for employment purposes, is one who can satisfactorily perform a particular job with or without reasonable accommodation. This is more

restrictive than the "essential functions" test in the ADA. An individual is not a qualified disabled person if their disabling condition creates an unreasonable safety or health risk.

e. *Reasonable Accommodation*

Employers are required to reasonably accommodate the disabling condition of a qualified disabled person. Reasonable accommodation may require (1) making physical changes in the workplace, or (2) changing the duties of the job in question.

(1) Physical changes: Reasonable accommodation requires an employer to make physical changes in the workplace including making facilities accessible to the disabled person, modifying equipment, and providing mechanical aids so that the disabled person can operate machinery and equipment. Physical changes need not be made where an employer can show that such changes would impose an undue hardship. Under the Act, the determination of whether such an accommodation would impose an "undue hardship" is identical to the factors to be considered under the ADA.

(2) Job Duties: An employer is required to change the duties of a job to accommodate a disabled person only if the change in duties does not require the employer to:

- hire one or more employees to assist the disabled person in performing the normal duties of the job in question;
- reassign duties of the job in question to other employees without assigning to the disabled employee other duties to compensate for those reassigned;
- reassign duties of the job in question to one or more other employees where such reassignment would increase the skill, effort, or responsibility required of the other employee or employees;
- alter, change, modify, or deviate from bona fide seniority policies or practices; or
- provide accommodations of a personal nature (e.g., eyeglasses, hearing aids, etc.) unless the same are provided to other employees generally.

f. *Exceptions*

Under the Act, it is not a discriminatory employment action for an employer to:

(1) make an employment decision based on federal or state law or regulation imposing physical, mental or psychological job requirements;

(2) fail to make reasonable accommodations where an employee has failed to request the accommodation, failed to provide medical documentation, or otherwise failed to cooperate with the employer's efforts to determine if reasonable accommodation can be made;

(3) inquire whether a person has the ability to perform a particular job;

(4) require an employee to undergo medical examination for the purpose of determining a person's ability to perform the duties of available jobs or to aid in accommodating a person's disabilities, provided that a conditional offer of employment has been made and the examination is required of all employees or applicants for the job in question;

(5) fail to hire, transfer, promote or to discharge a disabled person who has a communicable disease which would disqualify a non-disabled person from similar employment;

(6) fail to hire, transfer, promote or to discharge a disabled person who has a history of drug abuse in an establishment that manufactures, distributes, dispenses, conducts research on, stores, sells, or otherwise handles controlled substances regulated by the North Carolina Controlled Substances Act, N.C. Gen. Stat. § 90-86;

(7) require a medical examination for the purpose of establishing an employee health record; or

(8) administer preemployment tests in accordance with provisions of Section 168A-5(b)(8) of the Act.

g. *Affirmative Defenses*

(1) The Act also sets forth the following affirmative defenses which may be raised by an employer to defeat an employee's claim of disability discrimination. These include: failure to comply with the employer's work rules, policies, and performance standards (provided the same are applied to other employees generally);

(2) failure to comply with the employer's attendance or tardiness policies (provided the same are applied to other employees generally); or

(3) an employer's good faith reliance upon a bona fide seniority or merit system, a system which measures quality or quantity of production, or consideration of differences in location.

h. *Obligations of the Disabled Person*

An employer's duty to reasonably accommodate a disabled person arises only if the disabled person (1) apprises the employer of the disabling condition (unless the condition is obvious), (2) submits any necessary medical documentation, (3) makes suggestions for accommodation, and (4) cooperates in any discussion or evaluation concerning accommodation.

i. *Public Accommodations, Transportation, and Services*

The Persons with Disabilities Protection Act applies to places of public accommodation including hotels, motels, restaurants, and any facility, store, or other establishment which supplies goods or services on the premises to the public or which solicits or accepts the trade of any person. The Act also applies to providers of public transportation and public services. (See Sections

168A-6–8 of the Act.) North Carolina further recognizes the right of persons with disabilities to be accompanied by a service animal trained to assist the person with his or her specific disability in places of public accommodation. (See N.C. Gen. Stat. 168-4.2)

j. *Enforcement*

A disabled person may bring a civil action alleging disability discrimination in superior court in the county where the alleged discriminatory practice occurred or in the county where the plaintiff or defendant resides.

(1) Statute of Limitations: The civil action must be brought within 180 days after the disabled person became aware of, or with reasonable diligence should have become aware of, the alleged discrimination.

(2) Damages: Upon finding that an employer has violated the Act, the superior court may grant declaratory or injunctive relief, including orders to hire or reinstate the disabled individual. The court may also award back pay. Interim earnings or amounts earnable with reasonable diligence to reduce the amount of backpay otherwise allowable.

(3) Trial: All suits are tried before a judge of the superior court. Jury trials are not allowed.

(4) Attorney Fees: The court may, in its discretion, award attorney fees to the prevailing party.

(5) Election of Remedies: In order to avoid duplicative litigation under federal and state law, suits under North Carolina's Persons with Disabilities Act can be maintained only where the disabled person has not instituted judicial or administrative proceedings under Sections 503 or 504 of the federal Rehabilitation Act of 1973 or under the Americans with Disabilities Act of 1990.

C. ACTION REQUIRED BY EMPLOYERS

1. DETERMINE WHETHER A DISABILITY EXISTS

If an applicant or employee claims to be disabled and the disability is not readily apparent, the employer may require the applicant or employee to provide medical documentation. The employer may also require a medical examination, provided that a conditional offer of employment has been made.

2. IS ACCOMMODATION POSSIBLE?

A disabled person must apprise the employer of his disability and request reasonable accommodation. Once accommodation has been requested, the employer must investigate whether there are reasonable accommodations that can be made. The investigation should determine:

- Whether accommodation is, in fact, necessary.

- If so, is the accommodation reasonable? An accommodation is reasonable if it meets any of the criteria set forth in the law.
- If it is questionable whether a disabled person can safely perform a job even with reasonable accommodation, the employer should seek a written medical opinion.
- If reasonable accommodation will allow the qualified disabled individual to perform the job in question, the accommodations must be made, and the individual must be offered the job.
- If reasonable accommodation is not feasible, are there other jobs available that the disabled individual can safely perform with or without reasonable accommodation?
- If there is no reasonable accommodation that will allow the disabled individual to satisfactorily and safely perform the job in question, the individual is not a qualified disabled individual protected by the Act. In these circumstances, the employee need not be hired or promoted.

3. DOCUMENTATION

If a disabled individual cannot be reasonably accommodated, it is essential for the employer to document the steps taken in reaching this determination. If the disabled individual subsequently brings a suit, this documentation will provide the foundation of the employer's defense.

D. TIPS FOR EMPLOYERS

1. PREEMPLOYMENT INQUIRIES

It is unlawful for an employer to require an applicant to identify himself as disabled. This means that questions like "have you ever had a back injury" are unlawful if asked on an application form or in a preemployment interview. It is not unlawful, however, for an employer to ask an employee whether he can perform the duties of a particular job. If lifting heavy objects is an integral part of a job, an applicant can be asked if he is able to lift heavy objects with or without accommodation.

2. PREEMPLOYMENT PHYSICAL EXAMINATIONS

Although preemployment physicals are permissible, they may be given only after a conditional offer of employment has been made.

3. DIFFERENCES IN FEDERAL AND STATE LAW

Regulations implementing Sections 503 and 504 of the Rehabilitation Act and the ADA contain different and sometimes more onerous requirements than state law. Compliance with state law does not necessarily constitute compliance with federal law. Likewise, an employer can be in compliance with federal law, but not state law. Employers need to be familiar with both federal and state laws in order to ensure compliance with both.

4. **DOCUMENT YOUR ANALYSIS OF REQUESTS FOR ACCOMMODATION ON A CASE BY CASE BASIS.**

5. **BE AWARE OF UPDATED EEOC GUIDANCE**

   In 2013, the EEOC updated its guidance for employers concerning specific disabilities including: cancer, diabetes, epilepsy, and intellectual disabilities. The guidance addresses common questions or concerns including what type of reasonable accommodations may be appropriate, steps to prevent harassment, and examples of permissive medical inquiries. The guidance can be found on the EEOC's website (www.eeoc.gov).

6. **INDEFINITE LEAVE AS A REASONABLE ACCOMMODATION**

   Presently the law is unsettled as to the issue of indefinite leave as a reasonable accommodation. The EEOC takes the position that an employer generally cannot deny a request for extended leave, even if the employee cannot provide a fixed date of return. This interpretation is inconsistent with several federal court decisions.

20. Immigration

A. BACKGROUND

The Immigration and Nationality Act of 1990 (INA) provides for multiple categories of temporary and permanent visas that permit non-U.S. citizens to visit, study, work and reside in the United States. Many of the temporary and permanent work visas require the prospective employer to sponsor the foreign national for that visa type. In addition to enumerating visa categories, federal immigration laws also impose regulatory compliance obligations on all employers in the United States, regardless of whether the employer sponsors foreign nationals for work visas. Pursuant to the Immigration Reform and Control Act of 1986 (IRCA) employers are prohibited from hiring or continuing to employ foreign nationals who lack authorization to work in this country. That law requires employers to verify the identity and work authorization of all new hires, and it establishes civil and criminal penalties for noncompliance. The IRCA, which was amended by the Immigration Act of 1990 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, establishes a system of employment eligibility verification procedures that all employers must follow when filling a job. Employers are obliged to be an integral part of the government's efforts to reduce illegal immigration. (See Chapter 20-15 for the Form I-9 Employment Eligibility Verification)

Note: On March 1, 2003, the former Immigration and Naturalization Service (INS) ceased to exist. The functions formerly handled by INS now are carried out by no less than four separate government agencies under the Department of Homeland Security (DHS). The United States Citizenship and Immigration Services (USCIS or CIS) is primarily responsible for immigration benefits. Such benefits include the adjudication of family and employment-based visa petitions, naturalization and citizenship applications, and issuance of employment authorization and permanent residence documents. Immigration law compliance enforcement functions are carried out by a separate agency, the Immigration and Customs Enforcement (ICE), which has responsibility over the interior enforcement of immigration law and deportation functions, as well as investigations and detention responsibilities.

B. HOW THE LAW WORKS

1. IMMIGRATION COMPLIANCE

a. Coverage

IRCA makes it unlawful for any employer in the United States to knowingly "hire or to recruit or refer for a fee" or to knowingly "continue to employ" an individual who lacks authorization to be employed in the United States. The law applies to any employee hired after November 6, 1986. Employees hired prior to November 7, 1986, are "grandfathered," and their status need not be verified.

b. Verification Provisions

(1) The Employer's Obligations

Employers must require all newly-hired employees to confirm their identity and eligibility to work in the United States. This verification must occur within a specified time frame from the hire date. Employers must further record their verification effort on a designated *Form I-9 – Employment Eligibility Verification*. That form must be retained for a specified time, even after the employment relationship has ended, and it must be made available to federal agents in the event of an audit or inspection. These compliance requirements apply to every new employee regardless of citizenship or alienage, even if there is no doubt as to the individual's identity and employment authorization.

To confirm identity and employment eligibility, every new hire must produce an original document or a combination of documents that are designated by the federal government to satisfy that requirement. A sample *Form I-9 and Lists of Acceptable Documents* is at the end of this chatper. The Form, Lists for Acceptable Documents, and the official form Instructions are also available on the website of the USCIS at www.uscis.gov. The employer must accept whatever document or combination of documents from the Lists that the employee offers, so long as the document is original, unexpired, relates to the employee and shows no signs of tampering / counterfeiting. The employee, not the employer, chooses the document(s) to be presented. The verification requirement may be met by producing one document from List A (documents which establish both identity and employment eligibility), or by producing one document from List B (identity only) plus one from List C (employment eligibility only).

(2) Revisions to the Form I-9 and the List of Acceptable Documents

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), enacted September 30, 1996, amended the Immigration and Naturalization Act (Act) to require reduction in the number of documents acceptable for completion of Form I-9. IIRIRA mandated these changes take effect by September 30, 1997. In response, on September 30, 1997, the former Immigration and Naturalization Service (INS) implemented an interim policy until the agency was ready to fully implement the changes mandated under IIRIRA. However, it was not until November 2007 that the mandated changes in fact occurred. The USCIS has released a revised *Form I-9 – Employment Eligibility Verification, and a new M-274 – Handbook for Employers, Instructions for Completing the Form I-9.*

The current Form I-9 has a revision date of 10/21/2019 in the lower left-hand corner of the form. Employers must use this most recent version of the Form I-9; no prior versions of the form can be used anymore, even for recording re-verification of expiring work authorization. Employers who fail to use the most recent version of the Form I-9 may incur civil fines.

The revised Form I-9 is also available in Spanish, but that Spanish version may only be completed by employers located in Puerto Rico. Employers in the 50 states and other U.S. territories may use the Spanish version as a translation guide for Spanish-speaking employees but must complete the English version.

USCIS advised employers that Puerto Rico birth certificates issued prior to July 1, 2010, are not acceptable as a valid List C document for I-9 documentation effective October 31, 2010. I-9 verifications completed prior to this date using birth certificates from Puerto Rico remain valid and do not have to be re-verified.

Employers may want to take this opportunity to audit their existing I-9s and review their current policies and procedures.

(3) Time Limits

To record the verification process, the newly hired employee must complete and sign Section 1 of Form I-9 by the first day of employment. Employees can only begin work if, on the first day of employment, they are able to complete and sign Section 1 of the I-9 Form attesting that they are a U.S. citizen, noncitizen national of the U.S., lawful permanent resident, or other alien already authorized to work in the United States. After the employee has completed Section 1, the employer must then physically examine the required original document(s) and record information about the document(s) in Section 2 of Form I-9 within three business days of the first day of work for pay, or before work commences if the employment lasts less than three days. In certain very limited instances, employees may produce a receipt from the appropriate government agencies proving that an application for an acceptable replacement document has been made. If the employee submits a receipt showing that an application has been filed for the replacement document(s), the employee must be given 90 days from presenting the receipt to produce the original replacement document and complete the
I-9 verification.

If employees cannot complete the I-9 verification within the allowable time frame, the employer cannot continue to employ them. Employees pre-verified by a state government employment agency and hired in conjunction with a job order filed with that agency need not be verified by the employer, provided that the employer complies with special documentary requirements applicable to these limited situations.

In certain circumstances, foreign nationals may only have temporary work authorization which will expire at a specified date. If the employer wants to continue the person's employment beyond that expiration date, the employer must re-verify continued employment eligibility on or before that expiration date. The employee must present an unexpired, original document either from List A or from List C to confirm continued work authorization. Re-verification should be completed

using the newest version of the Form I-9 rather than completing Section 3 of the prior I-9 version.

(4) Record Retention

The completed Form I-9 must be retained for the duration of the individual's employment. Since the form contains personal information about the employee, the form should be retained in a secure location to prevent the unauthorized access to that information. Even after the employment relationship has ended, employers must continue to retain the Form I-9 for a specified period of time. The Form I-9 of terminated employees must be retained for a period of three years from the date of hire or one year from the termination date, whichever date is further in the future. After the retention period is over, employers should destroy the Form I-9.

A new M-274 Handbook for Employers released July 17, 2017, provides guidance on Electronic Retention of Forms I-9. See https://www.uscis.gov/i-9-central/handbook-employers-m-274. See Chapter 9-2 for details.

c. Employer Sanctions

Employers who knowingly hire unauthorized workers are subject to civil penalties of $473 to $4,586 per alien for the first offense, and up to $22,297 per alien for the third offense. Criminal penalties are possible for employers found to have engaged in a pattern or practice of employing unauthorized workers or found to have engaged in harboring of illegal aliens or other criminal offenses. Such criminal sanctions can be imposed on the company as well as individual owners, managers, supervisors or others involved in the hiring decision or hiring process. The law further provides for civil fines of between $234 to $2,322 for each error or omission on the Form I-9 or for recordkeeping violations, regardless of whether the employee in question is authorized to work. Significant fines have been assessed and collected, particularly for repeat violations. All these civil fines can be adjusted for inflation on a yearly basis.

The Immigration and Customs Enforcement agency (ICE), USCIS, or the Justice Department officials may inspect I-9 Forms by giving employers at least three days advance notice. ICE may inspect an employer's premises without notice pursuant to a search warrant if it has probable cause to believe unauthorized aliens are being employed. In certain circumstances, an employer's written I-9 compliance policy and other documented good faith efforts to comply with the law may help reduce fines or penalties assessed against the employer.

d. Antidiscrimination Provisions

Under IRCA, as amended, employers may not discriminate in the employment process against applicants or employees due to their national origin, or due to their citizenship status if they are a U.S. citizen, lawful

permanent resident or other aliens with unrestricted authorization to work. Employers with four to fourteen employees are covered by these IRCA provisions. Employers with fifteen or more employees are subject both to the national origin provisions of Title VII of the Civil Rights Act of 1964 and IRCA's antidiscrimination provisions. All charges and complaints of discrimination must be filed within 180 days of the alleged action. IRCA charges are investigated by the Department of Justice's Immigrant and Employee Rights Section (formerly the Office of Special Counsel for Immigration-Related Unfair Employment Practices). Hearings are held before Administrative Law Judges with the power to assess civil fines, back pay, and attorney's fees.

2. SOCIAL SECURITY ADMINISTRATION

An employer is obligated to send Copy A of IRS Form W-2 to the Social Security Administration (SSA) by the last day of February to report wages and withholdings of all employees for the prior calendar year. Employers who file electronically are given until the last day of March to file W-2 wage reports. The SSA matches the employer data against its employee database and posts corresponding earnings credits to each employee's account.

In some cases, the SSA is not able to post earnings to a particular employee account due to discrepancies involving the worker's name and Social Security Number, or due to the fact that the SSN provided by the employee is not a valid number assigned by the SSA. When such a mismatch occurs, the wages are instead posted to a suspense account. Pursuant to the Internal Revenue Code employers may be subject to civil fines of $50 per violation when an employer continues to submit an employee's incorrect Social Security Number on a W-2 wage report after being notified by the Internal Revenue Service (IRS) that the SSN was incorrect.

If the SSA identifies an SSN mismatch, it may send "no-match" letters to employers. SSA letters typically provide instructions to the employer on the proper method of correcting the reported information and instruct employers to register an account on the SSA's dedicated website in order to retrieve the list of incorrect Social Security Numbers.

An employer who receives an SSA no-match letter must take steps to ensure that it provides corrected data to the SSA. An employer must also be mindful that its corrective actions comply with the range of laws protecting workers from employment discrimination. An SSA letter notifying an employer of a records discrepancy triggers the employer's obligation to investigate and attempt to resolve the mismatch. Standing alone, however, such a letter by itself does not put the employer on notice that its affected employees lack work authorization. An employer must give affected employees an opportunity to present corrective information and/or documents to resolve the discrepancy.

During the course of such communication with the employee, the employer may obtain facts suggesting that the employee may not be authorized to work in the U.S. If the new information contradicts facts or documents provided by the employee on Form I-9 at the time of hire, the employer is obligated to

correct or re-verify the I-9 information. If the employer receives knowledge that the employee is not legally authorized to work in the U.S., the employer must not continue to employ the unauthorized individual. An employer's failure to attempt a resolution of the SSN mismatch may ultimately be used by ICE as evidence that the employer constructively knew (i.e., should have known) that the employee lacked work authorization.

Employers must exercise caution in handling SSN mismatch notices and are strongly encouraged to seek competent legal counsel when addressing such situations.

3. THE E-VERIFY PROGRAM

a. General Overview

In addition to conducting the mandatory I-9 verification at the time of hire, employers may further verify the employment authorization of new hires through the federal E-Verify program. E-Verify is an Internet-based system operated by USCIS in partnership with SSA. E-Verify is currently free to employers and is available in all 50 states, the District of Columbia, Puerto Rico, Guam and the U.S. Virgin Islands. Participation in the E-Verify program is voluntary, unless the employer is required to participate under a federal contract (see discussion below) or pursuant to local laws in a few states (such as North Carolina, among others). Further, if the E-Verify program confirms an individual's employment authorization, it creates a rebuttable presumption that the employer did not knowingly hire an unauthorized worker.

For the North Carolina E-Verify requirements, see Chapter 9, Other N.C. Employment Laws.

After completing a Form I-9 for a new employee, employers enrolled in the E-Verify program submit an electronic query that includes information from Sections 1 and 2 of Form I-9. If an employer participates in E-Verify, all List B documents presented for I-9 verification must contain a photo of the employee and Section 1 must list the employee's SSN. Employers must submit verification queries for newly hired employees no later than the third business day after their employment began.

After submitting the query, the E-Verify system will generate an automated response whether the individual is authorized to work in the U.S. If the employment authorization could not be immediately confirmed, the E-Verify system will issue one of two messages: 1) DHS Verification in Process, or 2) Tentative Non-confirmation (TNC) of the employee's employment authorization. Upon receipt of a DHS Verification in Process message, the employer must check back every 24 hours until the employee's status is updated to either *Employment Authorized or Tentative Non-confirmation*. This usually occurs within three business days. If a Tentative Non-confirmation (TNC) message is received, employers must timely notify the affected employee as soon as possible within 10 working days from receiving the TNC, provide the employee with a Further Action Notice and review the

information with the employee in private and have them confirm whether the information listed at the top is correct. If the information was incorrect, close the E-Verify case and select the statement indicating the information was not correct; after the case is closed, create a new case for the employee with correct information. If the information was entered correctly, tell the employee they must decide whether to take action on the TNC by the 10th day after TNC is issued. If the employee does not give their decision by the end of the 10th federal government working day after E-Verify issued the TNC, then you close the case. If the employee chooses to contest the TNC, you must provide the employee with a Referral Date Confirmation, which provides details on the next step your employee must take. The employee then has eight federal workdays to resolve the TNC. During those eight days, employers may not take any adverse action against an employee based upon a TNC unless E-Verify issues a Final Non-confirmation. Unless required by a federal contract, employers can only use E-Verify on new hires from the date of enrollment in the program and must not go back to check employment eligibility for employees hired before the company enrolled in the E-Verify program.

An employer enrolled in the E-Verify program is required to post the English and Spanish notice provided by DHS indicating the company's participation in the program, as well as the Right to Work Poster issued by the DOJ's Immigrant and Employee Rights Section. Both of these notices must be clearly displayed in plain view at the hiring site(s) to inform prospective and current employees that the company is participating in the E-Verify program.

b. Federal Contractor E-Verify Requirement

Under amended Executive Order 12989, certain federal contracts awarded, and solicitations issued on or after September 8, 2009 will include a Federal Acquisition Regulation (FAR) E-Verify clause requiring contractors and subcontractors to use E-Verify. In such cases, the contractor / subcontractor is required to verify the employment authorization of all new hires and of existing employees assigned to work on the federal contract. Federal contractors in those cases also have the option of verifying their entire workforce, which includes all other existing company employees regardless of whether they are assigned to work on the federal contract.

If a company becomes subject to this FAR E-Verify clause, it must enroll in E-Verify as a federal contractor within 30 calendar days of the award date of a contract that contains the FAR E-Verify clause. The company must then begin verifying all newly hired employees within 90 calendar days of the enrollment date and must initiate verification of all existing employees assigned to the contract within 90 calendar days of the enrollment date (if the company chooses to verify the entire workforce, it will have 180 days from enrollment date to do so). Once the company conducts E-verify checks on the existing employees (either those assigned to the contract or the entire workforce), there may be instances where the employer must complete a new Form I-9. For instance, a new I-9 will be required if the employee had presented a List B document that did not have a photo when completing the previous Form I-9;

or presented an expired document on a previous Form I-9 that allowed for such expired documents.

Some employees are exempt from the federal contractor E-Verify requirement to verify current employees. These include: (1) employees hired before November 7, 1986 and continuing in employment; (2) those previously confirmed as authorized to work through the E-Verify program; (3) employees who only perform support work such as general company administration or indirect or overhead functions and do not perform any substantial duties applicable to the contract (unless the company decides to E-Verify the entire workforce); and (4) employees who have an active confidential, secret, or top secret security clearance in accordance with the National Industrial Security Program Operating Manual (NISPOM) or Homeland Security Presidential Directive-12 (HSPD-12) credential.

Certain organizations that are awarded a federal contract containing the FAR E-Verify clause qualify for an exception. This exception only requires the use of E-Verify for new hires and existing employees who work directly under a covered contract. These organizations include: (1) state and local governments; (2) institutions of higher education (as defined at 20 U.S.C. § 1001(a)); (3) governments of federally recognized Native American tribes; and (4) sureties performing under a takeover agreement entered into with a federal agency under a performance bond.

4. VISA OVERVIEW

Employers who seek to hire a foreign national must ensure that the candidate possesses the necessary legal authority to work in the United States. Most employment-based visas require the employer's sponsorship and the approval from the USCIS before the employment in the United States can begin.

a. Terminology and Documents

(1) *Temporary versus Permanent* - Foreign nationals who seek to enter the U.S. for a temporary stay are known as "nonimmigrants" and those who seek to reside in the U.S. permanently are known as "immigrants." It is generally easier and faster to gain entry as a nonimmigrant than as an immigrant.

(2) *Visas* - A visa is a stamp placed in a passport by a U.S. consular officer overseas, and grants authorization to the visa holder to request admission into the U.S. for a specified purpose or activity (e.g. employment, study, visit). A valid, unexpired visa is usually needed to gain entry into the U.S. as a nonimmigrant, with certain exceptions for visa-exempt short-term visitors and Canadian citizens.

(3) *Temporary Work Visas* - Most of the nonimmigrant visa categories provide employment authorization that is limited to a specific job with a specific employer. In most cases, a person admitted in one of these visa categories will not have a photo identification card as evidence of work authorization. Instead, the work authorization is inherent in the visa status, which is shown on the Form I-94 Arrival Document issued

to nonimmigrant holders upon entry into the U.S., or on a USCIS-issued Form I-797 Approval Notice.

(4) *Immigrant Visas (Green Cards)* - A person who has been lawfully admitted as an immigrant is known as a "permanent resident" and receives a Permanent Resident Card that is commonly called a "green card". Similar cards are issued to "conditional residents" and "temporary residents." These cards authorize employment with any employer, and they may or may not have an expiration date.

(5) *Employment Authorization Document (EAD)* - The USCIS issues photo identification cards authorizing employment to foreign nationals in a wide variety of circumstances. These cards authorize employment with any employer, and they always have an expiration date. They sometimes contain specific limitations on employment, such as a maximum of 20 hours per week for a student during the school year.

b. Selected Nonimmigrant Visa Categories

(1) Short-Term Visitors

(a) *Visa Waiver* - Citizens of a limited number of countries can enter the U.S. for business visits or tourism without a visa and stay up to 90 days, but they are not authorized to perform work. A person (other than a Canadian citizen) who lawfully enters without a visa will have a notation in the passport of "WB" if admitted for business and "WT" if admitted as a tourist. A person who enters in WB or WT status without a visa cannot extend the stay beyond 90 days, cannot change to any other visa status without leaving the country, and cannot receive any compensation from a U.S. source, except that WB business visitors can receive reimbursement or a reasonable allowance for expenses of their stay. Except for Canadian citizens, visitors planning to enter under the Visa Waiver Program must first register with the US CBP's Electronic System for Travel Authorization ("ESTA") at least 72 hours before traveling to the United States.

(b) *B-1 and B-2 Visitor Visas* – Unless covered by the Visa Waiver Program noted above, citizens of most countries must obtain B-1 visas to enter the U.S. for business purposes, or B-2 visas to enter as tourists. A person who is eligible to enter without a visa may nevertheless wish to obtain a B-1 or B-2 visa in order to be eligible for extension of stay or change of visa status after entry. The B-1 visa and its visa waiver counterpart do not authorize employment on a U.S. payroll, and they are not appropriate for active management of a U.S. enterprise. Appropriate activities include: (1) engaging in commercial transactions which do not involve gainful employment in the U.S. (such as taking orders for goods manufactured abroad); (2) negotiating contracts; (3) consulting with business associates; (4) participating in scientific, educational, professional or business

conventions, conferences or seminars; (5) undertaking independent research; or (6) litigating in U.S. courts.

(c) *Special Rules for Canadian Business Visitors* - The North American Free Trade Agreement (NAFTA) authorizes Canadian business visitors to enter the U.S. in B-1 visa status without a visa and to engage in a broader range of activities than non-Canadians who enter in B-1 or WB status.

(2) Selected Nonimmigrant Visas for Employment

(a) *H-1B Visas (Specialty Workers/Professionals)*

The H-1B visa category allows employment in a broad range of specialized "professional" occupations, without any limitations on the nationality of the employee or the employer, and without any need for a prior employment relationship between the employee and a foreign office or affiliate of the U.S. employer. The employer must file a visa petition with the USCIS before the candidate is eligible to begin employment. All H-1B visa petitions and extension applications require that the employer attest to the U.S. Department of Labor that the employer will pay the H-1B employee according to prevailing wage standards, and that the employer will abide by other workforce protection standards.

An H-1B visa is available to a person who has at least a bachelor's level university degree in a specialized field (or work experience equivalent in some circumstances) relevant to the job, and who will work in an occupation where that specific degree or a closely-related degree is the normal minimum requirement for employment. The spouse and unmarried minor children of an H-1B worker are admitted in H-4 status for the same duration of stay as the H-1B worker. While they may attend school, H-4 holders are generally not authorized to work in the U.S., except in certain circumstances where the H-1B visa holder has already passed certain milestones in the employment-based green card sponsorship process, which will then allow the H-4 spouse to apply for temporary work authorization.

The maximum initial duration of H-1B visa status is 3 years. An H-1B visa can be extended to a maximum duration of 6 years. Extensions beyond 6 years are available only in limited circumstances.

(b) *TN Visa*

The USMCA (formerly NAFTA) authorizes Canadian and Mexican citizens to enter the U.S. in TN visa status for employment in certain professional occupations. The TN visa category is similar to the H-1B, but its use is limited to the list of occupations that have been specified by the USMCA treaty. Canadian TN applicants may apply directly at the U.S. border and receive same-day adjudication. Mexican citizens must first obtain a TN visa at a U.S. Embassy or

Consulate.

With several exceptions, a bachelor's level university degree or a professional license is the minimum qualification necessary for TN visa status. TN status is granted in 3year increments and can be renewed repeatedly in 3-year increments. The spouse and unmarried minor children of a TN worker are admitted in TD status for the same duration as the TN worker, and they may attend school. TD visa holders are not authorized to work in the U.S.

(c) *L-1 Visa (Intra-Company Transferee)*

The L-1 visa is appropriate for the transfer of employees between corporate entities of a multinational company. An L-1 visa is available to intra-company transferees who possess prior qualifying work experience within the foreign operation of a multinational company in a managerial, executive, or specialized knowledge position. With some exceptions, L-1 visas do not require that the candidate possess a specific educational background.

L-1 visa authorization may be granted for a total of 5 to 7 years, depending upon the L-1 category. The spouse and unmarried minor children of an L-1 worker are admitted in L-2 status for the same duration of stay as the L-1 worker, and they may attend school. L-2 spouses may request employment authorization.

(d) *F-1 Student Practical Training*

Upon graduation from a U.S. college or university, F-1 student visa holders may obtain work authorization valid for up to 12 months. Known as Optional Post-Curricular Practical Training (OPT), such authorization must be endorsed by the university's foreign student advisor, but the F-1 student/graduate must still apply for and be issued a USCIS-approved Employment Authorization Document (EAD) before engaging in employment. F-1 students who are currently enrolled in university studies on a full-time basis are permitted to engage in employment prior to graduation in some circumstances but must receive prior authorization from the university.

F-1 students who received a bachelor's or higher degree in science, technology, engineering, or mathematics (a so-called STEM degree) may be eligible for an additional 24-month extension of their OPT work permit if they work for a company that is enrolled in and is using the E-Verify program. A STEM student may change employers while holding the 24-month OPT extension, but the new employer must also be using the E-Verify program before the student may start employment with the new employer.

(e) *H-3 Visa (Trainee)*

The H-3 visa is available to a person who will receive training in

the U.S. that is not available in the trainee's home country, and that will be useful in pursuing employment in their home country. An H-3 trainee can engage in productive employment while in the U.S., but productive work must be purely incidental to the training, and the H-3 holder must not displace U.S. workers. The H-3 visa requires pre-approval of a visa petition from the USCIS. The initial duration of an H-3 visa is up to one year and can be renewed for one additional year. The spouse and unmarried minor children of an H-3 trainee are admitted in H-4 status for the same duration as the trainee. H-4 visa holders are not authorized to work in the U.S.

(f) *J-1 Visa (Exchange Visitor)*

The J-1 visa can be used for many purposes, including training of a foreign worker by a U.S. company. When a J-1 visa is obtained for the purpose of training, it generally permits the same range of activities as the H-3 visa. The primary purpose for coming to the U.S. must be to receive training, but some productive work is allowed.

A J-1 visa for training is limited to a maximum of 18 months and cannot be extended. The spouse and unmarried minor children of a J-1 trainee are admitted in J-2 status. In some circumstances a person who has J-1 or J-2 status will be barred from obtaining H-1B or L-1 visa status or permanent residence until that person has resided abroad for two years.

(g) *H-2A and H-2B Temporary Unskilled Labor*

Employers may utilize such visas to fill a temporary non-professional labor shortage in agricultural (H-2A) or non-agricultural (H-2B) occupations. An employer must demonstrate that its need is based upon a temporary labor market shortage associated with a seasonal, peak load, or non-recurring event. Employers must conduct a labor market test before applying for H-2 visa authorization. Visas may be issued for durations of up to one year.

C. ACTION REQUIRED BY EMPLOYERS

Form I-9 Compliance, Employment Eligibility Verification, must be completed for each employee hired after November 6, 1986. The employee provides all information to complete Section 1 and signs where indicated. The employer reviews the document(s) provided by the employee and completes and signs Section 2. Employers are not required to retain photocopies of the document(s) presented unless they are required to use E-Verify and the employee presents a Permanent Resident Card, Employment Authorization Document, US passport, or US passport card. If retained, the copied documents must be kept with the completed Form I-9 and must be made available for inspection by a federal official. Form I-9 must be

retained for as long as the employment relationship exists, and after employment ends, the form must be retained for three years from the date of hire or one year following separation, whichever is later. Forms I-9 should not be stored in the employee's personnel file but should be retained in a separate I-9 file. Copies of the Form I-9 and "Handbook for Employers (Instructions for Completing Form I-9)" (Form M-274) are available from the USCIS website at https://www.uscis.gov/i-9.

D. TIPS FOR EMPLOYERS

1. SUGGESTED PROCEDURES

Suggestions for successful and efficient completion of the I-9 forms:

- **Ask the new employee to fill out Section 1 of the form on or before the first day of employment, but only after the job offer is accepted. Ensure it is legible, an attestation box is checked, all required data is listed, and it is signed and dated.**
- **Examine the original document(s) offered to show identity and work eligibility/authorization. Make sure each document is unexpired, appears authentic, relates to the employee, is referenced on the Lists of Acceptable Documents, and shows no signs of tampering / counterfeiting.**
- **Complete Section 2 within three business days of the first day of work for pay and record the required information from the document(s) presented.**
- **You may copy the document(s) presented and attach them to the form (if you elect to keep copies, you must do so consistently for all new hires); however, this step is not required by law with exceptions previously noted for employers required to use E-Verify. There is a little-known North Carolina law that makes it illegal to photocopy a driver's license in color. However, per NC Statute 20-30, you may make copies in black and white for I-9 purposes. Finally, the federal immigration laws expressly permit employers to copy - and retain copies of - documents presented for I-9 verification (but only for that purpose) notwithstanding any other law (state or federal) to the contrary.**
- **Retain all I-9 Forms in a central location, separate from personnel records.**
- **Contact your employer association or immigration counsel if you are notified of an ICE inspection. Do not consent to an immediate inspection. Use the 3-day notice period to audit your I-9 files and identify any potential problems.**

2. POINTS TO REMEMBER

- **Every new employee must confirm their identity and eligibility to work.**
- **Maintain a consistent written I-9 verification policy in the organization's policy manual, not in the employee handbook.**
- **Form I-9 is required only for people who actually begin work; you should not complete the form on job applicants.**
- **Never specify which document(s) you prefer to establish employment eligibility and/or identity. The employee must be given the opportunity to present any document(s) among those listed on the Lists of Acceptable Documents. For employers using E-Verify, if the employee presents a List B document, it must contain a photo.**
- **Work authorizations that expire (e.g., temporary EADs) must be re-verified on or before the expiration date. Employers may either complete the re-verification part of Section 3 of Form I-9 (if the original I-9 version date is July 17, 2017), or complete a new I-9 form to record the re-verification. Note: The expiration date on a Permanent Resident Card or Resident Alien Card (colloquially referred to as "green card") does not mean that an individual's employment authorization has expired, only that the card must be renewed. Green Cards must not be re-verified. See the new M-274 issued July 7, 2017 Chapter 3: Completing Section 3 of Form I-9 https://www.uscis.gov/i-9-central/handbook-employers-m-274).**
- **Employers must take appropriate action when "no match" letters are received from the Social Security Administration. [See Section II, Social Security Administration of this chapter.]**

Form I-9:

https://www.uscis.gov/sites/default/files/document/forms/i-9-paper-version.pdf

Employment Eligibility Verification

Department of Homeland Security
U.S. Citizenship and Immigration Services

USCIS
Form I-9
OMB No. 1615-0047
Expires 10/31/2022

►START HERE: Read instructions carefully before completing this form. The instructions must be available, either in paper or electronically, during completion of this form. Employers are liable for errors in the completion of this form.

ANTI-DISCRIMINATION NOTICE: It is illegal to discriminate against work-authorized individuals. Employers **CANNOT** specify which document(s) an employee may present to establish employment authorization and identity. The refusal to hire or continue to employ an individual because the documentation presented has a future expiration date may also constitute illegal discrimination.

Section 1. Employee Information and Attestation *(Employees must complete and sign Section 1 of Form I-9 no later than the **first day of employment**, but not before accepting a job offer.)*

Last Name *(Family Name)*	First Name *(Given Name)*	Middle Initial	Other Last Names Used *(if any)*

Address *(Street Number and Name)*	Apt. Number	City or Town	State	ZIP Code

Date of Birth *(mm/dd/yyyy)*	U.S. Social Security Number	Employee's E-mail Address	Employee's Telephone Number
	☐☐☐ - ☐☐ - ☐☐☐☐		

I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.

I attest, under penalty of perjury, that I am (check one of the following boxes):

☐ 1. A citizen of the United States

☐ 2. A noncitizen national of the United States *(See instructions)*

☐ 3. A lawful permanent resident (Alien Registration Number/USCIS Number): _____

☐ 4. An alien authorized to work until (expiration date, if applicable, mm/dd/yyyy): _____
Some aliens may write "N/A" in the expiration date field. *(See instructions)*

Aliens authorized to work must provide only one of the following document numbers to complete Form I-9: An Alien Registration Number/USCIS Number OR Form I-94 Admission Number OR Foreign Passport Number.

1. Alien Registration Number/USCIS Number: _____
OR
2. Form I-94 Admission Number: _____
OR
3. Foreign Passport Number: _____
Country of Issuance: _____

QR Code - Section 1
Do Not Write In This Space

Signature of Employee	Today's Date *(mm/dd/yyyy)*

Preparer and/or Translator Certification (check one):

☐ I did not use a preparer or translator. ☐ A preparer(s) and/or translator(s) assisted the employee in completing Section 1.

(Fields below must be completed and signed when preparers and/or translators assist an employee in completing Section 1.)

I attest, under penalty of perjury, that I have assisted in the completion of Section 1 of this form and that to the best of my knowledge the information is true and correct.

Signature of Preparer or Translator	Today's Date *(mm/dd/yyyy)*

Last Name *(Family Name)*	First Name *(Given Name)*

Address *(Street Number and Name)*	City or Town	State	ZIP Code

STOP *Employer Completes Next Page* STOP

Section 2. Employer or Authorized Representative Review and Verification

(Employers or their authorized representative must complete and sign Section 2 within 3 business days of the employee's first day of employment. You must physically examine one document from List A OR a combination of one document from List B and one document from List C as listed on the "Lists of Acceptable Documents.")

Employee Info from Section 1	Last Name *(Family Name)*	First Name *(Given Name)*	M.I.	Citizenship/Immigration Status

List A Identity and Employment Authorization	OR	List B Identity	AND	List C Employment Authorization
Document Title		Document Title		Document Title
Issuing Authority		Issuing Authority		Issuing Authority
Document Number		Document Number		Document Number
Expiration Date *(if any) (mm/dd/yyyy)*		Expiration Date *(if any) (mm/dd/yyyy)*		Expiration Date *(if any) (mm/dd/yyyy)*
Document Title				
Issuing Authority				
Document Number				
Expiration Date *(if any) (mm/dd/yyyy)*				
Document Title				
Issuing Authority				
Document Number				
Expiration Date *(if any) (mm/dd/yyyy)*				

Additional Information

QR Code - Sections 2 & 3
Do Not Write In This Space

Certification: I attest, under penalty of perjury, that (1) I have examined the document(s) presented by the above-named employee, (2) the above-listed document(s) appear to be genuine and to relate to the employee named, and (3) to the best of my knowledge the employee is authorized to work in the United States.

The employee's first day of employment *(mm/dd/yyyy)*: _____ ***(See instructions for exemptions)***

Signature of Employer or Authorized Representative	Today's Date *(mm/dd/yyyy)*	Title of Employer or Authorized Representative

Last Name of Employer or Authorized Representative	First Name of Employer or Authorized Representative	Employer's Business or Organization Name

Employer's Business or Organization Address (*Street Number and Name*)	City or Town	State	ZIP Code

Section 3. Reverification and Rehires *(To be completed and signed by employer or authorized representative.)*

A. New Name *(if applicable)*			**B.** Date of Rehire *(if applicable)*
Last Name *(Family Name)*	First Name *(Given Name)*	Middle Initial	Date *(mm/dd/yyyy)*

C. If the employee's previous grant of employment authorization has expired, provide the information for the document or receipt that establishes continuing employment authorization in the space provided below.

Document Title	Document Number	Expiration Date *(if any) (mm/dd/yyyy)*

I attest, under penalty of perjury, that to the best of my knowledge, this employee is authorized to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.

Signature of Employer or Authorized Representative	Today's Date *(mm/dd/yyyy)*	Name of Employer or Authorized Representative

LISTS OF ACCEPTABLE DOCUMENTS
All documents must be UNEXPIRED

Employees may present one selection from List A
or a combination of one selection from List B and one selection from List C.

LIST A Documents that Establish Both Identity and Employment Authorization	OR	LIST B Documents that Establish Identity	AND	LIST C Documents that Establish Employment Authorization
1. U.S. Passport or U.S. Passport Card		**1.** Driver's license or ID card issued by a State or outlying possession of the United States provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address		**1.** A Social Security Account Number card, unless the card includes one of the following restrictions: (1) NOT VALID FOR EMPLOYMENT (2) VALID FOR WORK ONLY WITH INS AUTHORIZATION (3) VALID FOR WORK ONLY WITH DHS AUTHORIZATION
2. Permanent Resident Card or Alien Registration Receipt Card (Form I-551)		**2.** ID card issued by federal, state or local government agencies or entities, provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address		**2.** Certification of report of birth issued by the Department of State (Forms DS-1350, FS-545, FS-240)
3. Foreign passport that contains a temporary I-551 stamp or temporary I-551 printed notation on a machine-readable immigrant visa		**3.** School ID card with a photograph		**3.** Original or certified copy of birth certificate issued by a State, county, municipal authority, or territory of the United States bearing an official seal
4. Employment Authorization Document that contains a photograph (Form I-766)		**4.** Voter's registration card		**4.** Native American tribal document
5. For a nonimmigrant alien authorized to work for a specific employer because of his or her status: **a.** Foreign passport; and **b.** Form I-94 or Form I-94A that has the following: (1) The same name as the passport; and (2) An endorsement of the alien's nonimmigrant status as long as that period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the form.		**5.** U.S. Military card or draft record		**5.** U.S. Citizen ID Card (Form I-197)
		6. Military dependent's ID card		**6.** Identification Card for Use of Resident Citizen in the United States (Form I-179)
		7. U.S. Coast Guard Merchant Mariner Card		**7.** Employment authorization document issued by the Department of Homeland Security
		8. Native American tribal document		
		9. Driver's license issued by a Canadian government authority		
		For persons under age 18 who are unable to present a document listed above:		
		10. School record or report card		
		11. Clinic, doctor, or hospital record		
		12. Day-care or nursery school record		
6. Passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with Form I-94 or Form I-94A indicating nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI				

Examples of many of these documents appear in the Handbook for Employers (M-274).

Refer to the instructions for more information about acceptable receipts.

STATE OF NORTH CAROLINA
DEPARTMENT OF TRANSPORTATION

MICHAEL F. EASLEY
GOVERNOR

DIVISION OF MOTOR VEHICLES

LYNDO TIPPETT
SECRETARY

February 5, 2002

Mr. A. Bruce Clarke
President and CEO
Capital Associated Industries, Inc
PO BOX 41910
Raleigh NC 27629-1910

Dear Mr. Clark:

This is in response to your letter requesting permission to photocopy North Carolina driver's licenses.

The Division of Motor Vehicles has no objection to your photocopying North Carolina driver's licenses to comply with the Immigration Reform and Control Act. We would appreciate your destroying the copies when they are of no use to your office in order to maintain the integrity of the documents and our system.

If I can be of further assistance, please let me know.

Sincerely,

Carol Howard
Commissioner

CH:pg

MAILING ADDRESS:
NC DIVISION OF MOTOR VEHICLES
DRIVER LICENSE SECTION
INFORMATION SERVICES BRANCH
3114 MAIL SERVICE CENTER
RALEIGH NC 27699-3114

TELEPHONE: 919-715-7000

WEBSITE: WWW.DMV.DOT.STATE.NC.US

LOCATION:
DMV HEADQUARTERS BUILDING
1100 NEW BERN AVENUE
RALEIGH NC

21. Group Health Insurance Continuation: COBRA, N.C. Law and HIPAA

A. BACKGROUND

North Carolina and other states have long required employers to offer group insurance continuation and conversion privileges to former employees. These rights are generally of limited duration and designed to provide a source of individual coverage.

The Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA), a federal law, passed by Congress in part to require employers to offer former employees and dependents access to group health benefits for a temporary extended period. Certain employers who sponsor group health insurance plans must provide certain employees and family members the option to continue health insurance (including dental and vision) at rates up to 102% of the employers' cost of the plan after coverage would normally be lost. The Health Insurance Portability and Accountability Act of 1996 (HIPAA), a federal law enacted on August 21, 1996 was enacted to regulate the availability and breadth of group health plans and to provide other participant protections in group health insurance plans. Furthermore, HIPAA relates to standards regarding individuals' privacy rights and security requirements with respect to their personal health information.

B. HOW THE LAW WORKS

1. CONSOLIDATED OMNIBUS BUDGET RECONCILIATION ACT (COBRA)

a. Coverage

All private sector employers who normally employ 20 or more employees on at least 50 percent of its typical working days during the prior calendar year are subject to COBRA. Part-time employees are counted as fractional employees and leased employees are also counted as employees once they have been employed for 12 months.

b. Election of Coverage

Individuals provided insurance under the employer's group health plan are entitled to elect COBRA coverage upon the occurrence of a "qualifying event." Anyone who was a plan beneficiary the day before the qualifying event (e.g., employee, spouse, former spouse, or dependent) or any child who is born to or placed for adoption with a covered employee during a period of COBRA continuation coverage, may elect coverage.

In addition, anyone who receives health coverage by virtue of the performance of services for the employer is a covered employee (this includes independent contractors who receive health care coverage under their contract). COBRA coverage must be selected during an "election period." The election period

is the 60-day period which begins on the later of (1) the date coverage terminates or (2) the date that the "election" notice, (formerly referred to as the "qualifying event" notice (below)), is given to the qualified beneficiary. If the qualified beneficiary is mentally incompetent at the time the COBRA election must be made, court decisions indicate that the election period must be extended until a guardian can be appointed. Unless the election provides otherwise, when an employee, spouse, widow, or divorced spouse elects coverage, that election includes all qualified persons who would otherwise lose their coverage. However, each qualified beneficiary may make elections among the group health options available, or may refuse coverage, without affecting the rights of others.

c. Qualifying Events

COBRA's election provisions are triggered when a "qualifying event" results in a loss of coverage.

For a covered employee, a qualifying event may include:

- a reduction of hours
- the termination of employment (unless for gross misconduct)
- bankruptcy of the employer under title II of the Bankruptcy Code, but only with respect to retirees

For a covered spouse or dependent child, a qualifying event may include:

- the death of a covered employee
- the termination (unless for gross misconduct) or reduction of hours of a covered employee
- a divorce or legal separation of the covered employee from the employee's spouse
- the covered employee becomes entitled to Medicare
- a child is no longer a dependent under the terms of the insurance plan
- bankruptcy of the employer under title 11 of the Bankruptcy Code, but only with respect to retirees.

d. Notice Rules

Plan administrators are responsible for providing four types of COBRA notices: a general notice, a qualifying event notice, a notice of unavailability, and a termination notice. Participants are also required to notify the plan administrator of certain events. The following is a brief description of requirements for each notice.

(1) General Notice. Administrators of group health plans subject to COBRA must provide written notice to each covered employee and spouse of the right to continuation of coverage by the earlier of: (a) 90 days after coverage commences, or, if later, 90 days after the plan becomes subject to COBRA; or (b) the first date the plan administrator

is required to provide an election notice to the employee, spouse, or dependent after being notified of a qualifying event by the employer.

The general notice must be written in a manner calculated to be understood by the average participant, and contain:

(a) The plan name under which continuation coverage is available and the name, address, and telephone number of the party (or parties) from whom additional information can be obtained;

(b) A general description of the continuation coverage, including:

- Classes of individuals who may become qualified beneficiaries;
- Types of qualifying events;
- The obligation of the employer to notify the plan administrator of certain qualifying events;
- Maximum period of continuation coverage;
- When and what may extend coverage beyond the applicable maximum period; and
- The plan's premium payment requirements for continuation coverage;

(c) An explanation of the qualified beneficiary's responsibilities to notify the plan administrator of divorce, legal separation, or that a child has ceased to be a dependent under the terms of the plan, and a description of such notice procedures;

(d) An explanation of the qualified beneficiary's responsibilities and the procedures concerning notice to the plan administrator of a disability determination by the Social Security Administration ("SSA") that occurs when the qualified beneficiary is receiving continuation coverage and is deemed disabled;

(e) An explanation of the importance of updating with the plan administrator addresses of all participants or beneficiaries; and

(f) A statement that the notice is not a full description of continuation coverage and that more information is available from plan administrator or summary plan description ("SPD").

The plan administrator may send a single notice addressed to both the covered employee and the spouse, if the most recent information indicates the two reside together, and the spouse's coverage commences after the covered employee's commenced, but not later than the date the general notice is required to be sent to the covered employee. Alternatively, the general notice requirement can be satisfied if all the above information is included in a SPD that is provided in accordance with the applicable timing provisions noted above. Delivery must be in a manner reasonably calculated

to ensure actual receipt by participants, beneficiaries, and other specified individuals.

(2) Notice of Qualifying Event. A notice of a qualifying event must be provided to the plan administrator either by the employer or the covered employee and qualified beneficiaries depending on the type of qualifying event. Moreover, a group health plan must contain "reasonable notice procedures."

(a) Notice Requirement for Employers

The employer must notify the plan administrator of a group health plan subject to COBRA of a covered employee's death, termination (other than by reason of gross misconduct), reduction in hours of employment, Medicare entitlement, or, (if the covered individual is a retiree), the employer's bankruptcy. Such notice must generally be provided within 30 days of the date the qualified beneficiary loses coverage due to a qualifying event and it must contain sufficient information to enable the plan administrator to determine the plan, the covered employee, the qualifying event, and the date of the qualifying event.

(b) Notice Requirements for Covered Employees and Qualified Beneficiaries

Covered employees and qualified beneficiaries are required to provide notice to plan administrators of the following qualifying events if they wish to continue coverage:

- Divorce or legal separation;
- Dependent child ceases to be dependent of participant;
- Second qualifying event after the qualified beneficiary has become entitled to continuation coverage of 18 or 29 months;
- That the Social Security Administration ("SSA") determined a qualified beneficiary who is entitled to 18 months of continuation coverage was disabled at any time during the first 60 days of that 18 months; and
- That a qualified beneficiary previously determined disabled has subsequently been determined no longer disabled by the SSA.

Reasonable Procedures. A plan's notice procedures for employees' notice to the plan administrator will be deemed reasonable only if the procedures:

I. Are described in the SPD;

II. Specify the individual or entity designated to receive notice;

III. Specify the means by which notice may be given;

IV. Describe the information necessary to provide continuation coverage or extension; and

V. Comply with the timing provisions, content provisions, and the provisions outlining who may provide notice set forth in the Department of Labor ("DOL") regulations (specifically, 29 C.F.R. Section 2590.606-3.)

If the plan does not establish reasonable procedures for providing notice, an oral or written notice identifying a specific event, reasonably calculated to inform the person or unit that customarily handles benefit matters in a single-employer plan, will be deemed adequate notice.

Timing for Qualifying Event Notices. The time period for providing notice to the plan administrator by the covered employee or qualified beneficiary may not end before the date that is 60 days after the latest of:

I. The qualifying event;

II. The date the qualified beneficiary loses (or would lose) coverage as a result of the qualifying event; or

III. The date the qualified beneficiary is informed, through the furnishing of an SPD or a general COBRA notice, of both the responsibility and procedures for providing notice to the administrator.

Special Timing Rule for Disability Determination Notices. The time period for providing notice to the plan administrator by the covered employee or qualified beneficiary with respect to disability determinations made by the SSA may not end before the date that is 60 days after the latest of:

I. The date of the disability determination by the SSA;

II. The date on which the qualifying event occurs;

III. The date the qualified beneficiary loses (or would lose) coverage as a result of the qualifying event; or

IV. The date the qualified beneficiary is informed, through the furnishing of an SPD or a general COBRA notice, of both the responsibility and procedures for providing notice to the administrator.

Contents. A plan may have reasonable content requirements for the notices described above, but a notice may not be deemed untimely merely because it failed to contain all the required content if the plan administrator: (i) is unable to determine the correct plan, (ii) cannot determine who is the covered employee for which plan and/or the qualified beneficiaries, (iii) cannot determine whether there was a qualifying event or disability, and/or (iv)

the date on which the qualifying event (if any) occurred. A plan administrator may require additional information be provided within a reasonable time after receipt of a notice not meeting its' content requirements.

Who May Provide Notice. Any individual who is the covered employee, a qualified beneficiary with respect to the qualifying event, or any representative of either may provide notice, and notice by such person will satisfy the notice responsibilities for all related qualified beneficiaries with respect to the qualifying event, if so noted in the notice.

COBRA Election Notice. Upon receipt of a notice of a qualifying event from the employer or the qualified beneficiary, the plan administrator has 14 days to provide a COBRA election notice to the qualified beneficiaries. When the employer is the plan administrator, it has 44 days from the date of a qualifying event that is the employee's termination (other than by reason of gross misconduct), reduction in hours, death, Medicare entitlement, or, (if the covered individual is a retiree) the employer's bankruptcy to provide the COBRA election notice. The COBRA election notice must be written in a manner calculated to be understood by the average plan participant and must contain the following information:

I. Plan name and the name, address and telephone number of the party responsible for administering COBRA benefits;

II. The specific qualifying event that triggered the COBRA rights;

III. The identity of the qualified beneficiaries (either by status or name) entitled to COBRA benefits and the date on which coverage under the plan will terminate (or has terminated) if COBRA is not elected;

IV. Statement that each qualified beneficiary has an independent right to elect COBRA but that a covered employee or spouse may elect COBRA coverage on behalf of the other qualified beneficiaries and a parent or legal guardian may elect COBRA coverage on behalf of a minor child;

V. Explanation of the plan's procedures for electing COBRA coverage including the time period during which the election must be made and the date by which the election must be made;

VI. Explanation of the consequences of failing to elect or waiving COBRA coverage, including an explanation that the decision to elect or waive COBRA coverage may affect the future rights of qualified beneficiaries to portability of group health coverage, guaranteed access to individual health coverage, and special enrollment under HIPAA and a reference to where

a qualified beneficiary can get additional information about such rights, and the plan's procedures for revoking a waiver of the right to continue coverage before the date by which the election must be made;

VII. Description of the COBRA coverage that will be made available if elected and the date the coverage will begin (as an alternative, the notice may refer to the SPD);

VIII. The maximum period for which contribution coverage will be available, the specific termination date, and any events that could cause coverage to end sooner;

IX. Description of the events (if any) that COBRA coverage may be extended;

X. Description of the plan's requirements and procedures for qualified beneficiaries to give notice of a second qualifying event and disability determinations;

XI. Amount, if any, of the COBRA premiums the qualified beneficiary must pay;

XII. The due dates for payments, the qualified beneficiary's right to pay on a monthly basis, the grace periods for payments, the address to which payments should be sent, and the consequences of delayed or nonpayment;

XIII. The importance of keeping the plan administrator informed of each of the qualified beneficiaries' current address(es); and

XIV. Statement that the notice does not fully describe the continuation coverage or other rights under the plan and that more complete information regarding such rights is available in the SPD or from the plan administrator.

(3) Notice of Unavailability of Continuation Coverage. If a plan administrator receives notice from a covered employee and/or qualified beneficiary relating to a first or second event or determination of disability by the SSA regarding a covered employee and/or qualified beneficiary, and determines that such individual(s) are not entitled to continuation coverage, the plan administrator must provide such individual(s) with an explanation of why continuation coverage or extended continuation coverage is not available. This notice of unavailability must be written in a manner calculated to be understood by the average participant and must be furnished within 14 days after receipt of the notice by the covered employee and/or qualified beneficiary of the event.

(4) Notice of Termination of Coverage. If continuation coverage will terminate before the end of the maximum period, the plan administrator must provide notice of such termination to each qualified beneficiary. This notice of termination must be written in a manner

calculated to be understood by the average participant and must contain the following:

(a) Reason for early termination;

(b) Termination date; and

(c) Any rights to elect alternative group or individual coverage.

This notice of termination of coverage must be furnished as soon as "practicable" following the plan administrator's determination concerning termination and may be furnished to covered employees and their spouses by a single notice pursuant to the same procedure noted above under the General Notice section.

e. Coverage Period

Generally, if elected, coverage must extend from the date of the qualifying event. However, if a qualified beneficiary waives coverage but subsequently revokes the waiver within the 60-day election period, coverage may be extended from the date the waiver is revoked. The maximum COBRA coverage periods are:

(1) 36 months after the date of any qualifying event other than employment termination or reduction of hours;

(2) 18 months after an employee's termination or reduction of hours; but 36 months after the initial qualifying event if second qualifying event occurs within the first 18 months; and

(3) qualified beneficiaries who are determined to be disabled under the SSA may extend their 18-month coverage period described in e(2) above by an additional 11 months, for a total of 29 months. This is allowed only if the date of disability, per SSA, was within or before the first 60 days of COBRA continuation coverage. This extension is also available to the spouse and dependent children of the disabled beneficiary. In order to receive 11 additional months of coverage, the disabled qualified beneficiary must make the request within 60 days of obtaining the disability determination and before the end of the initial 18-month period.

However, certain events may shorten the maximum required COBRA period. These events are:

(1) when the employer no longer provides any group health plan to any employee;

(2) when coverage ceases because the beneficiary fails to make a timely payment;

(3) when the beneficiary becomes covered under any other group health plan after electing COBRA coverage;

(4) when the beneficiary becomes entitled to Medicare after electing COBRA coverage. (If Medicare entitlement occurs before a

termination or reduction in hours of employment, a special rule applies. The COBRA period after the later termination or reduction in hours of employment for everyone except the covered employee will be measured from either (1) 18 months from the termination of employment or reduction in hours or (2) 36 months from the earlier Medicare entitlement, whichever occurs later. If Medicare entitlement occurs more than 18 months before a termination or reduction in hours of employment, the special Medicare rule has no application); and

As previously mentioned, if early termination of continuation coverage occurs timely notice must be provided to the affected individual(s).

f. Premium Payments

Employers may require beneficiaries to pay up to 102% of the applicable total premium for the coverage elected, including any portion of the premium previously borne by the employer. If coverage is extended beyond the original 18-month period for an eligible disabled person, up to 150% of the applicable premium may be charged for coverage in the 19th through 29th month of coverage if the disabled qualified beneficiary elects to extend coverage. Upon election, the plan must permit the beneficiary to pay for the interim coverage (between the qualifying event and the election) within 45 days of election. Beneficiaries may pay their premium monthly if they choose. Subsequent premium payments are timely if made within 30 days of the after the first day of the applicable period (or within the grace period if later). If the employer is self-insured, the premium must be actuarially estimated as the cost of providing coverage to similarly situated beneficiaries.

Insignificant premium shortfalls (defined as amounts no greater than the lesser of $50 or 10% of the required payment) must be waived or the administrator must notify the participant of the deficiency and allow a reasonable time to pay the difference.

2. MICHELLE'S LAW

Michelle's Law prohibits group health plans from ending a dependent child's eligibility for coverage based on loss of status as a student or full-time student because of a "medically necessary leave of absence." A "medically necessary leave of absence" includes not only a complete leave of absence, but also a reduced course load or other schedule change that would otherwise cause the dependent child not to be a "full time" student. Michelle's Law applies only if the group health plan or issuer of the child's insurance coverage has received written certification by the child's treating physician stating that the child is suffering from a serious illness or injury, and that the leave of absence is medically necessary. Under those circumstances, the group health plan may not terminate coverage of the child before the earlier of (1) one year after the leave of absence began; or (2) the date on which coverage otherwise would have ended for reasons unrelated to the leave of absence (such as reaching a maximum age or the parent's termination of employment). Michelle's Law also includes a special notice provision. If a plan distributes any notice relating to certification of student status or full-time student status

for children over a certain age to continue to be eligible for coverage as a dependent, the plan must include a description of the rules under Michelle's Law that require continued coverage during medically necessary leaves of absence. Congress adopted Michelle's Law on September 25, 2008 but delayed its effective date until the first day of the group health plan's fiscal year that begins on or after September 25, 2009. For most plans, this means that Michelle's Law first became effective on January 1, 2010. The North Carolina legislature passed a similar provision which was signed by the governor on July 31, 2009 and became effective October 1, 2009.

Note that the Patient Protection and Affordable Care Act ("ACA") requires group health plans to cover dependents up to age 26, regardless of student status, Michelle's law has limited applicability. In general, it will only apply if a plan offers coverage for dependents who are not covered by the ACA mandate (e.g., dependents who are older than age 26) and conditions eligibility on student status.

3. THE NORTH CAROLINA CONTINUATION AND CONVERSION LAW

State law provides that employees and beneficiaries covered by a group accident or health plan for three consecutive months (immediately prior to the date of termination of either employment or group membership) may elect to continue coverage. However, continuation coverage is not available for any person who is or could be covered by any other arrangement of hospital, surgical, or medical coverage for individuals in a group, whether insured or uninsured, within 31 days immediately following the date of termination; or whose insurance terminated because the person failed to pay any required premium. Continuation of dental, vision or prescription drug coverage is not required. The beneficiary must pay the applicable premium in advance and must elect coverage in writing before the insurance otherwise terminates.

Continuation lasts, at most, 18 months beyond the date it would have otherwise ended. It may stop earlier if the premiums are not paid, the employee becomes eligible for similar benefits elsewhere, or if the group plan is terminated. A notice of the continuation privilege shall be included in each individual certification of coverage.

Conversion to an individual policy must be available to employees without evidence of insurability or exclusion of pre-existing conditions. Conversion is not available if the employee was ineligible for continuation, or failed to elect continuation coverage, continuation premiums were not timely paid, or the employee failed to continue insurance for the maximum 18-month period. The insured must make written application for conversion to the insurer within 31 days of the end of the continuation coverage. The converted policy shall cover the employee and eligible dependents. Insurers need not offer conversion if the employee is eligible for Medicare or is covered by or eligible for coverage under another group plan. Conversion rights are available to a surviving spouse, divorced/separated spouse and children, and to a child who is no longer eligible for coverage.

Detailed rules exist to regulate the insurers who effectuate the law. Contact

your insurance carrier, Employer Association or employment counsel for assistance. North Carolina's continuation of coverage and conversion provisions are essentially preempted by the federal law unless a plan is insured. Therefore, if the group health plan is self-funded (and not subject to state insurance laws) such plan is subject to the federal law (i.e. pre-empted by the Employee Retirement Income Security Act ("ERISA") and not state law. State laws regulating insurance are not preempted.

COBRA may normally pre-empt the state law. However, the state law becomes important if COBRA does not apply. COBRA may not apply because the employer is not covered by COBRA (i.e. the employer employs less than 20 employees).

COBRA provides only for group insurance continuation. It does not require conversion provisions, unless the plan itself provides for conversion.

4. THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA) LAW

a. The federal HIPAA Portability and Accountability laws and related regulations focus on providing individuals with opportunities to obtain coverage outside of regular open enrollment or other time periods as well as ensuring employers are not discriminating against certain employees by offering them less valuable coverage for impermissible reasons.

b. Special Enrollment Periods. In furtherance of HIPAA's goal to achieve and promote portability, a group health plan must provide several special enrollment periods for employees and, if dependents are generally eligible for the group health plan, dependents. The first type of special enrollment period is available to any employee or dependent who has had other coverage that he loses, if he meets four conditions:

- The individual had other coverage at the time he was previously offered coverage under the group health plan;
- If required by the group health plan, the individual stated in writing, if required, he was declining to enroll in the group health plan because he had the other coverage;
- Coverage being lost was (i) COBRA coverage that was exhausted or (ii) other coverage for which the individual is no longer eligible (for example, by reason of divorce from, or termination of employment of the spouse), or the employer providing other coverage ceases to pay for it; and
- The individual requests enrollment under the group health plan within 30 days after losing the other coverage.

A group health plan must provide a description of the special enrollment rights at or before the time an employee is initially offered an opportunity to enroll. The special enrollment period applies separately to employees and dependents.

There is another special enrollment that period applies when an employee

who is a participant or is eligible to participate in a group health plan (including having met any waiting period) obtains a new dependent through marriage, birth, adoption, or placement for adoption. The special enrollment period in this circumstance must extend for at least 30 days beginning on the date of marriage, birth, adoption, or placement for adoption. During this special enrollment period, not only the new dependent, but also the employee and the employee's spouse may enroll. If the new dependent is enrolled within 30 days of the start of the special enrollment period, the coverage is to become effective as of the birth, adoption, or placement for adoption or, for marriage, the first of the month after the request for enrollment.

The third and fourth special enrollment rights were established under the Children's Health Insurance Program Reauthorization Act of 2009 ("CHIP") which was signed into law on February 4, 2009. CHIP provides two additional special enrollment periods for certain qualified individuals effective April 1, 2009. As a result of CHIP, all group health plans must provide special enrollment rights for employees and their dependents upon either (a) the termination of coverage under Medicaid or state children's health insurance program due to loss of eligibility; or (b) becoming eligible for premium assistance from a state under a Medicaid or children's health insurance program. To be eligible for either additional special enrollment right, the employee must notify the plan administrator of the special enrollment event within 60 days of the event.

CHIP also imposes notice requirements on group health plans to inform participants of state premium assistance programs. Group health plans are required to distribute the notices to all employees of their potential eligibility for state subsides when they become eligible for enrollment under the plan, with open enrollment materials and in the SPD. In addition, upon request, group health plans have to provide states with sufficient plan information to allow the state to determine whether employees and/or their dependents are eligible for assistance and/or whether the CHIP program provides supplemental coverage. Employers are subject to a penalty of $100 per day per participant or beneficiary for failure to provide the required notices and disclosures.

c. Nondiscrimination in Eligibility and Premiums

In addition to HIPAA's special enrollment rules, a group medical plan may not establish rules for eligibility (including continued eligibility) of any individual to enroll under the terms of the medical plan based on any of the following factors in relation to the individual or a dependent of the individual:

- Health status;
- Medical condition (including both physical and mental illnesses);
- Claims experience;
- Receipt of health care;
- Medical history;

- Genetic information;
- Evidence of insurability (including conditions arising out of acts of domestic violence, or the fact that the participant engages in high-risk sports such as skiing or parachuting); and
- Disability.

Generally, this rule does not prevent a plan from limiting the amount, level, or type of benefits that will be offered or require the plan to provide certain types of benefits. If any individual or his dependents have any one of the health status-related factors listed above, that individual cannot be charged a higher premium or contribution rate than similarly situated individuals. However, this rule does not preclude a group medical plan from excluding certain types of benefits based on injury source as long as the exclusion applies to all participants uniformly. Note that the rule also does not preclude the plan from offering incentives such as premium discounts for participation in wellness, fitness, or similar programs as long as they meet specific requirements.

d. Penalty

HIPAA contains certain enforcement provisions for aspects of the group portability portion of HIPAA, but generally, HIPAA is enforced through ERISA's general enforcement provisions. Note that HIPAA amended certain ERISA notification and disclosure sections and added a group health insurance portability section.

As amended, ERISA specifically requires health insurance plan SPDs to provide information about insurers and plan administration. In addition, plan participants must be notified of any material reductions in benefits or services under a group health plan within specified time frames. The ERISA notice and disclosure requirements are enforced through criminal and civil penalties. Criminal penalties include a fine of up to $5,000, or imprisonment up to one year for any person who willfully violates notice and disclosure requirements. If, however, the "person" is a corporation, penalties could be as high as $100,000. Civil actions against the plan for non-compliance with HIPAA may be brought by: a participant, the Internal Revenue Service, the DOL, the fiduciary, the employer or other interested parties. The penalties and enforcement proceedings depend largely on who brings the action.

Under ERISA, the plan administrator of a group health plan may be fined up to $110 per day for failure to provide COBRA notices or plan information requested by participants within the prescribed time frames. HIPAA amended this section of ERISA so that each violation with respect to any single participant or beneficiary is treated as a separate violation.

e. Other Federal and State Laws Affecting Health Plans

(1) Maternity Provisions

Under the Newborns' and Mothers' Health Protection Act of 1996, group health plans (including health insurance companies) must

allow 48-hour hospital stays after vaginal births and 96-hour stays for cesarean section births. Group health plans are prohibited from:

- Requiring a maternity care provider to obtain authorization from the plan or insurance company for prescribing any length of stay required by the law;
- Denying the mother or newborn child eligibility or continued eligibility for coverage solely to avoid the requirements imposed by the law;
- Providing payments or rebates to mothers to induce them to forgo the minimum required hospital stays;
- Penalizing or reducing reimbursement to any attending provider because the provider provided the care guaranteed by the law;
- Providing any type of incentives to an attending provider to induce the provider to render a lesser level of care than that required by the law; or
- Providing less favorable benefits during any portion of the minimum stays specified by the law.

The required minimums do not apply if the decision to discharge a new mother or her newborn child rests solely with the mother and her attending physician. Mothers are not required to give birth in a hospital or stay in the hospital a particular length of time after giving birth.

The legislation is not intended to prevent a group health plan or health insurer from imposing deductibles, co-payments, or other cost-sharing tools. Group health plans and health insurers may negotiate the level and type of reimbursements for the minimum care required by the law.

The SPD should include a description of these rights.

(2) Mental Health Provisions

After HIPAA was enacted, the Mental Health Parity Act of 1996 was adopted to amend HIPAA to require plans that offered mental health coverage to set the same annual and lifetime dollar caps on mental health coverage as they did for other medical/surgical services.

The law did not require any group health plan or group health insurance policy to provide mental health benefits, prevent a health plan from limiting the number or frequency of mental health treatments, or limit the plan's ability to set its terms and conditions. Moreover, the parity requirements did not apply to the treatment of substance abuse or chemical dependency. Furthermore, these requirements regarding mental health care parity did not apply to a group health plan (or insurance coverage) if application of the requirements resulted in an increase in the cost of the group health plan (or insurance coverage) by more than one percent. Finally, the mental health provisions did not apply to group health plans or underlying insurance policies sponsored

by employers that employed, on the average, two to 50 employees during a preceding calendar year.

On October 3, 2008, the Mental Health Parity and Addiction Equity Act of 2008 ("MHPAEA") was signed into law. It extends the parity provisions that were created under the Mental Health Parity Act of 1996 to substance abuse disorder benefits and places additional limitations on the restrictions group health plans place on mental health and/or substance abuse disorder benefits. In particular, if a group health plan provides mental health and/or substance abuse disorder benefits it may not set limitations, restrictions or cost sharing arrangements that are different from benefit restrictions and/or cost sharing arrangements on medical and surgical benefits. For example, group health plans that cover mental health/substance abuse disorder benefits may not apply lower annual or lifetime caps and/or higher copayments, deductibles, and/or coinsurance amounts to such benefits than are applied to medical surgical benefits. If plans cover medical/surgical benefits provided within or without a network of preferred providers, if they also provide mental health/substance abuse disorder benefits, they must also provide such benefits whether the benefits are provided within or without a network of preferred providers. However, like the Mental Health Parity Act of 1996, the MHPAEA does not require group health plans to cover mental health and/or substance abuse disorder benefits. Note that on April 23, 2018 the DOL released extensive information regarding how to determine whether a plan is in compliance with this law, including a fact sheet, FAQs, a draft template, a self-compliance tool and a pathway to full parity. This was updated in May 2021 and can be found at the link below:

https://www.ncdoi.gov/documents/life-and-health/healthcare-law/mental-health-parity-and-addiction-equity-act-mhpaea-compliance-checklist

The MHPAEA is generally effective for plan years beginning on or after October 3, 2009 (e.g., for calendar year plans, the effective date is January 1, 2010). However, certain employers and groups are exempt from compliance. These include small employers with an average of at least two but not more than fifty employees during the preceding calendar year and union plans whose collective bargaining agreements have not terminated as of the enactment of the MHPAEA or January 1, 2009, discounting any bargaining agreement extension. An exemption also exists for employers whose claim costs increase by two percent in the first year of adoption of the MHPAEA, provided that the cost calculation is based on six months of actual claims data with parity in place. The cost exemption for those employers who qualify is effective in the following plan year and it is a one-year exemption. Employers must apply each year for future exemptions. In addition, employers must notify participants, beneficiaries and the government of the election to use the exemption.

North Carolina Mental Health Parity Law. In July 2007, the governor of North Carolina signed into law a mental health parity act that requires insurers in North Carolina to provide mandatory coverage of certain mental illnesses and to provide minimum benefit coverage for other mental illnesses. This law applies to fully insured health benefit plans that are delivered, issued for delivery or renewed on or after July 1, 2008.

Under this law, insurers must provide group health plan benefits for the necessary care and treatment of mental illnesses that are no less favorable than benefits for physical illness generally. In particular, the insurers must provide the same benefits and limitations (e.g., durational limits, copayments, coinsurance levels, etc.) for the following mental illnesses that are extended for physical illnesses generally: bipolar disorder, major depressive disorder, obsessive compulsive disorder, paranoid and other psychotic disorder, schizoaffective disorder, schizophrenia, post-traumatic stress disorder, anorexia nervosa, and bulimia. In addition, all plans must provide at least thirty combined inpatient/outpatient days per year and thirty office visits per year for other mental illnesses. This law does not, however, require an insurer to offer coverage for chemical dependency (e.g., alcohol abuse or drug addiction) or to cover treatment or studies leading to or in connection with sex changes or modifications and related care. On July 31, 2009, the North Carolina governor signed a law which requires that group health plans of employers with at least 51 employees to comply with the provisions of MHPAEA. This state law went into effect on October 1, 2009.

(3) Women's Health and Cancer Rights

Under the Women's Health and Cancer Rights Act of 1998, group health plans are required to provide benefits for mastectomy-related services including reconstruction and surgery to achieve symmetry between the breasts, prostheses, and complications resulting from a mastectomy, including Lymphedema. Group health plans are required to notify individuals of these rights upon enrollment and annually.

(4) GINA

The Genetic Information Nondiscrimination Act of 2008 (GINA), which went into effect for group health plans in plan years beginning after May 21, 2009, prevents discrimination in health insurance based on genetic information. Under GINA group health plans and group health insurance issuers may not:

- use genetic information as the basis for adjusting premium or contribution amounts or to discriminate with respect to premium or contribution amounts;
- request or require that individuals or their family members undergo genetic testing (with limited exceptions);
- collect (by requesting, requiring or purchasing) genetic information

for underwriting purposes and collecting genetic information with respect to any individual prior to enrollment or coverage under the health plan; or

- use genetic information to determine eligibility for coverage or to impose preexisting condition exclusions.

Genetic information includes any information about an individual's own genetic tests, the genetic tests of an individual's family members, and the manifestation of a disease or disorder in the individual's family members. Genetic information also includes family medical history. In general, a genetic test is any analysis of human DNA, RNA, chromosomes, proteins or metabolites that detects genotypes, mutations or chromosomal changes which could be used to predict whether an individual has a predisposition to a disease, disorder, or pathological condition. On July 31, 2009, the North Carolina governor signed a law which requires that group health plans of employers with at least 51 employees comply with the provisions of GINA. This state law went into effect on October 1, 2009.

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

Under the Uniformed Service Employment and Reemployment Rights Act of 1994 ("USERRA"), persons who serve in the armed forces of the United States (including the National Guard and the commissioned corps of the Public Health Service) are generally entitled to the seniority and all rights and benefits based on seniority that they would have attained with reasonable certainty had they remained continuously employed instead of serving in the armed forces. To be eligible for the rights granted under USERRA, the following requirements must be met:

- The employee must provide advance notice of the leave when practical;
- The cumulative length of an employee's absences from a position may not exceed five years;
- The employee cannot have been dishonorably discharged from the military; and
- The employee must report back to the employer or apply for reemployment within the following time frames, depending on the length of military service:
    - o If the period of service is 0-30 days, the employee must reapply by the beginning of the first regularly scheduled period 8 hours after safe travel home from the service;
    - o If the period of service is 31-180 days, the reapplication period is 14 days after service; and
    - o If the period of service is 181 days or longer, the reapplication

period is 90 days after service.

The types of military service covered under USERRA include:

- Full-time and reserve components of the Army, Navy, Marine Corps, Air Force, and Coast Guard;
- Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty;
- Commissioned corps of the Public Health Service;
- Certain types of service in the National Disaster Medical System; and
- Any other category of persons designated as a "uniformed service" by the President in time of war or national emergency.

Employers who sponsor health plans must provide COBRA-like health benefit continuation coverage for persons who are absent from work to serve in the military, even when the employer, due to size, is not subject to COBRA. Such coverage must be provided for up to 24 months after the absence begins, or through the day after the date on which the person fails to apply for or return to a position of employment, whichever period is shorter. During the first 30 days that the employee is on military leave, the employer may not charge the employee any more for the group health coverage than what it charges similarly situated active employees for the coverage. However, after the first 30 days of military leave, the employer may charge the employee up to 102% of the full premium for coverage. Employers may not discontinue coverage merely because the employee and family members become eligible to receive other coverage under TRICARE or otherwise.

If a person's coverage under a group health plan is terminated because of service in the uniformed services (e.g., the individual fails to pay the applicable premiums while out on military leave), the plan may not impose an exclusion or waiting period in connection with the reinstatement of coverage if health coverage would have been provided to the employee had the employee not been absent for military service. This protection applies to the person who is reemployed and to his or her family members who have their coverage reinstated. However, the group health plan may exclude coverage for any illness or injury determined by the Veterans Administration to be service-related.

(6) Effect on State Laws

The federal requirements do not override any state law that provides more favorable treatment of mental health benefits or maternity coverage under health insurance coverage than is required under this measure. State laws requiring coverage for maternity and pediatric care under guidelines established by the American College of Obstetricians and Gynecologists, the American Academy of Pediatrics, or other

established medical associations will be left intact. Also, any state law that leaves the determination of a mother's hospital stay following delivery to the attending provider in consultation with the mother will not be preempted by the new law.

f. Privacy Regulations Under HIPAA

The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and related regulations provide national standards to protect individuals' personal health information and gives patients increased access to their medical records. The privacy regulations apply to covered entities and have been in effect for all covered entities since April 14, 2004. These privacy rules restrict covered entities from using or disclosing certain types of health information except where permitted by HIPAA's privacy rules or where required by law. The HIPAA privacy rules also provide individuals certain rights with respect to their own protected health information including the right to:

- inspect and obtain a copy of their own protected health information (with certain exceptions)
- amend or correct protected health information that is inaccurate or incomplete
- direct the transmission of protected health information to another person or entity
- obtain an accounting of certain disclosures of their protected health information that were made by covered entities (with some exceptions, including disclosures made for purposes of treatment, payment, or health care operations and disclosures made to the individual or pursuant to the individual's authorization)
- receive the notice of privacy practices required under the privacy standards
- request additional restrictions on the use or disclosure of their own protected health information (although the covered entity may deny this type of request).

The HIPAA privacy rules also set specific time limits within which covered entities must respond to an individual's request to inspect, copy, or amend protected health information or for an accounting.

(1) General Rule. The use of protected health information by a covered entity for any reason other than treatment, payment, or health care operations requires a specific authorization by the individual.

(2) Definitions

(a) Covered Entity. A covered entity is defined as:

- A health plan (individual plan or group health plan) that provides or pays the cost of medical care (self-insured,

self-administered plans with fewer than 50 participants are exempt);

- A health care clearinghouse, defined generally to mean an entity that processes or facilitates the processing of health information; and
- A health care provider who transmits any health information in electronic form.

The law does not define an employer as a covered entity. However, employers must be aware of HIPAA privacy and security rules because the health plans they sponsor and their service providers who administer the plans must handle PHI in accordance with the privacy and security rules.

(b) Protected Health Information. Protected health information ("PHI") includes all individually identifiable health information transmitted or maintained by a covered entity regardless of its form.

g. Use and Disclosure of Protected Health Information

(1) General Rules. Other Covered entities, such as health plans, may, but are not required to, obtain acknowledgments from participants.

(a) Permitted Uses and Disclosures. A covered entity may:

I. use or disclose PHI for its own treatment, payment or health care operations ("TPO");

II. use or disclose PHI for treatment activities of another health care provider;

III. disclose PHI to another covered entity or health care provider for the payment activities of the entity receiving the information, subject to the minimum necessary principle discussed below;

IV. disclose PHI to another covered entity for that entity's health care operations activities if both entities have a relationship with the individual who is the subject of the PHI being requested, the information pertains to that relationship, and the information falls within a narrower range of health care operations defined in the rules (e.g., quality assessment, reduction of healthcare costs, case management and care coordination, credentialing, accreditation, licensing an/or fraud and abuse detection or compliance); or

V. disclose PHI to another covered entity that participates in the same organized health care arrangement.

(b) Consent Permitted. A covered entity may obtain the individual's consent to use or disclose PHI to a carry out TPO. A consent, however, is not effective to permit a use or disclosure of PHI for

anything other than to a TPO.

(2) Specific Authorization. All covered entities must obtain an individual's specific written authorization to use and disclose PHI for any other reason other than treatment, payment, or health care operations. In addition, covered entities are required to document and retain all authorizations they obtain, and they must provide the individual a copy as well.

(a) Receipt of Authorization as a Condition for Service. A covered entity generally may not condition treatment or payment on receipt of an individual's authorization. Moreover, except for limited circumstances, a covered entity may not condition eligibility for benefits or enrollment in a health plan on obtaining authorization. This restriction prevents a covered entity from forcing individuals into signing an authorization for a use or disclosure that is not necessary to carry out the primary services that the covered entity provides to the individual.

A health plan may condition eligibility for benefits or enrollment in the plan on an individual's authorization for the use and disclosure of PHI for purposes of eligibility or enrollment determinations relating to the individual or for its underwriting or risk-rating determinations.

(b) Core Elements of a Valid Authorization. The specific authorization must be in plain language and contain:

I. A description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion;

II. The name or other specific identification of the person(s), or class of persons, authorized to make the requested use or disclosure;

III. The name or other specific identification of the person(s), or class of persons, to whom the covered entity may make the requested use or disclosure;

IV. A description of each purpose of the requested use or disclosure. The statement "at the request of the individual" is a sufficient description of the purpose when the individual initiates the authorization and does not, or elects not to, provide a statement of the purpose;

V. An expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure; and

VI. The signature of the individual and date. If the authorization is signed by a personal representative of the individual, a description of such representative's authority to act for the individual must be provided. The covered entity must provide the individual with a copy of the signed authorization.

(c) Required Statements in a Valid Authorization. A valid authorization must contain statements adequate to put the individual on notice of all the following:

I. The individual's right to revoke the authorization in writing and either the exceptions to the right to revoke and a description of how the individual may revoke the authorization or, if the covered entity's notice includes this information, a reference to the covered entity's notice;

II. The ability or inability to condition treatment, payment, enrollment or eligibility for benefit on the authorization by stating either:

i. the covered entity may not condition treatment, payment, enrollment, or eligibility for benefits on whether the individual signs the authorization when the prohibition on conditioning of authorization applies; or

ii. the consequences to the individual of a refusal to sign the authorization when the covered entity can condition treatment, enrollment in the health plan, or eligibility for benefits or failure to obtain such authorization; and

III. The potential for information disclosed in accordance with the authorization to be subject to re-disclosure by the recipient and no longer be protected by this rule.

(d) Special Rules for Psychotherapy Notes. A covered entity must obtain an authorization for any use or disclosure of psychotherapy notes except:

I. To carry out the following treatment, payment, or health care operations:

i. use by originator of psychotherapy notes for treatment;

ii. use or disclosure by the covered entity in its own training programs in which students, trainees, or practitioners in mental health learn under supervision to practice or improve their skills in group, joint, family, or individual counseling; or

iii. use or disclosure by the covered entity to defend itself in a legal action or other proceeding brought by the individual.

II. A use or disclosure that is required by law, for health oversight activities, for uses about decedents, to avert a serious threat to health or safety, public health purposes, or when requested by the Secretary of HHS in conducting an investigation of an alleged violation of the privacy regulations.

(3) Use and Disclosure of PHI Without Authorization. In certain circumstances, a covered entity may use or disclose PHI, provided that

the individual is informed in advance or the use or disclosure and has the opportunity to agree to or prohibit or restrict the use of disclosure. However, for such use or disclosure to be valid, the individual must be informed in advance of the use or disclosure and the individual must have the opportunity to agree to or to prohibit or restrict disclosure. This exception only applies to the use or disclosure of PHI used for a facility directory or to disclose to a family member, other relative, close personal friend, or any other individual identified by the individual PHI directly relevant to such person's involvement with the individual's care or payment related to the individual's health care. A covered entity may also use or disclose PHI to a public or private entity authorized by law or by its charter to assist in disaster relief efforts.

(4) Exceptions. An individual's authorization is not required when PHI is required to be disclosed by law, for public health purposes, or in instances of alleged child abuse or neglect or domestic violence. If a covered entity discloses PHI because of child abuse or neglect or domestic violence, it must promptly inform the individual of such disclosure unless it believes, in its professional judgment, that informing the individual would place that individual at risk of serious harm. The regulations also provide for several other limited exceptions which involve a number of detailed requirements. These exceptions include uses and disclosures: for health oversight activities; for judicial and administrative proceedings; for law enforcement proceedings (e.g., limited information for identification and location purposes); about decedents (e.g., to coroners and medical examiners, organ and tissue donations, etc.); to facilitate research purposes; to avert a serious threat to health or safety; for specialized government functions (e.g., military and veterans activities); and for workers' compensation.

(5) Disclosure to Business Associates. A covered entity may disclose PHI to a business associate as necessary to permit the business associate to perform functions for or on behalf of the covered entity. However, the covered entity must obtain an agreement from the business associate that will appropriately handle the information.

The business associate agreement must:

(a) Establish the permitted and required uses and disclosures of PHI by the business associate, which may include using and disclosing PHI for proper management and administration of the business associate and data aggregation services relating to the health care operations of the covered entity.

(b) Provide that the business associate will:

I. not use or further disclose PHI other than as permitted or required by the contract or as required by law;

II. use appropriate safeguards to prevent use and disclosure of the PHI other than as provided for by its contract;

III. report to the covered entity any use or disclosure of the information not provided for by its contract of which it becomes aware;

IV. ensure that any agents to whom it provides PHI agree to the same restrictions as the business associate;

V. make information available to individuals who request access to their PHI;

VI. make information available for amendment and incorporate any amendments;

VII. make available the information required to provide an accounting of disclosures;

VIII. make its internal books and records available to the Secretary for purposes of determining compliance with the regulations; and

IX. return or destroy, within a reasonable period of time, all PHI held by the business associate on behalf of the covered entity at the termination of the contract.

(c) Authorize termination of the contract by the covered entity if the covered entity determines that the business associate violated a material term of the contract.

(6) Disclosure to Plan Sponsors. A group health plan and authorized issuer and HMO with respect to the group health plan may disclose PHI to a plan sponsor only if the plan sponsor certifies to the plan that it will use and disclose the information in accordance with the regulations. As discussed more fully below, the plan sponsor must amend the plan document to describe its use of PHI and must certify to the group health plan that the plan document has been so amended. The plan sponsor may only use PHI for plan administration activities that fall within the regulation's definitions of payment or health care operations.

The plan may provide summary health information to the plan sponsor for other plan administration purposes, such as soliciting premium bids from other health plans or for the purpose of modifying, amending, or terminating the plan. No certification is required for the plan sponsor to receive summary health information.

(7) Minimum Necessary Requirement. When using and disclosing PHI for any reason other than treatment or when requesting PHI from another covered entity, a covered entity must make reasonable efforts to limit PHI to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request. However, the final rules provide that the minimum necessary requirements do not apply to a covered entity's use or disclosure to another health care provider for treatment purposes.

A covered entity must implement internal procedures to identify the

employees who need access to PHI to carry out their duties, what category of information the employees need and the conditions that apply to such access. A covered entity must also set up internal procedures to limit access to only the identified employees and only the identified information and to verify the identity and authority of third parties requesting information. See below for more detail.

(8) Identifying Information. Individually identifiable health information is health-related information that identifies the individual or with respect to which there is a reasonable basis to believe that the information could be used to identify the individual. Covered entities may strip the "identifiable" health information by removing all items (e.g.., name, date of birth, phone number, social security number, address, date of admission or service, date of discharge, etc.) listed in the regulation.

(9) Limited Data Set. A covered entity may use or disclose a "limited data set" for purposes of research, public health, or health care operations. A limited data set is PHI that excludes the following direct identifiers of the individual or of relatives, employers, or household members of the individuals:

(a) Names;

(b) Postal address information, other than town or city, state or zip code;

(c) Telephone numbers;

(d) Fax numbers;

(e) E-mail addresses;

(f) Social security numbers;

(g) Medical record numbers;

(h) Health plan beneficiary numbers;

(i) Account numbers;

(j) Certificate/license numbers;

(k) Vehicle identifiers and serial numbers, including license plate numbers;

(l) Device identifiers and serial numbers;

(m) Web Universal Resource Locators;

(n) Internet Protocol address numbers;

(o) Biometric identifiers, including finger and voice prints; and

(p) Full face photographic images and any comparable images.

A covered entity may use or disclose a limited data set to business associates who provide satisfactory assurances in a written agreement

that the recipient will only use or disclose the limited data set for research, public health or health care operations. The agreement, which is similar to a business associate agreement, must:

I. Establish the permitted uses and disclosures;

II. Not authorize the recipient to further use or disclose the information in any way that would violate the final rules if done by the covered entity;

III. Specify who is permitted to use or receive the limited data set; and

IV. Require the recipient to:

i. not use or further disclose the information other than as permitted by the agreement and required by law;

ii. use appropriate safeguards to prevent unauthorized use or disclosure of the information;

iii. report to the covered entity if it becomes aware of any unauthorized use or disclosure of the information;

iv. if it allows use of the limited data set by, or disclosures of the limited data set to, agents or subcontractors, the recipient must require them to agree to the same restrictions that apply to the original recipient; and

v. not identify or contact the subject individuals.

If a covered entity knows of activity that violates the limited data set agreement, it must either seek to cure the breach or discontinue the disclosure of the information and report the problem to the Secretary of HHS.

(10) Administrative Requirements Under HIPAA's Privacy Rules

(a) Privacy Official and Contact Person. A covered entity must designate a privacy official who is responsible for implementing and developing the covered entity's privacy policies and procedures. A covered entity must also designate a contact person on privacy matters. One person may serve as both the privacy official and the contact person.

(b) Training. Covered entities must provide training on medical records privacy rules to all employees who will have access to PHI as needed for those employees to carry out their functions. New employees must be trained within a reasonable time and retraining is required if there are material changes to the policy.

(c) Safeguards. Administrative, technical and physical safeguards are required to be implemented to protect the privacy of PHI from accidental or intentional use or disclosure in violation of the law and to protect against inadvertent disclosures to parties other than the intended recipients.

(d) Formal Complaint Procedures. Covered entities must create a mechanism for receiving complaints from individuals regarding the covered entity's compliance with its privacy practices. A contact person to receive complaints must be identified in the Notice of Privacy Practices which is to be distributed to plan participants. Covered entities must also maintain a record of the complaints that are filed against it along with a brief explanation of their resolution in accordance with the covered entities' record retention policy as long as such policy meets the minimum HIPAA requirements, which vary (between 6 and 10 years) depending on the type of document..

(e) Sanctions. The covered entity must have written disciplinary policies and procedures for members of its workforce who fail to comply with the entity's privacy policies or procedures or the regulations.

(f) Mitigation. The covered entity has a duty to mitigate the harm caused by either members of its workforce or by its business associates as a result of improper use or disclosure of PHI that it knows about.

(g) No Retaliation. The covered entity may not intimidate or retaliate against an individual who is the subject of PHI or any other person who files a complaint with the HHS or otherwise participates in an investigation or hearing or who opposes an unlawful act or otherwise exercises any right under the privacy rule, such as filing a complaint.

(11) Notice of Privacy Practices

(a) Notice Requirement. Generally, covered entities must provide individuals with adequate notice of the uses and disclosures of PHI that it may make as well as the individual's rights and the covered entity's duties with respect to PHI. However, group health plans that: (i) provide health benefits solely through an insurance contact with an HMO or health insurance issuer; and (ii) do not create or receive PHI in addition to summary health information do not have to provide the notice. (Note: if a group health plan provides health benefits through an insurance contact with an HMO or health insurance issuer and creates or receives PHI in addition to summary health information, it has to maintain this notice and provide the notice upon request to any person.

The notice must be provided (1) as of the compliance date, (2) at enrollment, (3) within 60 days after a material revision, (4) or upon request of an individual. In addition, at least once every 3 years, the health plan must notify participants about the availability of the Notice and how to obtain a copy. Health care providers who have a direct treatment relationship with an individual must provide the notice no later than the date of the first service delivery, or in an

emergency treatment situation, as soon as reasonably practicable after the emergency treatment situation.

A covered entity that maintains a website that provides information about the covered entity's customer services or benefits must prominently post its notice on the website and make the notice available through the website. The covered entity may provide the notice required to an individual by e-mail if the individual agrees and such agreement has not be withdrawn. If the covered entity knows that the e-mail transmission failed, a paper copy of the notice must be provided. If the first service delivery to an individual is delivered electronically, the covered health care provider must provide electronic notice automatically and contemporaneously in response to the individual's first request for service. The individual retains the right to obtain a paper copy of the notice from a covered entity upon request.

(b) Notice Contents. The Notice must:

I. Be written in plain language Include the following language in the heading:

THIS NOTICE DESCRIBES HOW MEDICAL INFORMATION ABOUT YOU MAY BE USED AND DISCLOSED AND HOW YOU CAN GET ACCESS TO THIS INFORMATION. PLEASE REVIEW IT CAREFULLY;

II. Describe and give at least one example of the types of uses and disclosures of PHI that the covered entity is permitted or required to make without authorization, including treatment, payment, and health care operations, and the purpose of these disclosures;

III. Describe all other uses and disclosures that can be made only with authorization;

IV. Describe the individual's right to (a) revoke the authorization; (b) request restrictions on certain uses and disclosures; (c) receive confidential communications; (d) inspect and copy PHI; (e) amend PHI; (f) receive an accounting of disclosures of PHI; and (g) receive a paper copy of the Notice upon request if the notice was provided electronically;

V. Describe the covered entity's duties to maintain the privacy of PHI and its reservation of the right to change its privacy policies and apply the new policy retroactively;

VI. Inform individuals about how they can file complaints with the covered entity if they believe their privacy rights have been violated;

VII. Provide the name or title and telephone number of the person at the covered entity to contact for further information; and

VIII. State the date the Notice went into effect.

(c) Joint Notices. Covered entities that participate in organized health care arrangements may issue a joint notice of privacy practices provided that:

I. The covered entities participating in the notice agree to abide by the terms of the notice with respect to PHI created or received by the covered entity as part of their participation in the organized health care arrangement;

II. The notice meets the general notice requirements outlined above and reflects that the notice covers more than one covered entity and:

i. describes with reasonable specificity the covered entities or class of entities to which the joint notice applies;

ii. describes with reasonable specificity the service delivery sites, or classes of service delivery sites to which the joint notice applies; and

iii. if applicable, states that the covered entities participating in the organized health care arrangement will share PHI with each other, as necessary to carry out treatment, payment or health care operations relating to the organized health care arrangement.

III. Any one of the covered entities provides the notice to individuals (provision of the joint notice by any one of the covered entities included in the joint notice will satisfy this provision with respect to all of the other covered entities included in the notice).

(12) Individual's Right to Restrict Use and Disclosure of PHI

(a) Limited Use and Disclosure of PHI by Covered Entity. Individuals may request that a covered entity restrict the use or disclosure of PHI. The covered entity must ensure that any agents to whom it provides the limited data agree to the same restrictions and conditions that apply to the limited data recipient with respect to such information. Covered entities do not have to agree to the restrictions. However, if they do, they must abide by the agreement. In addition, if an individual requests a restriction to prevent the disclosure to a health plan for purposes of carrying out payment or health care operations (and not for treatment) and the PHI pertains solely to a health care item or service for which the individual has already paid a health care provider out-of-pocket in full, the health plan must comply with the request.

(b) Terminating Restrictions. If the covered entity terminates the restriction agreement with the individual's consent, it may use and disclose PHI in accordance with the law. If it terminates the

agreement without the individual's consent, it may use and disclose only that PHI it creates or receives after it informs the individual of the termination of the restriction. The restriction must be documented in the individual's file and retained for six years.

(c) Restricted Means of Communication. Individuals may request a restriction on the manner in which a covered entity communicates confidential information to the individual if disclosure would endanger the individual.

(13) Individual's Right to Access PHI

(a) Right to Inspect and Copy PHI. For the most part, individuals have the right to inspect and copy PHI maintained about them for as long as the information is maintained by the covered entity. However, individuals do not have the right to access psychotherapy notes, information compiled in reasonable anticipation of, or for use in, a civil, criminal or administrative action or proceeding, or PHI relating to the Clinical Laboratory Improvements Amendments of 1988 ("CLIA"), to the extent that CLIA would prohibit individual access, or other information that is exempt from CLIA. If the covered entity maintains an electronic health record with respect to an individuals' protected health information, the individual has a right to obtain a copy of this information in an electronic format and if the individual requests that the information be transmitted in electronic format to himself, another entity or person, the covered entity must comply with the request.

(b) Response Time. The covered entity must act on a request for access within 30 days if the information is maintained or accessible on-site, or within 60 days of the request if the information is not available to be secure within the initial 30 days. The response period may be extended only with 30 days written notice to the individual indicating the reasons for the delay and the date by which the covered entity will complete its action on the request. The covered entity may charge reasonable fees for copying, mailing or summarizing the information, if requested.

(c) Denial of Access. There are two ways an individual's request to review their PHI may be denied: (1) unreviewable grounds for denial and (2) reviewable grounds for denial.

(d) Unreviewable Grounds. If access is denied for any of the following reasons, the individual is not entitled to a review of the denial:

- the PHI is excepted from the right of access;
- a correctional institute determines that access would be harmful to the individual or others;
- the information is obtained in the in the course of research that includes treatment;

- the information is subject to the Federal Privacy Act; or
- revealing the PHI would be a breach of confidentiality with the source of the PHI who is not a health care provider.

(e) Reviewable Grounds. If access is denied for any of the following reasons, the individual must be granted a review of the denial:

- access would cause physical harm to the individual or another person;
- the information makes reference to another person and access could cause harm to that other person; or
- a personal representative of the individual requests access and granting access to the personal representative could jeopardize the safety of the individual.

(14) Individuals' Right to Amend PHI

(a) Right to Amend. An individual may request that a covered entity amend PHI about the individual that is incorrect or inaccurate. This applies to any health care provider, health care plan or health care clearinghouse that creates or receives PHI other than as a business associate.

(b) Response Time. A covered entity must act on a request for an amendment within 60 days, which may be extended for 30 days with notice to the individual.

(c) Notification of Amendment. If the covered entity accepts the amendment, it must identify the individual and the revised information for other entities that should be notified of the amendment, such as business associates who use the PHI to make decisions about the individual. If a covered entity receives notice of amended PHI from another covered entity, it must correct its own records and require business associates to do the same.

(d) Denial of Request to Amend. The covered entity may deny the request to amend if (1) it determines the information is accurate; (2) the information is not part of the designated record set; (3) the information is information for which access by the individual was denied in accordance with the regulations; or (4) the covered entity was not the entity that created the information, unless the individual provides a reasonable basis to believe that the originator of the information is not available to act on the request. If the covered entity denies the amendment, it must describe the reason for the denial in plain language and notify the individual of his or her rights with respect to future disclosures of the disputed information. The individual must be permitted to submit a statement of disagreement which must be appended to any future disclosures of the PHI. As an alternative, the individual may request that the individual's request for an amendment and the

denial of the request be appended to any future disclosures of the PHI. The covered entity may prepare a rebuttal to the individual's statement of disagreement which may also be appended to any future disclosures of the PHI as long as the individual is also given a copy of the rebuttal.

(15) Accounting for Disclosures of PHI

(a) Individual's Right to Receive an Accounting for Disclosures of PHI. Individuals have a right to receive an accounting of disclosures by a covered entity to any entity, including a business associate, for reasons other than payment, treatment, or health care operations with certain exceptions. In particular, a covered entity is not required to provide an accounting for disclosures: (1) to carry out treatment, payment, or healthcare operations; (2) pursuant to an authorization; (3) to individuals about their own PHI; (4) for the facility's directory or to persons involved in the individual's care; (5) for national security or intelligence purposes; (6) to correctional institutions or law enforcement officials; or (7) that occurred prior to the compliance date for the covered entity.

(b) Retention Period. The period for which an accounting can be requested is six years

(c) Contents of an Accounting. The accounting must include a brief statement of the reason for the disclosure or a copy of the individual's authorization or written request for disclosure.

(d) Response Time. An accounting must be provided within 60 days, which can be extended by 30 days with notice to the individual. The covered entity must retain documentation of the information required in the accounting, and a copy of any accounting provided, and must document the titles of the persons or officers responsible for receiving and processing requests for an accounting.

(16) Enforcement and Penalties

(a) Complaints. Any persons who believe that a covered entity has not complied with the requirements of the regulations may file a written complaint with the Office of Civil Rights ("OCR") under the Department of Health and Human Services within 180 days after the individual becomes aware that a violation has occurred, unless OCR waives notice of this requirement for good cause shown. OCR may then investigate the complaint, including a review of pertinent policies, procedures and practices of the covered entity and the circumstances underlying any alleged acts or omissions concerning compliance.

(b) Civil and Criminal Penalties.

Criminal penalties include:

I. Up to $50,000 and one year in prison for knowingly

improperly obtaining or disclosing PHI;

II. $100,000 and 5 years in prison for obtaining PHI under "false pretenses;" and

III. Up to $250,000 and 10 years in prison for obtaining or disclosing PHI with the intent to sell it.

The regulations do not, however, create a private right of action against covered entities by individuals whose privacy rights have been breached.

The civil penalties are tiered and are based on the violator's "state of mind:"

I. No Knowledge – when the person does not know and would not know by exercising due diligence that he violated HIPAA's administrative simplification provisions, the minimum penalty is $117 and the maximum penalty is $58,490 per violation with a cap of $1,754,698 for multiple violations of identical requirement or prohibition;

II. Reasonable Cause and not Willful Neglect – the minimum penalty is $1,170 per violation and the maximum penalty is $58,490 per violation with a cap of $1,754,698 for multiple violations of identical requirement or prohibition;

III. Willful Neglect (but corrected within 30 days) – the minimum penalty is $11,698 per violation and the maximum penalty is $58,490 per violation with a cap of $1,754,698 for multiple violations of identical requirement or prohibition; and

IV. Willful Neglect (but not Corrected within 30 days) – the minimum penalty is $58,490 per violation with a cap of $1,754,698 for multiple violations of an identical requirement or prohibition.

(c) Preemption of State Law. HIPAA preempts state laws except in the following instances:

I. When HHS determines that the state law is necessary to: prevent fraud and abuse; ensure appropriate state regulation of insurance and health plans to the extent expressly authorized by statute or regulation; for state reporting on health care delivery; or for purposes of serving a compelling need related to public health, safety, or welfare and HHS determines that the intrusion into privacy is warranted when balanced against the need to be served;

II. The state laws relate to controlled substances;

III. The state laws are more stringent than HIPAA;

IV. The state law provides for reporting disease, injury, child

abuse, death, or for public health initiatives; and

V. The state law relates to audits, program monitoring, or licensing or credentialing.

HHS determines whether a state law is more stringent than HIPAA. Private parties may request a ruling from HHS that a particular state law is not pre-empted because it is more stringent.

(17) Employer and Plan Sponsor Issues

(a) Potential Conflict. ERISA requires group health plans to identify a named fiduciary which is often the plan sponsor or employees of the plan sponsor (e.g. on or after a benefits committee with respect to self-insured plans.

A group health plan that is fully insured and has an authorized issuer and/or HMO may find that the issuer and/or HMO will be willing to disclose PHI to a plan sponsor if the plan sponsor voluntarily agrees to use and disclose the information only as permitted or required by the regulations.

Depending on the plan type the plan sponsor may need to amend the plan document to limit its use of PHI and the plan sponsor must provide a certification to the plan.

An employer or plan sponsor may use PHI only for plan administration functions performed on behalf of the group health plan, as specified in the plan documents. These activities are limited to payment and health care operations, such as quality assurance, claims processing, auditing, monitoring, and management of carve-out plans, such as vision or dental plans.

An employer or plan sponsor may not use PHI to modify, amend or terminate the plan or solicit bids from prospective issuers. Further, an employer or plan sponsor may not use PHI for employment-related functions or functions in connection with any other benefits or benefit plans.

A group health plan may provide summary health information to the plan sponsor for other plan administration type of activities, such as soliciting bids from other health plans or amending, modifying, or terminating the plan.

(b) Plan Document Requirements. The plan document must contain the following information:

I. Description of the permitted uses and disclosures of PHI;

II. Statement that the plan sponsor will receive PHI from the health plan only if it has provided a certification that the plan documents have been amended and that it has agreed to certain conditions regarding the use and disclosure of PHI;

III. Provision of adequate firewalls to:

a. identify the employees or classes of employees who will have access to PHI;

b. restrict access solely to the employees identified and only for the functions performed on behalf of the group health plan; and

c. provide a mechanism for resolving issues of non-compliance.

(c) Certification to Group Health Plan. The plan sponsor must certify to the group health plan that it agrees to:

I. Not use or further disclose PHI other than as permitted or required by the plan documents or as required by law;

II. Ensure that any subcontractors or agents to whom the plan sponsor provides PHI agree to the same restrictions;

III. Not use or disclose PHI for employment-related actions;

IV. Report to the group health plan any use or disclosure that is inconsistent with the plan documents or this regulation;

V. Make the PHI accessible to individuals;

VI. Allow individuals to amend their information;

VII. Provide an accounting of disclosures of PHI;

VIII. Make its practices available to the Secretary of Health and Human Services for determining compliance;

IX. Return and destroy all PHI when no longer needed, if feasible; and

X. Ensure that firewalls have been established in accordance with the Security Rule Portion of HIPAA (see below).

(18) Security Regulations Under HIPAA

(a) Purpose and Scope. On February 20, 2003, the Department of Health and Human Services ("HHS") published final Security Regulations under HIPAA. The Security Regulations are intended to protect electronic health information ("e-PHI") from unauthorized access, alteration, deletion, and transmission. The Security Regulations apply to the same "covered entities" as the Privacy Regulations and govern all e-PHI that a covered entity creates, receives, maintains, or stores. Notably, the Privacy Regulations contain an independent security provision under which covered entities must maintain "appropriate administrative, technical and physical safeguards to protect the privacy of protected health information." Compliance with the Security Regulations will satisfy the Privacy Regulations' general security provision.

In general, the Security Regulations require covered entities to maintain reasonable and appropriate administrative, technical, and physical safeguards to:

I. Ensure the confidentiality, integrity, and availability of all e-PHI the covered entity creates, receives, maintains, or transmits;

II. Protect against any reasonably anticipated threats or hazards to the security or integrity of the information and any reasonably anticipated uses and disclosures not permitted or required under the Security Regulations; and

III. Otherwise ensure compliance with both the Privacy and Security Regulations.

The Security Regulations offer flexibility in how a covered entity can become compliant. In determining which security measures will allow it to "reasonably and appropriately" implement the Security Regulations' requirements, the covered entity must take into account the following four factors:

I. Its size, complexity, and capabilities;

II. Its technical infrastructure, hardware, and software security capabilities;

III. The costs of security measures; and

IV. The probability and criticality of potential risks to e-PHI.

(c) Definition of E-PHI. The Security Regulations define e-PHI as individually identifiable health information that is either transmitted by, or maintained in, electronic media. (By contrast, the Privacy Regulations apply to PHI in any form (e.g., written and oral)). Under this definition, information transmitted via telephone is not in electronic form. Generally, if information is not in electronic form prior to being transmitted, it is not e-PHI. Thus, information transmitted in paper-to-paper faxes, person-to-person telephone calls, video teleconferencing, or messages left on voice mail is not considered e-PHI.

(d) Structure of the Security Regulations. The Security Regulations are divided into the following five areas that are designed to cover the various functions within a covered entity:

I. Administrative safeguards;

II. Physical safeguards;

III. Technical safeguards;

IV. Organizational safeguards; and

V. Policies and procedures/documentation.

The five areas contain "Standards" and "Implementation Specifications," each of which is either required or addressable. If a Standard or Implementation Specification is "required," a covered entity must implement it. If, on the other hand, a Standard or Implementation Specification is "addressable," a covered entity must:

I. Assess whether the Standard or Implementation Specification is a reasonable and appropriate safeguard in its environment, when analyzed with reference to the likely contribution to protecting the entity's e-PHI; and

II. As applicable, either: (a) implement the Standard or Implementation Specification if reasonable and appropriate; or (b) if implementing the Standard or Implementation Specification is not reasonable and appropriate (i) document why it is not reasonable and appropriate; and (ii) implement an equivalent measure if reasonable and appropriate.

All told, the Security Regulations set forth 18 security Standards that must be implemented, through 19 "required" and 22 "addressable" Implementation Specifications.

The HIPAA security rule also requires that a plan amendment be in place if the plan sponsor will create, receive, maintain, or transmit e-PHI on behalf of the plan.

(e) Notice of Security Breaches

In February 2009, the Health Information Technology for Economic and Clinical Health Act ("HITECH"), was signed into law. A key provision of HITECH imposes a new duty on covered entities (including group health plans) to notify affected individuals and, in some cases, the media and the Department of Health and Human Services ("HHS"), of a breach of unsecured protected health information protected health information. HHS issued regulations regarding the HITECH effective on September 23, 2009.

Under the regulations, covered entities must notify each individual whose unsecured protected health information has been, or is reasonably believed to have been, accessed, acquired, used, or disclosed following a breach of unsecured protected health information. The covered entity is also required to notify the media and HHS in certain breaches involving large numbers of individuals. In addition, business associates of covered entities are required to notify the covered entities of a breach of unsecured protected health information.

Unsecured protected health information is generally defined as protected health information maintained in any form or medium, including paper or electronic, that is not encrypted or destroyed.

The regulations establish a process for covered entities and their business associates to follow in determining whether a breach has occurred for which notification must be given:

I. Determine whether there has been an impermissible use or disclosure of protected health information under the HIPAA privacy rules;

II. Determine whether the incident is excluded from the definition of "breach" because it is:

- an unintentional use of protected health information by a workforce member acting in good faith and within the scope of his or her authority, and the protected health information is not further used or disclosed improperly
- an inadvertent disclosure of protected health information by an authorized person to another authorized person, and the protected health information is not further used or disclosed improperly
- a disclosure of protected health information to an unauthorized person where there is a good faith belief that the unauthorized person would not reasonably have been able to retain the protected health information.

If the covered entity determines that a breach has occurred, it must notify the affected individuals without reasonable delay but not later than 60 calendar days after discovery of the breach. The notice must be "in plain language" and include a brief description of what happened, the dates of the breach and discovery (if known), a description of the types of unsecured protected health information involved in the breach, steps the individuals should take to protect themselves from potential harm resulting from the breach, a brief description of the steps the entity is taking to investigate the breach, mitigate harm, and protect against future breaches, and contact procedures for individuals to ask questions or obtain additional information, including a toll-free number, e-mail address, website, or postal address.

The notices should be sent to the affected individual's last known address via first-class mail, or e-mail if the individual has agreed to e-mail and has not withdrawn such agreement. If a covered entity determines that the contact information on the affective individuals is out of date, the regulations provide alternate means of notification, depending on the number of individuals with outdated contact information. If there are less than 10 individuals with outdated contact information, substitute notice may be provided by an alternative written notice, telephone or other means. If, however, there are 10 or more individuals with outdated contact

information, the covered entity must use one of the following alternative forms to notify the individuals:

- If the covered entity has a website, it may conspicuously post the notice on the website for a period of not less than 90 days; or
- Post the notice in major print or broadcast media in geographic areas where the affected individuals likely reside

Both of the alternative notice methods must include a toll-free telephone number that will remain active for at least 90 days where individuals can learn whether their unsecured protected health information was included in the breach.

If a breach affects more than 500 residents in a particular state, the covered entity must also notify prominent media outlets serving the state of the breach without reasonable delay, but not later than 60 calendar days after discovery of the breach. In addition, if a breach affects 500 or more individuals, the covered entity must also notify HHS within the same time period.

Covered entities must maintain a log of all breaches that affect fewer than 500 individuals and submit the log annually to HHS no later than 60 days following the end of the calendar year.

Business associates must provide breach notification to covered entities without reasonable delay but not later than 60 calendar days after discovery of the breach. Business associates must also, to the extent possible, identify each individual whose protected health information was breached and provide any other available information the covered entity will need to notify the affected individuals. The breach notification issue should be negotiated in the contract for the plan sponsor to assess and mitigate risk.

C. ACTIONS REQUIRED BY EMPLOYERS

1. GENERAL NOTICE ON WHEN COVERAGE IS EFFECTIVE

Employers must notify all employees and covered spouses of their future continuation rights within 90 days of the date their group health insurance becomes effective. This notice must be in writing. Moreover, simply handing the notice to the employee would not satisfy the obligation of notifying the employee's spouse. In such cases, employers may want to mail the notice to the employee's residence addressed to "Mr. and Ms. [Name]" or "The [John Doe] family." Notice to all covered employees and spouses must be made when the plan is first covered by COBRA.

2. ELECTION NOTICE

An employer of a covered employee must notify the plan administrator within

30 days of the following events which cause a loss of coverage under the plan, even if the actual loss of coverage occurs later: (a) death of the employee, (b) termination or reduction in hours, (c) covered employee's entitlement to Medicare, or (d) employer's bankruptcy if the covered individual is a retiree.

The employee or family member must notify the plan within 60 days of the following events which cause a loss of coverage: (a) the divorce or legal separation of a covered employee from spouse, (b) a child's loss of dependent status under the plan, (c) the receipt by a COBRA participant of a disability determination by SSA during an 18-month COBRA coverage period, (d) second qualifying event after the qualified beneficiary becomes entitled to continuation coverage of 18 or 29 months, or (e) a qualified beneficiary previously determined disabled has subsequently been determined no longer disabled by the SSA. An employer must have reasonable procedures for the employee or family member to follow for providing notice in these circumstances.

3. PLAN ADMINISTRATOR'S OBLIGATIONS

The plan administrator must notify qualified beneficiaries of their COBRA rights within 14 days of knowledge of the qualifying event.

4. NOTICE OF UNAVAILABILITY

If a plan administrator receives notice from an individual requesting COBRA coverage and the plan administrator determines that the individual is not entitled to COBRA coverage, it must provide a notice of unavailability within 14 days of receipt of the request.

5. NOTICE OF TERMINATION

If an individual's COBRA coverage is terminated before the end of the maximum period, the plan administrator must provide a notice of termination as soon as practicable following termination.

6. HIPAA PRIVACY RULES

In order for a covered entity to use protected health information for any other purpose, an authorization from the individual must be obtained. Employers are not usually considered as covered entities. However, an employer with a self-insured plan, certain cafeteria plans, or flexible spending health plans will likely be administering the plan and acting on the plan's (i.e. the covered entity's) behalf as a fiduciary. An employer who self-administers such plans is likely to have the full burden of compliance requirements.

7. HIPAA SECURITY RULES - STEPS FOR COVERED ENTITIES

a. Appoint a security official.

b. Conduct a risk analysis (an evaluation that will ideally involve the input of counsel and information systems/information technology personnel).

c. Develop appropriate policies/procedures.

d. Amend health plan documents (if applicable).

e. Review business associate contracts and revise as necessary.

f. Train workforce.

D. TIPS FOR EMPLOYERS

Some takeaways for employers in navigating COBRA and HIPAA.

COBRA: The Governmental regulators issued many technical and complex regulations interpreting COBRA. Some of the more significant include:

- **With a few exceptions, a qualified beneficiary need only be given an opportunity to continue the coverage that he/she was receiving before the qualifying event. However, the qualified beneficiary is entitled to all of the rights and features provided to active participants (i.e. the ability to add or drop eligible dependents and/or select another benefit option during open enrollment).**
- **The IRS has not issued detailed regulations defining gross misconduct, leaving employers at risk if COBRA coverage is withheld on this basis.**
- **A beneficiary's election is effective on the date sent.**
- **If no coverage is elected in the applicable period, the obligation to offer continuation ends.**
- **Elections by minors are made by their parent or legal guardian.**
- **If coverage is specifically waived, it can be subsequently elected until the original election period expires. In this case, coverage must be provided only from the date of election.**
- **If continuation coverage is provided, for example, under North Carolina's state continuation/conversion provisions, COBRA has not been satisfied unless this offering meets all of the COBRA requirements. Employers may offer both a COBRA plan and an alternative plan. Generally, if the alternative is selected, the employer need not offer COBRA coverage upon expiration of the alternative plan.**
- **Premiums may be at 102% of the employer's cost of the plan regardless if active employees receive premium discounts.**
- **Premiums may be increased at each 12-month determination period.**
- **The initial notification requirement to all employees and new hires can be met by mailing the notice, first class, to the last known address. A single mailing is appropriate for the employee and spouse if the address is the same.**

HIPAA: HIPAA's privacy rules require that certain safeguards be implemented by employers that have access to protected health information. Examples of safeguards include:

- **Physical safeguards include locked files, separating health information from human resources files, password protected computer files that contain health information and secured work areas where health information is being processed and worked on.**
- **Personnel safeguards include limiting access to health information to individuals who have access needs based on their job functions and providing training to individuals with access regarding required protection and consequences for violations.**
- **Procedural safeguards relate to the manner in which benefit information is handled and dispersed. Technical issues such as the means to verify the identity or location of individuals requesting information by telephone or computer connection.**

HIPAA's security rules require that covered entities maintain reasonable and appropriate administrative, technical, and physical safeguards to protect electronic protected health information from unauthorized access, alteration, deletion and transmission.

22. Polygraph Protection Act

A. BACKGROUND

The Employee Polygraph Protection Act 29 U.S.C. § 2001 prohibits most private employers from using polygraphs to screen job applicants or test current employees. The Act contains a limited number of narrow exceptions with detailed notice and disclosure requirements. Most employers will find it difficult or impractical to administer polygraph tests even if an exception applies.

B. HOW THE LAW WORKS

1. COVERAGE

All private employers engaged in interstate commerce as defined in the Fair Labor Standards Act are covered. There are no dollar tests or minimum employee thresholds. Federal, State and local governments (as well as their political subdivisions) are exempt.

2. WHAT IS PROHIBITED

Covered employers may not (a) require, request, suggest or cause any employee or applicant to take a lie detector test; (b) use, accept or inquire about the results of a test an employee or applicant may have taken; or (c) discharge, discipline, discriminate against, deny employment or promotion, or threaten any employee or applicant to take such action for failure to take the test, for the results of a test, or for pursuing rights under the Act.

3. TYPES OF TESTS PROHIBITED

A lie detector is any mechanical or electronic device used to render an opinion regarding the honesty or dishonesty of an individual and includes voice stress analysis, as well as, polygraph. A polygraph is a lie detector which simultaneously records changes in cardiovascular, respiratory, and electrodermal patterns and is used to diagnose honesty. Drug tests, oral or written "honesty" tests, and handwriting tests are not considered lie detector tests.

4. WHEN TESTING IS ALLOWED

Employers may use polygraph tests in three limited circumstances, each with its own detailed requirements.

a. Investigations of Economic Loss or Injury

Employers investigating an economic loss or injury to the employer (not a loss to co-employees) may ask an employee to take a polygraph test (and no other type of lie detector test) only if:

(1) it is part of an on-going investigation of a specific economic loss to the employer such as theft or sabotage;

(2) the employee had access to the subject property;

(3) there is reasonable suspicion the employee was involved;

(4) the employer provides a written statement (at least 48 hours prior to the test excluding weekends/holidays) fully explaining the incident and basis for suspicion, the specific loss, the employee's access, the basis of the suspicion and the signature of an authorized employer representative; and

(5) the employer retains this statement for three years and makes it available on request to the Wage and Hour Division.

The economic loss must be a specific incident caused by intentional wrongdoing. Property that belongs to others only qualifies if the employer is legally responsible for its loss or damage, and the employer's business is damaged. Generalized suspicions, non-specific inventory losses and accidents are not sufficient reason. A polygraph may not be used to detect drug use. Access to the lost property means the opportunity to misappropriate, not just physical contact. Reasonable suspicion is defined as an observable, articulable basis in fact indicating involvement in the loss, not just the opportunity for involvement.

b. Employers Who Manufacture, Distribute or Dispense Controlled Substances

Employers who manufacture, distribute or dispense controlled substances listed in Schedule I, II, III or IV of Section 202 of the Controlled Substances Act (21 U.S.C. 812) may administer polygraph tests to:

(1) an applicant (or current employee seeking a transfer) who would have *direct* access to the manufacture, storage, distribution or sale of any controlled substance; or

(2) an employee if the test is part of an on-going investigation of criminal or other misconduct involving loss or injury of the controlled substance, and the employee had access to the person or property subject to the investigation (includes infrequent or opportunistic access).

This exception does not apply to common carriers who transport the substances. The written statement specified in 4(a)iv above is not required. If a current employee seeks a transfer or promotion to a direct access position, and is rejected based upon a polygraph result, the current assignment cannot be affected.

c. Employers Providing Security Services

Employers who primarily provide armored car personnel, alarm system personnel (including design, installation and maintenance) or other uniformed or plainclothes security personnel may polygraph *job applicants* if the employee will be hired to protect:

(1) facilities, materials or operations having a significant impact on the health or safety of any state or political subdivision or the national security (e.g. power plants, water supplies, toxic waste, transportation); or

(2) currency, negotiable securities, precious commodities or instruments, or proprietary information.

This exception applies to applicants or employees seeking transfer into covered positions only. The on-going investigation exception may apply to current employees if all the conditions are met. The security exception does not apply to employers who maintain security personnel, but are not in the security service business (e.g. a manufacturing plant). "Facilities, materials or operations" includes those against which acts of sabotage, espionage, terrorism or other hostile, destructive or illegal acts could significantly impact public safety or national security. Employers may request a ruling on this issue (in advance) from the Wage and Hour Administrator.

5. RESTRICTIONS ON POLYGRAPH USAGE WHEN AN EXCEPTION APPLIES

If one of the three exceptions apply, a private employer must meet several additional requirements before and during administration of the test including:

a. An employee may not be disciplined or affected by the results of an "on-going investigation" test (or a refusal to take the test) unless there is additional supporting evidence of the result (e.g. access to missing property, evidence that led to a reasonable suspicion, admissions);

b. An employee or applicant may not be disciplined or affected by the results of a "security service" or "controlled substance" test (or a refusal to take the test) unless there is an additional reason for the action (e.g. prior experience, education, job performance, admissions);

c. During polygraph testing, the person being examined has these rights:

(1) he may end the test at any time (it will be a refusal);

(2) no degrading or unnecessarily intrusive questions may be asked;

(3) no questions regarding religious beliefs, racial issues, politics, sexual behavior, or labor organizations may be asked;

(4) there can be no test if a physician states in writing the person has a condition which might cause abnormal responses (this can be treated as a refusal to take the test);

(5) each test will have a pretest phase (before actual use of the polygraph) where the examinee receives a notice (48 hours before the test excluding weekends/holidays) as to when and where the test will occur, that he or she can consult with counsel or a representative before each phase, and the nature of the instrument and procedure (orally and in writing). The notice must be read and provided to the examinee. The actual questions

to be asked must be provided and the examinee must be given a detailed statement of rights. The examinee must sign the statement of rights;

(6) the actual testing phase will contain only the questions provided to the examinee in advance;

(7) the post-testing phase must include an interview concerning the results, a copy of any opinion or conclusions, and the questions asked with charted responses;

(8) no testing period shall be less than 90 minutes beginning with the pre-test phase and ending with review of the results.

6. QUALIFICATIONS OF EXAMINERS

Polygraph examiners must have a valid license, carry a $50,000 bond, observe all examinee rights, do no more than five complete exams in one day, avoid any opinion as to honesty in writing, must base all conclusions on the test results, must not make employment recommendations and must maintain all records and statements relating to the test for three years.

7. ENFORCEMENT

The U.S. Department of Labor, Wage and Hour Division may seek federal court injunctions, and relief including back pay, back benefits, employment, reemployment and promotion. The maximum penalties allowed adjust based upon inflation.

Individuals may sue in federal or state court on their own behalf and on behalf of others within three years of the violation.

C. ACTIONS REQUIRED BY EMPLOYERS

1. POSTER

All covered employers must post in a conspicuous place an official notice containing the rights of applicants and employees. This notice must be posted even if polygraph tests are not contemplated.

2. RECORDKEEPING

All records, statements, results and other documents relating to a polygraph test must be retained for three years.

D. TIPS FOR EMPLOYERS

- **Polygraph examinations are difficult to administer lawfully and effectively. While they may have a place in certain situations, they are not available as a general screening or investigatory tool.**
- **If the polygraph is used, every procedure must be followed and documented. A qualified polygraph examiner can help with procedures and many can offer additional sample forms.**
- **The Act does not forbid pencil and paper honesty tests, or other nonmechanical, non-electrical procedures.**

23. Worker Adjustment & Retraining Notification Act (WARN)

A. BACKGROUND

Congress enacted the Worker Adjustment and Retraining Notification Act ("WARN") in 1988 to provide certain protections to employees involved in plant closures and mass layoffs. WARN requires employers to provide at least 60 days advance written notice of covered layoffs and plant closures to affected employees, their representatives, and appropriate local government officials. If the required notice is not given, the employer may be held liable to affected employees for back pay and benefits for the 60-calendar day notice period, as well as civil penalties for failing to notify the local government unit. The U.S. Department of Labor ("DOL") is authorized to issue interpretive regulations under WARN, and the DOL published regulations in April 1989. However, the DOL is not authorized to investigate complaints or bring suits to enforce WARN. Instead, the Act entitles aggrieved employees to file civil actions for damages incurred by noncompliance with WARN.

B. HOW THE LAW WORKS

1. COVERAGE

WARN applies to any employer that employs:

a. 100 or more employees, excluding part-time employees, or

b. 100 or more employees, including part-time employees who, in the aggregate, work at least a combined 4,000 hours per week, excluding overtime.

"Part-time employees" are defined as employees who are employed for an average of fewer than 20 hours per week or who have been employed for fewer than 6 of the 12 months before the date on which WARN notice is required.

Workers on temporary layoff or on leave who have a reasonable expectation of recall are counted as employees.

For purposes of determining coverage under WARN (but not whether a particular employment action triggers the notice requirements of WARN), all the facilities of an employer are combined. Coverage also extends to private for-profit and non-profit employers, as well as public and quasi-public entities which operate in a commercial context and are separately organized from the regular government. Regular federal, state, and local government entities that provide public services are not covered.

Individuals entitled to notice include those that are hourly and salaried, as well as managerial and supervisory workers. Business partners, consultants, contract

employees of another employer that are paid by that other employer, and self-employed individuals are excluded.

2. WHAT TRIGGERS NOTICE?

A covered employer who anticipates a "plant closing" or "mass layoff," as defined by the Act, must provide the required 60 days' advance notice.

a. Plant Closing - The term plant closing means the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss during any 30-day period for 50 or more employees, excluding part-time employees.

(1) The DOL has interpreted "single site of employment" to include either a single location or a group of contiguous locations. The regulations indicate that the functional relationship between the separate buildings or areas is a determining factor in whether they will be considered a single site. For workers who travel, look to the home base from which work is assigned or to where they report when the worker's duties are outside any of the employer's regular employment sites.

(2) A single site of employment may contain a number of distinct operating units. The term "operating unit" refers to an organizationally or operationally distinct product, operation, or specific work function within the single site of employment. Under the plant closing definition, shutdown of an operating unit creating an employment loss for 50 or more employees will require compliance with WARN.

b. Mass Layoff - A mass layoff is a reduction in force which is not a plant closing as defined above and which results in an employment loss at a single site of employment during any 30-day period for:

(1) at least 33 percent of the active employees, excluding part-time employees, and

(2) at least 50 employees, excluding part-time employees.

If 500 or more employees (excluding part-time employees) are affected, the 33% requirement does not apply.

c. Employment Loss - Both plant closings and mass layoffs require, at a minimum, an employment loss for 50 or more employees before notice must be given. An employment loss under the Act is:

(1) an employment termination, other than a discharge for cause, voluntary departure or retirement;

(2) a layoff exceeding 6 months; or

(3) a reduction in hours of work of individual employees of more than 50% during each month of any 6-month period.

An employment loss does not occur if an employee who is terminated or laid off as a result of a relocation or consolidation of all or a part of

the employer's business is offered a transfer to a job within a reasonable commuting distance.

The DOL has adopted the constructive discharge theory from NLRB and Title VII law for determining if an employee's departure is voluntary for purposes of (1) above. Where an employee is pressured to resign or the employer has created a hostile or intolerable work environment, the employee's departure will not be considered voluntary, and the employee will have suffered an employment loss.

d. **The 90 Day Rule** - Generally, employment actions taken within a 30-day period are considered in determining whether a statutory plant closing or mass layoff has occurred. However, under section 3(d) of the Act, employment losses for two or more groups of employees at a single site of employment, each of which individually does not meet the 50 employee or 33 percent minimum, but which in the aggregate exceed the minimum numbers, are considered a single plant closing or mass layoff if they occur within a 90-day period. This section is designed to discourage employers from spacing out layoffs to avoid WARN coverage. The section does not apply if the employer can demonstrate that the employment losses are the result of separate and distinct actions and causes.

C. ACTION REQUIRED BY EMPLOYERS

1. WHO MUST RECEIVE NOTICE?

WARN requires employers to provide the required notice to each employee representative or collective bargaining agent at the appropriate time. If there is no representative, each affected employee must receive notice. Notice must also be served on the state dislocated worker unit and the chief elected official of the unit of local government in which the layoff or closing occurs. Part-time employees are due notice, even though they are not counted when determining the trigger levels.

2. REQUIREMENTS OF NOTICE

WARN sets forth the specific information that must be included in the mandatory notice. The requirements vary slightly between the notice that must be provided to affected employees, their representative, and local government officials. However, all notices must be in writing. The notice to affected employees must state the date of the separations, whether the separations will be temporary or permanent, whether employees have bumping rights, and the identity of the company official to contact for more information. The notice to the employee representative must have this same information, plus the location of the plant, the job titles and positions affected, and the individuals holding these positions. The information required in the notice to the local government unit resembles that provided to the union, except the identity of the affected employees is not revealed.

3. TIME OF NOTICE

The mandatory notice under WARN must be given at least 60 calendar days prior to a plant closing or mass layoff. If all employees are not terminated on the same date, the date of the first termination within the applicable 30-day or 90-day period triggers the 60-day notice requirement.

D. TIPS FOR EMPLOYERS

1. DETERMINE IF WARN APPLIES

If layoffs or terminations are planned, employers should analyze the number of employees involved to determine if WARN's notice requirements are applicable. WARN contains a number of exceptions and technical requirements. Consequently, legal counsel should be consulted in assessing the impact of WARN on an employment decision.

2. PLANT CLOSING V. MASS LAYOFF

In analyzing employment decisions for WARN coverage, employers should determine if a layoff effectively shuts down an operating unit, making the layoff a "plant closing" under WARN. The distinction between plant closings and mass layoffs is significant, since the definition of plant closing is met if 50 employees suffer an employment loss, while the mass layoff definition has the additional requirement that at least 33 percent of the employees at the employment site be affected, unless 500 employees are laid off.

3. SUPERVISORS

Unlike the National Labor Relations Act, supervisors are included as employees under WARN. Therefore, supervisors should be counted when computing whether WARN applies, and they should receive the required notice if they are laid off in a plant closing or mass layoff covered by WARN.

4. PART-TIME EMPLOYEES

WARN regulations define "part-time employees" as employees who are employed for an average of fewer than 20 hours per week or who have been employed for fewer than 6 of the 12 months preceding the date on which notice is required. Part-time employees are included in calculating the 100-employee coverage threshold but are not counted in determining whether a plant closing or mass layoff will occur. If a plant closing or mass layoff occurs, part-time employees are entitled to the required notice.

5. SAMPLE NOTICES

Sample WARN notices to the collective bargaining agent, individual employees, and state and local government officials are found following this chapter.

Mayor and/or Highest Elected Offical of the
unit of local government where the site is located

Re Announcement of Planned Action

Dear [Mayor/Chair _____]:
We are writing to give you notice that there will be a total closure of the [Name of Facility] facility located at [Street Address, City, State] on [Date]. The entire facility will be closed and all employees at the facility will be impacted. This closure is expected to be [permanent/temporary]. The expected date of the first separation will be [Date]. OR We are writing to give you notice that there will be a mass layoff at the [Name of Facility] facility located at [Street Address, City, State] on [Date]. This mass layoff is expected to be [permanent/temporary]. The expected date of the first separation will be [Date].

All affected employees have been notified of their separation dates and that their separation from employment will be [permanent/temporary]. Those employees are expected to be separated from employment beginning on [Date], with all separations accomplished by [Date].

The [following/attached] is a list of the job positions and number of individuals who will be affected by the [mass layoff/closure] along with the anticipated schedule for job losses:

Job Title Number of Employees Affected Date of Separation

[Employer] [is/is not] part of a union [state name of local union, chief elected officer of union, and and address of chief elected officer, if union affiliated]. There [will/will not] be any bumping rights for the affected employees, that is, employees [will/will not] be able to displace more junior employees out of their job positions as a result of this [closure/mass layoff].

If you have any questions or want additional information concerning this matter, please contact [Name of Person and Title] at [telephone number] or [e-mail address].

Sincerely,

_____
[Name of Company Representative]

Name and Address of Employee

Re: Announcement of Planned Action

Dear [Employee Name]:
We are writing to inform you that [the Name and Address of Facility] will close on [Date]. The entire facility will be closed and all employees at the facility will be impacted. This closure is expected to be [permanent/temporary]. The expected date of the first separation will be [Date]. OR We are writing to inform you that there will be a mass layoff at the [Name and Address of Facility] on [Date]. This mass layoff is expected to be [permanent/temporary]. The expected date of the first separation will be [Date].

We regret to inform you that your position will be eliminated [on the separation date above OR on another specific date that is at least 60 days from the notice date OR between Start Date and End Date {must span a 14-day period}].

As you know, [Employer Name] [does/does not] have a job bumping system, that is, employees [will/will not] be able to displace more junior employees out of their job positions as a result of this [closure/mass layoff].

{The notice may include additional information useful to the employees such as information on available dislocated worker assistance, and, if the planned action is expected to be temporary, the estimated duration, if known.}

If you have any questions or want additional information concerning this matter, please contact [Name, Title] at [telephone number] or [e-mail address].

Sincerely,

_____

[Name of Company Representative]

North Carolina Department of Commerce
Division of Workforce Solutions
Attention: Rapid Response Team
4316 Mail Service Center
Raleigh, NC 27699-4316

Re Announcement of Planned Action

Dear Rapid Response Team:
We are writing to give you notice that there will be a total closure of the [Name of Facility] facility located at [Street Address, City, State] on [Date]. The entire facility will be closed and all employees at the facility will be impacted. This closure is expected to be [permanent/temporary]. The expected date of the first separation will be [Date]. OR We are writing to give you notice that there will be a mass layoff at the [Name of Facility] facility located at [Street Address, City, State] on [Date]. This mass layoff is expected to be [permanent/temporary]. The expected date of the first separation will be [Date].

All affected employees have been notified of their separation dates and that their separation from employment will be [permanent/temporary]. Those employees are expected to be separated from employment beginning on [Date], with all separations accomplished by [Date].

The [following/attached] is a list of the job positions and number of individuals who will be affected by the [mass layoff/closure] along with the anticipated schedule for job losses:

Job Title Number of Employees Affected Date of Separation

[Employer] [is/is not] part of a union [state name of local union, chief elected officer of union, and and address of chief elected officer, if union affiliated]. There [will/will not] be any bumping rights for the affected employees, that is, employees [will/will not] be able to displace more junior employees out of their job positions as a result of this [closure/mass layoff].

If you have any questions or want additional information concerning this matter, please contact [Name of Person and Title] at [telephone number] or [e-mail address].

Sincerely,

_____
[Name of Company Representative]

[Name and Address of Union Chief Official]

Re: Announcement of Planned Action

Dear [Union Chief]:
We are writing to give you notice that there will be a total closure of the [Name of Facility] facility located at [Street Address, City, State] on [Date]. The entire facility will be closed and all employees at the facility will be impacted. This closure is expected to be [permanent/temporary]. The expected date of the first separation will be [Date]. OR We are writing to give you notice that there will be a mass layoff at the [Name of Facility] facility located at [Street Address, City, State] on [Date]. This mass layoff is expected to be [permanent/temporary].] The expected date of the first separation will be [Date].

Employees are expected to be separated from employment beginning on [Date], with all separations accomplished by [Date].

The anticipated schedule for job losses is as follows:
{Specify date(s) of separation from employment and, if all separations are not occurring at once, names of employees being separated on each date.}. Attached is a list of the job titles and names of the workers currently holding those affected jobs who will be separated according to the above schedule.

{The notice may include additional information useful to the employees such as information on available dislocated worker assistance, and, if the planned action is expected to be temporary, the estimated duration, if known.}

If you have any questions or want additional information concerning this matter, please contact [Name and Title], at [telephone number] or [e-mail address].

Sincerely,

_____

[Name Of Company Representative]

24. Family & Medical Leave Act

A. BACKGROUND

The Family and Medical Leave Act of 1993 (FMLA) entitles eligible employees to take up to 12 or 26 weeks of unpaid leave of absence in a 12-month period for certain medical and family reasons.

B. HOW THE LAW WORKS

1. COVERAGE

Private sector employers with 50 or more employees during 20 or more workweeks in the current or preceding calendar year are covered by the FMLA. All employees, even employees who are "jointly" employed (e.g. leased employees in many cases), part time, temporary, or seasonal must be included when determining if an employer employs 50 or more employees. Public sector employers and local educational agencies are covered by the FMLA without regard to how many employees they employ.

2. ELIGIBLE EMPLOYEES

Employees are eligible for FMLA leave if they work for a covered employer, have been employed for at least 12 months (not necessarily consecutive), and have worked at least 1,250 hours during the 12 months prior to the need for leave. [NOTE: In certain circumstances, the time an individual spends working for an organization as a temporary employee through a temporary employment agency must be counted toward the 12-month/1250 hour eligibility test.] In considering whether an employee has worked for the employer for 12 months, the employer must consider any time worked for the employer in the past seven years (rehires) or longer if the break in employment is due to service covered by the Uniformed Services Employment and Reemployment Rights Act (USERRA) or if there is a written agreement outlining the employer's intention to rehire the employee after the break in employment.

An employee is not eligible for FMLA where there are less than 50 employees within 75 miles of the employee's worksite. This important exemption means that employees working in small offices within a company may not be eligible for FMLA leave. For example, employees who regularly work in a small sales office more than 75 miles from the main company worksite are probably not eligible for FMLA leave.

3. REASONS FOR TAKING FMLA LEAVE

Employers covered by the FMLA must grant unpaid leave to an eligible employee for any of the following reasons:

a. The birth of a son or daughter, and to care for the newborn child;

b. The placement of a son or daughter with the employee for adoption or foster care;

c. To care for the employee's spouse, son, daughter or parent with a serious health care condition;

d. Because of a serious health condition that makes the employee unable to perform the essential functions of the employee's job.

In addition, eligible employees with a spouse, son, daughter, or parent who is a servicemember on covered active duty may use their 12-week entitlement to address certain qualifying exigencies. Covered active duty means: 1) in the case of a member of a regular component of the Armed Forces, duty during the deployment of the member with the Armed forces in a foreign country; and 2) for servicemembers of a reserve component of the Armed Forces, duty during the employment of the member with the Armed Forces to a foreign country under a call or order to active duty status. Qualifying exigencies may include attending certain military events, arranging for alternative childcare, addressing certain parental care issues, addressing certain financial and legal arrangements, attending certain counseling sessions, rest and recuperation leave, and attending post deployment reintegration briefings.

FMLA also includes a special leave entitlement that permits eligible employees to take up to 26 weeks of leave to care for a covered servicemember or veteran during a single 12-month period.

A covered servicemember is a current member of the Armed Forces, including a member of the National Guard or Reserves, who has a serious injury or illness incurred in the line of duty on active duty that may render the servicemember medically unfit to perform his or her duties for which the servicemember is undergoing medical treatment, recuperation, or therapy; or is in outpatient status; or is on the temporary disability retired list. Serious injury means an injury or illness that was incurred in line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in line of duty on active duty in the Armed Forces) and that may render the member medically unfit to perform the duties of the member's office, grade, rank or rating.

A covered veteran is a veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness and who was a member of the Armed Forces (including a member of the National Guard or Reserves) at any time during the period of five (5) years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy. Serious injury or illness for a covered veteran means a qualifying (as defined by the Secretary of Labor) injury or illness that was incurred by the member in line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in line of duty on active duty in the Armed Forces) and that manifested itself before of after the member became a veteran.

"Spouse" means a husband or wife (see below for more information). "Child"

means biological, adopted, or foster child, a stepchild, legal ward, or a child being raised by the employee. The child must be either under 18 years of age, or 18 and older and incapable of self-care because of a mental or physical disability for Basic Leave Entitlement; for Military Leave Entitlement, the child may be of any age. "Parent" means biological parent, or a non-biological parent who had primary responsibility for raising the employee. This term does not include "parents-in-law."

The U.S. Department of Labor in an Administrative Interpretation on June 22, 2010 clarified the definition of the parental relationship under the Family and Medical Leave Act (FMLA) when it addressed the definition of "son and daughter" under the Family and Medical Leave Act (FMLA) in regards to an employee who assumes the parental role ("in loco parentis") of caring for a child regardless of the legal or biological relationship. According to the Department of Labor, the term in loco parentis is defined as those individuals with day-to-day responsibilities to care for and financially support a child. It is not required, however, that the employee provides both day-to-day care and financial support to be covered by *in loco parentis*. Some examples of *in loco parentis* relationships include: an uncle who takes care of his young niece and nephew because their single parent is on active military duty; an aunt who assumes responsibility for raising a child after the death of the child's parents; a grandmother who assumes responsibility for her grandchild because her own child is debilitated and incapable of providing care; and an employee who intends to share parenting responsibilities with his or her same-sex partner.

Next of kin of a covered servicemember means the nearest blood relative other than the covered servicemember's spouse, parent, son, or daughter, unless the covered servicemember has designated a specific blood relative in writing for purposes of military caregiver leave under FMLA. Leave for reasons (a) and (b) above must conclude within 12 months of the event.

In June 2013, the US Supreme Court ruled that part of the federal Defense of Marriage Act (DOMA) was unconstitutional because it denied recognition of marital status to same-sex couples under federal law. One effect of this ruling was to expand FMLA protections to employees in same-sex marriages residing in States that recognize same-sex marriage. The Department of Labor's FMLA regulations provide that a spouse is a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides. Thus, in the case of same-sex marriages, the FMLA focuses not on whether the marriage is lawful in the state where the employer is located, where the employee works, or where the marriage occurred, but whether it is recognized in the state in which the employee resides. The Department of Labor issued a Final Rule on February 25, 2015 (effective March 27, 2015) revising the regulatory definition of spouse. The Final Rule amended the regulatory definition of spouse under the FMLA so that eligible employees in legal same-sex marriages will be able to take FMLA leave to care for their spouse or family member, regardless of where they live. This ensures that the FMLA will give spouses in same-sex marriages the same ability as all spouses to fully exercise their FMLA rights.

Following the US Supreme Court's 2015 decision in *Obergefell v. Hodges*, in which it ruled that the fundamental right to marry is guaranteed to same sex couples by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the US Constitution, all fifty states must recognize same sex marriages. Accordingly, all same sex marriages satisfy the definition of spouse under the FMLA.

4. SERIOUS HEALTH CONDITION

A "Serious Health Condition" means an illness, injury, impairment, or physical or mental condition that involves one or more of the following:

a. Inpatient Care

Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity or subsequent treatment in connection with or consequent to such inpatient care. Incapacity, for purposes of FMLA, is defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom.

b. Incapacity Plus Treatment

A period of incapacity of more than three consecutive calendar days (including any subsequent treatment or period of incapacity relating to the same condition), that also involves:

(1) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(2) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider. A regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition. A regimen of treatment does not by itself include the taking of over-the-counter medications, such as aspirin, antihistamines or salves; bed rest; drinking fluids; exercise; or other similar activities that can be initiated without a visit to a health care provider. The first visit to the health care provider must take place within seven days of the first day of incapacity. Treatment two or more times must occur within 30 days of the first visit to the health care provider.

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

c. Pregnancy

Any period of incapacity due to pregnancy or for prenatal care.

d. Chronic Conditions Requiring Treatments

A chronic condition which:

(1) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

(2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(3) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.) but, does not necessarily require a visit to a physician at the time of occurrence. For example, a patient with asthma who has been advised to stay home when the pollen count is high or a pregnant woman with morning sickness. "Periodic" visits is defined as at least two visits to a health care provider per year.

e. Permanent/Long-Term Conditions Requiring Supervision

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

f. Multiple Treatments (Non-Chronic Conditions)

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

A **health care provider** is a doctor of medicine or osteopathy, podiatrist, dentist, clinical psychologist, optometrist, chiropractor (limited to treatments consisting of spine manipulation), nurse midwife, nurse practitioner, clinical social worker, certain foreign health care providers, any provider recognized by the group health plan for certification of claims, or Christian Science practitioner (company can require separate medical opinion, but not medical treatment).

5. LENGTH OF LEAVE

An eligible employee is entitled to a maximum of 12 weeks of unpaid family and medical leave during any 12 month period. The 12-month period is determined in one of four ways: (a) calendar year; (b) a fixed 12-month "leave year" such as a fiscal year; (c) a 12-month period measured forward from the date an employee's first FMLA begins; or (d) a "rolling" 12-month period measured backward from the date an employee uses any FMLA leave. Employers should expressly choose one of those methods for its workforce and communicate it in the FMLA policy. Spouses employed by the same employer are limited to a combined total of 12

weeks of FMLA for the birth and care of a newborn child, for placement of a child for adoption or foster care, and to care for a parent who has a serious health condition. Employees are entitled to up to 26 weeks of leave in a single 12-month period measured forward for leave to care for a covered servicemember.

6. INTERMITTENT OR REDUCED LEAVE SCHEDULE

An employee is entitled to take FMLA leave on an intermittent or reduced schedule basis when the leave is medically necessary (1) to care for a spouse, child or parent with a serious health condition; or (2) because the employee is unable to perform any one of the essential functions of the job because of a serious health condition. An employee may request, but the employer does not have to grant, intermittent or reduced leave schedule for the birth or placement of a child.

An intermittent leave is a leave taken in separate blocks of time due to a single illness or injury, rather than for one continuous period of time, and may include leave periods of one hour or less, or several hours or days at a time. Examples of intermittent leave would include leave for medical appointments related to a serious health condition, or leave taken for a day or two at a time spread over several months.

Reduced leave schedule is a leave schedule that reduces an employee's usual number of working hours per workweek. In other words, a reduced leave schedule is the change of an employee's work schedule for a period of time, normally from full time to part time. For example, an employee may request reduced leave to work part time while recovering from a serious health condition or to care for a seriously ill family member.

If an employee takes intermittent or reduced leave, only the amount of leave actually taken can be counted toward the number of weeks of FMLA leave to which the employee is entitled. If an employee who normally works five days a week takes off one day, the employee has used only one-fifth week of FMLA leave. Similarly, an employee who normally works eight-hour days works four-hour days under a reduced leave schedule uses one-half week of leave each week. Some employers calculate an employee's FMLA entitlement by hours. That is, if an employee is normally scheduled to work 40 hours per week, the employee is entitled to 480 FMLA hours during a leave year (12 weeks x 40 hours).

An employee who requests intermittent or reduced leave for foreseeable medical treatment may be temporarily transferred by the employer to another job with equivalent pay and benefits that better accommodates the need for leave.

An employee may also take FMLA leave on an intermittent or reduced leave basis for the military caregiver and exigency leaves.

7. NOTICE AND CERTIFICATION

An employee must give at least 30 days notice before an FMLA leave is to begin if the reason for the leave is reasonably foreseeable. If the need for the leave is not reasonably foreseeable, the employee must give notice as soon as practicable. Employees do not have to specifically request or mention specifically FMLA

to meet their notification obligations. They do, however, have to provide their employer with enough information so that it can be inferred that the leave may be covered under the FMLA. An employer may require an employee to provide written certification from a health care provider of the employee's serious medical condition or the serious medical condition of the employee's spouse, child or parent. FMLA leave may be delayed until proper notice or certification is provided by the employee under certain circumstances.

Employers may also require an employee to provide written certification for the military caregiver and qualifying exigency leaves.

Employers should respond to FMLA situations in a timely manner. While the Supreme Court overruled the Department of Labor regulation that employers cannot make a retroactive designation of FMLA if the employee gave sufficient notice of the need for FMLA leave, the employee may still have a valid claim if he can show that he was prejudiced by the lack of notice.

8. USE OF PAID TIME OFF

The employer may require an employee to use paid vacation or paid personal leave during any FMLA leave. An employer can also require an employee to use sick days as part of any FMLA leave based on a serious medical condition of the employee, spouse, child, or parent as long as the employer's sick pay plan allows pay for these purposes. The fact that an employee is required to take paid vacation and use paid sick days during an FMLA leave does not extend the entitlement to FMLA leave beyond 12 weeks as long as this is made clear in the employer's policy. Any paid leave that qualifies as FMLA, including short-term disability and workers' compensation leave, may be counted as FMLA. Employers should make it clear in their FMLA policy and subsequent notice to employees that such leaves run concurrently. Employers should also be aware of conflicting or overlapping provisions in the Americans with Disabilities Act.

9. CONTINUATION OF MEDICAL BENEFITS

For the duration of FMLA leave, the employer must maintain the employee's health coverage under any group health plan under the same conditions that coverage would have been provided if the employee had continued working. Employees can be required to continue making the same copayments during the leave that they were making before the leave starts. If the employee does not return to work after FMLA leave, the employer may recoup (in some cases) all payments made by the company to continue the employee's health coverage while the employee was on leave.

10. REINSTATEMENT

Upon return from an FMLA leave, an employee must be reinstated to the same position the employee held when the leave started or to a position with equivalent pay, benefits, and other terms and conditions of employment. This is a strict standard essentially requiring reinstatement to the same job, pay and working conditions. An exception to this standard exists for "key employees" – employees paid on a salary basis, who are among the highest paid 10% of all employees within 75 miles of the applicable workplace, and for whom

reinstatement would cause the employer substantial and grievous economic injury. If the employer offers, and an employee accepts, a light duty position, the time spent in the light duty position does not count against the employee's 12 weeks of reinstatement or leave rights.

11. NOTICE OF FMLA REQUIREMENTS

A poster explaining the Family and Medical Leave Act must be posted in a conspicuous place where it can be seen by employees and applicants for employment. Information concerning an employee's rights and obligations and the employer's FMLA leave policies must also appear in the employee handbook. If the employer does not maintain an employee handbook, general notice containing the same information contained in the DOL's FMLA poster should be provided to each new employee upon hire. The form must be given to an employee at the time the employee requests FMLA leave. The employer must also give an employee the information set out at the time an employee requests FMLA leave, though no particular form is required. The Designation Notice may be used to designate whether or not the requested leave is FMLA qualifying. This may be given within five business days of receipt of sufficient information to determine whether the leave qualifies as FMLA leave or receipt of a certification. The best practice is to use the forms provided by the Department of Labor. Records of all FMLA leaves must be kept for three years. The records which must be kept are generally listed in Chapter 17.

12. UNLAWFUL ACTS BY EMPLOYERS

The FMLA makes it unlawful for an employer to

a. Interfere with, restrain or deny any right provided by the FMLA; or

b. Discharge or discriminate against any person for opposing practices made unlawful by the FMLA or for participating in any proceeding relating to the FMLA.

13. PENALTIES

An employee may file a complaint with the Wage-Hour Division alleging a violation of the FMLA or the employee can go directly to court and file a private FMLA lawsuit. The statute of limitations is two years from the last act that the employee contends violated the Act, or three years if the violation was willful. If the employer is found to have violated the FMLA, the following remedies are available to the employee:

a. Wages, benefits or other compensation lost as a result of the violation;

b. Any monetary loss suffered by the employee because of an unlawful denial of FMLA leave, such as the cost of providing care up to a sum equal to 12 weeks of wages for the employee;

c. Liquidated damages equaling the total of the previous sums;

d. Employment, reinstatement, or promotion when appropriate;

e. Reasonable attorney and expert witness fees; and

f. Interest at the prevailing rate.

C. ACTION REQUIRED BY EMPLOYERS

To comply with the FMLA, a covered employer must take the following actions.

1. BEFORE AN EMPLOYEE REQUESTS FMLA LEAVE

a. Adopt a family and medical leave policy that coordinates with existing leave policies.

b. Post required poster in conspicuous places where it can be seen by employees and applicants for employment.

c. Include an explanation of the FMLA and all FMLA leave policies in the employee handbook. If the employer does not maintain an employee handbook, general notice containing the same information contained in the DOL's FMLA poster should be provided to each new employee upon hire.

2. WHEN AN EMPLOYEE REQUESTS LEAVE

a. Determine whether the employee is "eligible" for FMLA leave.

b. When an employee requests any type of leave, a determination should be made whether the leave is FMLA leave. If the leave is FMLA leave, then that fact together with the start and end dates of the leave should be recorded.

c. Provide the employee with the forms and/or information within five business days after the employee gives notice of the need for leave, and in the case of the Designation Notice within five business days of receipt of sufficient information to determine whether the leave qualifies as FMLA leave or a certification. If leave has already begun, these notices should be mailed to the employee's address of record.

d. If the leave involves the serious health condition of the employee or a family member, require certification of the condition by the employee's or family member's health care provider on a "certification form". Employers may also require certification for military caregiver and exigency leave.

e. Decide whether you will require the employee to take paid vacation, sick days, personal days, etc. as part of the FMLA and inform the employee of your decision. Consistently apply this policy and supply an explanation of it in the employee handbook.

f. Inform the employee of the right to continue medical insurance and, if applicable, arrange for payment of the employee's portion of the premium during leave.

g. If the employee requests intermittent or reduced schedule leave:

- Require the employee to provide certification from a health care provider of the medical need for the intermittent or reduced schedule leave.
- Require the employee to schedule the leave so as to minimize disruption to operations.
- If the leave is for foreseeable medical treatment, decide whether to temporarily transfer the employee to another job with equivalent pay and benefits that better suits the employee's intermittent or reduced leave schedule.

3. DURING FMLA LEAVE

a. Temporarily fill the job of the employee on FMLA leave, if necessary.

b. Collect employee's portion of health insurance premiums, if applicable.

c. Require recertification of the serious medical condition or the medical necessity for intermittent or reduced leave at reasonable intervals, but not more often than every 30 days (unless the original certification was for a longer period) unless:

- The employee requests an extension of the leave;
- Circumstances described in the original certification have changed significantly;
- The company receives information that casts doubt on the need for leave.

In all cases, the employer may request a recertification of a medical condition every six months in connection with an absence by the employee.

4. WHEN LEAVE ENDS

a. An employer may request that the employee provide a certification of fitness to return to work if the leave was taken because of the employee's serious health condition that made the employee unable to perform the employee's job and if the employer has a uniformly applied policy of requiring such certifications from all similarly situated employees.

b. Reinstate employee to the same position held before leave or to another job that is truly equivalent in pay, benefits, and terms and conditions of employment.

c. Record exact time spent on FMLA and deduct from employee's 12-week or 26-week entitlement.

d. Do not take adverse action against employee for taking FMLA leave, and do not count FMLA leave time (whether hours, days or weeks) against the employee's attendance record. The FMLA regulations allow employers to

deny certain awards or bonuses to employees despite FMLA leave under certain conditions. Employers should seek assistance prior to doing so.

D. TIPS FOR EMPLOYERS

1. **Abuse of intermittent and reduced leave schedule can be controlled by requiring an employee to use paid vacation days when taking these types of leave.**
2. **Absences which qualify as FMLA leave cannot be counted as absences under a "no fault" absentee policy. Nor can these absences be used to impact negatively an employee's performance evaluation or unconditional pay increase.**
3. **If an employer uses temporary employees from a temporary employment agency, the temporary agency is responsible for compliance with the FMLA. The temporary agency must provide the required FMLA notices and grant leave to the temporary employee. However, the company at which the temporary employee is working must cooperate in reinstating the temporary employee if the company continues to use the same temporary agency. [Note: This requirement applies even if the company is not a covered employer.]**
4. **Employers can request a second or third opinion prior to designating leave. Employers can require re-certifications (no more often than every 30 days, unless the original certification was for a longer period) during leave. Employers (but not direct supervisors) can contact the employee's physician directly under limited circumstances but should first ask the employee to have the physician clarify medical certifications when necessary.**
5. **Employers cannot terminate/discipline in retaliation for taking leave. The types of conduct relevant to this decision include but are not limited to knowledge of the leave by decision makers; negative attitude toward employee's condition; treatment of other employees on leave; failure to adhere to company policies; and progressive discipline not applied/ followed. The closer disciplinary action is to leave claim, the stronger the circumstantial evidence of retaliation**
6. **The FMLA regulations are complex. Employers should seek assistance until they become familiar with these regulations.**

25. Patient Protection and Affordable Care Act

A. BACKGROUND

The Patient Protection and Affordable Care Act of 2010 as amended by the Health Care and Education Reconciliation Act of 2010 (collectively referred to as the PPACA) provides for a number of market reforms and consumer protections in the healthcare industry. The PPACA makes substantial amendments to certain other laws, including the Public Health Service Act (PHSA), the Internal Revenue Code of 1986, as amended (Code), the Employee Retirement Income Security Act of 1974, as amended (ERISA), the Fair Labor Standards Act (FLSA), and the Health Insurance Portability and Accountability Act (HIPAA). This chapter provides a brief overview of the PPACA provisions that are most relevant to employers.

B. HOW THE LAW WORKS

1. PHSA MANDATES

The PPACA creates reforms that are implemented through amendments to the PHSA. These amendments are commonly called the PHSA Mandates. The following is a list of those PHSA Mandates most relevant to group health plans sponsored by employers.

a. LIMITS PROHIBITED ON ESSENTIAL HEALTH BENEFITS

The PPACA generally prohibits imposing lifetime or annual dollar limits on "essential health benefits" for plan years beginning on or after September 23, 2010. This requirement was subject to a transition period, but a complete ban on lifetime and annual limits took effect on January 1, 2014. Note that these limitations apply differently to certain account-based plans, such as health flexible spending arrangements (FSAs) and health reimbursement arrangements (HRAs), which have their own specific statutory provisions.

Group health plans subject to this requirement may impose a lifetime or annual dollar limit only with respect to any individual on specific covered benefits that are not "essential health benefits," and only to the extent such limits are otherwise permitted under federal or applicable state law.

However, if any benefits are provided for a condition, then the prohibition on lifetime or annual limits applies to all benefits associated with that condition.

Under the PPACA, essential health benefits include health care items and services in the following ten categories:

1. Ambulatory patient services;

2. Emergency services;

3. Hospitalization;

4. Maternity and newborn care;

5. Mental health and substance use disorder services;

6. Prescription drugs;

7. Rehabilitative and habilitative services and devices;

8. Laboratory services;

9. Preventive care and wellness services and chronic disease management; and

10. Pediatric care services (including oral and vision care).

Regulations issued by the U.S. Department of Health and Human Services in 2013 clarifies that only non-grandfathered individual and small group health plans are required to offer essential health benefits. Although not required to offer essential health benefits, to the extent employer-sponsored self-insured health plans, insured large group health plans, or grandfathered health plans do cover items or services that fall under one of the essential health benefits categories, no lifetime or annual dollar limits may be imposed. Health plans may use a state benchmark plan or one of the three Federal Employees Health Benefit Program options as a benchmark for determining which items and services covered by their health plan will be considered an essential health benefit.

Although no lifetime or annual dollar limits are allowed effective January 1, 2014, the annual limit restriction was previously subject to a three-year phase in:

Plan Year (for calendar year plans)	**Annual Limit**
2011	$750,000
2012	$1,250,000
2013	$2,000,000

For plan years beginning before January 1, 2014, the rules also contained a limited waiver provision which was intended to benefit certain limited benefit plans. Plans could apply to the Secretary of HHS for waivers if compliance would result in a significant decrease in access to benefits or a significant increase in premiums.

b. APPEALS PROCESS AND EXTERNAL REVIEW REQUIREMENTS

The PPACA requires plan sponsors to establish both internal claims and appeals procedures as well as external review procedures that meet certain requirements. Grandfathered plans are not subject to these requirements.

(1) Internal Claims and Appeals Process

The PPACA requires group health plans to implement an effective internal claims and appeals process. Rules on this requirement set forth

standards that group health plans must generally comply with regarding their internal claims and appeals procedure, including defining "adverse benefit determination" to include rescissions of coverage, heightened standard for expedited notification of benefit determinations that involve urgent care, additional criteria for ensuring a full and fair review, adjudication of claims in a manner designed to ensure the independence and impartiality of decision makers, heightened notice requirements, and a rule that where plans fail to meet requirements, claimants are deemed to have exhausted the internal claims and appeals procedure. In such a case, a claimant may then pursue the judicial remedies under Section 502(a) of ERISA, and a court will review the claim de novo, as if the claim was denied without any exercise of fiduciary discretion.

(2) External Review Process

In addition to the internal claims and appeals process, plans are also required to comply with an external review process. Generally, fully-insured plans are subject to a State-level external review, and self-insured plans must comply with a Federal-level external review process. If there is no State-level external review process applicable to the fully-insured plan or the State-level external review process does not comply with minimum requirements under the PPACA, the fully-insured plan must comply with the Federal-level external review process. The rules for the external review process outline timing requirements and deadlines for external review of claims, as well as guidelines for how an accredited independent review organization will conduct the review. In certain cases, participants will have a right to an expedited external review process.

c. DEPENDENT COVERAGE FOR CHILDREN UNDER AGE 26

Effective for plan years beginning on or after September 23, 2010, group health plans that offer dependent coverage of participants' children must make such coverage available until a child reaches age 26. There is a limited exception to this mandate for grandfathered plans. Before 2014, a grandfathered plan needed not offer coverage to a child if that child was eligible for employer-sponsored coverage (other than through his or her parents). Beginning January 1, 2014, grandfathered plans must now comply with this requirement.

d. PATIENT PROTECTIONS

The PPACA contains patient-focused provisions designed to simplify access to certain types of care with respect to plans or health insurance coverage with a network of providers. These provisions are applicable to group health plans and health insurers and are effective for plan years beginning on or after September 23, 2010. However, these rules do not apply to grandfathered plans.

(1) Choice of Health Care Professional

If a group health plan or health insurer requires that the participant or enrollee designate a participating primary care provider, the plan or insurer must permit each participant or enrollee to choose any provider who is available to accept the patient. Similarly, in the case of a child, the plan or issuer must permit the participant or beneficiary to choose a pediatrician as the primary care provider for the child.

(2) Obstetrics and Gynecological Referrals

A group health plan or health insurer also may not require authorization or referral for a female participant or enrollee who seeks obstetrical or gynecological care provided by an in-network health care professional who specializes in obstetrics and gynecology. Regulations have clarified that this professional need not be a doctor.

(3) Emergency Care

Group health plans or health insurers may not require a prior authorization for emergency care (even if out-of-network) or impose any requirement or limitation on coverage that is more restrictive than the requirements or limitations that apply to emergency services from an in-network provider. Further, any cost-sharing component of the fee may not exceed the cost-sharing component of the fee if the care were obtained in-network. However, guidance clarifies that out-of-network providers may "balance bill" patients for the difference between the provider's charges and what has been paid by the plan and the patient in the form of a copayment or coinsurance.

2. NOTICE REQUIREMENT

A group health plan or insurer that requires a designation of a primary care provider must provide notice to participants that they have a right to designate a primary care provider of their choice, that they have the right to designate a pediatrician as the primary care provider of a child, and that authorization or referral may not be required for obstetrical or gynecological care. The notice can be included in the summary plan description or other similar description of benefits under the plan or health insurance coverage. Regulations have included model language that plans may use to satisfy the notice requirement.

a. PREVENTIVE CARE

Plans (other than grandfathered plans) that offer coverage for certain "preventive" care and services are required to do so without cost-sharing, such as:

(1) Evidence-based items or services rated A or B in the United States Preventive Services Task Force recommendations;

(2) Immunizations for routine use in children, adolescents, and adults that are recommended by the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention; and

(3) Preventive care and screenings for women, infants, children, and adolescents set forth in comprehensive guidelines supported by the Health Resources and Services Administration.

Guidance has clarified that the preventive care requirement extends to in-network coverage only. Plans remain free to impose cost-sharing on out-of-network preventive services, or even to exclude coverage for out-of-network preventive services. Plans also retain discretion to offer coverage for – or impose cost-sharing on – preventive services that are not listed above.

b. PREEXISTING CONDITION EXCLUSION PROHIBITIONS

Prior to the PPACA, group health plans and health insurance issuers could incorporate limited preexisting condition exclusions into their plans, provided the exclusions complied with the portability and nondiscrimination rules under HIPAA. HIPAA generally defines a preexisting condition exclusion as a limitation or exclusion of benefits relating to a condition that was present before the date of enrollment for the coverage, whether or not any medical advice, diagnosis, care, or treatment was recommended or received before that date. While all group health plans and insurers, including grandfathered plans, are required to comply with this requirement, the PPACA implements it in two phases:

(1) Preexisting condition exclusions are prohibited for children under age 19 for plan years beginning on or after September 23, 2010; and

(2) Preexisting condition exclusions are prohibited entirely for plan years beginning on or after January 1, 2014.

c. EMPLOYMENT RETALIATION PROTECTIONS

Effective March 23, 2010, the PPACA amended the FLSA to provide employees for protection from retaliation relating to certain healthcare reform requirements. Under the amendment, an employer is prohibited from discharging or discriminating against an employee because the employee receives a premium tax credits, provides information to the employer, federal government, or state attorney general regarding violations of the PPACA, testifies regarding alleged violation, participates in any proceeding about a violation, or refuses to participate in activities that the employee believes are a violation of the PPACA.

d. PROHIBITION ON RESCISSION OF COVERAGE

Effective for plan years beginning on or after September 23, 2010, rescissions of health insurance coverage are prohibited by the PPACA. Guidance explaining the rule has clarified that "rescission" means a retroactive cancellation or discontinuance of coverage. For example, a cancellation of insurance coverage that voided benefits paid up to six months before the cancellation occurred would be a rescission. However, a cancellation or discontinuance of coverage will not be a rescission if it is only effective on a prospective basis. Further, cancellation of coverage is not a rescission if it

is attributable to a failure to timely pay required premiums or contributions towards the cost of coverage.

When a group health plan or insurer plans to rescind coverage, it must provide at least 30 calendar days advance notice to an individual before coverage is rescinded. This 30-day period is intended to provide individuals an opportunity to contest the rescission or look for alternative coverage.

Unlike some of the PHSA Mandates, this requirement applies to both fully-insured and self-funded health plans, and no exception is provided for grandfathered plans.

e. SUMMARY OF BENEFITS AND COVERAGE

Effective for open enrollment periods start before September 23, 2012, health insurers and employers that sponsor health plans are required to provide new summaries of benefits and coverage, or "SBCs," to new enrollees and existing health plan participants. The SBC is intended to provide better understanding of plan features and costs, and to allow for comparison shopping.

The plan administrator of the group health plan initially must provide an SBC to a participant or beneficiary for each benefit package for which the participant or beneficiary is eligible. The rules also establish deadlines for providing the SBC in various other circumstances.

Regulations explaining the rule contain detailed content and formatting requirements. Notably, beginning January 1, 2014, this includes a statement as to whether the plan provides "minimum essential coverage" under the PPACA and whether the plan's share of the total allowed costs of benefits provided under the plan meets applicable requirements. However, the DOL website provides templates for preparing the SBC, as well as instructions and other guidance

Further, plans have some flexibility in the manner of distribution. The SBC can be provided as part of a summary plan description (SPD) or other summary document, rather than only as stand-alone documents, and it can be provided electronically if certain requirements are met.

Generally, if a plan makes a material modification to any term that would impact the content of the most recently issued SBC, the plan sponsor must provide a notice of the modification no later than 60 days prior to the effective date of the modification.

f. CLINICAL TRIAL COVERAGE

Effective January 1, 2014, group health plans may not deny an individual the right to participate in a clinical trial, deny coverage of routine costs for items and services that are furnished in connection with participation in a clinical trial, or discriminate against an individual on the basis of the individual's participation in a clinical trial. Grandfathered plans are excluded from this requirement.

g. COST-SHARING LIMITATIONS

Effective for plan years beginning on or after January 1, 2014, the PPACA limits cost-sharing in health plans, such as deductibles, co-insurance, co-payments, and out of pocket maximums with respect to essential health benefits covered under a plan. The requirements contain an overall limitation on cost-sharing with respect to the annual out-of-pocket maximum. In 2022, the out-of-pocket maximum is $8,700 for self-only coverage and $17,400 for family coverage. Grandfathered plans are excluded from this requirement.

h. EXCESSIVE WAITING PERIODS PROHIBITED

Effective for plan years beginning on or after January 1, 2014, the PPACA prohibits group health plans (including grandfathered plans) from applying a waiting period that exceeds 90 days. This prohibition applies to the exclusion of any individual who is otherwise eligible to participate in the group health plan. In counting the 90-day waiting period, all calendar days are included, beginning on the enrollment date.

i. NONDISCRIMINATION RULES FOR FULLY-INSURED PLANS

The PPACA requires all fully-insured plans (except grandfathered health plans) to comply with nondiscrimination rules similar to those already in effect for self-funded plans. Accordingly, such rules are intended to ensure that a group health plan does not discriminate in favor of highly compensated individuals with regard to both eligibility and benefits. Although the PPACA originally required compliance with this rule effective for plan years beginning on or after September 23, 2010, the IRS has indicated that compliance will not be required under these provisions until regulations are issued. To date, no such regulations have been issued.

j. NONDISCRIMINATION IN HEALTH CARE PROVIDERS

Effective January 1, 2014, group health plans may not discriminate with respect to plan participation or coverage against any health care provider, so long as the provider acts within the scope of licensure or certification rules under applicable state law. However, group health plans are not required to contract with any provider, and are not prevented from establishing rates of reimbursement that vary based on quality or performance measures. Until regulations explaining this requirement in detail are released, group health plans are required to follow a good faith, reasonable interpretation of the rule. Grandfathered plans are exempt from this requirement.

k. NONDISCRIMINATION IN HEALTH STATUS

Group health plans offering coverage may not discriminate against individuals with regard to eligibility or coverage (such as by charging different premiums or imposing different costs) if based on health-status related factors. Health-status related factors include: health status, medical condition, claims experience, receipt of health care, medical history, genetic information, evidence of insurability, disability, and any other health

status related factor determined to be appropriate by the Secretary of HHS. However, a limited exception exists for wellness programs that meet extensive requirements outlined in regulations.

l. GRANDFATHERED PLANS

As described above, certain "grandfathered plans" are not subject to all of the PHSA Mandates. Grandfathered plans are coverage provided by a group health plan in which an individual was enrolled on March 23, 2010 (for as long as the plan maintains its grandfathered status under the rules). A grandfathered plan can lose its grandfathered status in certain cases, such as when it eliminates certain benefits, increases cost-sharing percentages, decreasing the employer contribution rate, or changing annual limits. However, plans may allow new employees and their families to enroll in the plan without compromising its grandfathered status.

Grandfathered plans are exempt from a number of PPACA requirements, as described throughout this chapter. However, they are still subject to many other PPACA requirements, such as the prohibition on preexisting condition exclusions, prohibitions on excessive waiting periods, lifetime or annual limits, rescissions, and the dependent coverage provisions, among others.

3. SHARED RESPONSIBILITY FOR EMPLOYERS

The PPACA requires that, starting on January 1, 2015 (a delayed effective date may be available for certain non-calendar year plans), certain large employers (called "Applicable Large Employers," but referred to as employers in this section) must choose between two alternatives. The first is to provide an opportunity at least once per year for its Full-Time Employees to enroll themselves and their Dependents in Minimum Essential Coverage that meets a minimum value standard and an affordability standard. The second is to risk exposure to what is often referred to as a "penalty" or an "excise tax." This requirement to "pay or play" is referred to as Employer Shared Responsibility. Satisfying the coverage obligation and computing the tax liability each require the employer to know which of its employees is a Full-Time Employee as of the first day of a given month beginning with January, 2015. Because of the special importance of Employer Shared Responsibility to employers, this section will provide more detail regarding this component of the PPACA. Further, because the PPACA uses many specialized terms to describe the operation of Employer Shared Responsibility, this section sets out a number of relevant definitions.

a. TERMINOLOGY

(1) Employee

A common law employee of another person, referred to as the common law employer.

(2) Full-Time Employee

As defined in the PPACA, an Employee is a Full-Time Employee for a calendar month if he or she was employed for 130 or more Hours of

Service during the calendar month, or 30 or more Hours of Service per week on average. As discussed below, practical difficulties stand in the way of relying directly on the statutory definition. For that reason, regulations create alternative methods for determining whether an employer must treat an Employee as a Full-Time Employee based on such factors as expected Hours of Service when the employee is hired, Hours of Service during past periods, and a small number of other criteria.

(3) Hour of Service

Each hour (A) for which an Employee is paid, or entitled to payment, for the performance of duties for the Employer; and (B) each hour for which an Employee is paid, or entitled to payment by the Employer for a period of time during which no duties are performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence

(4) Employer

The common law employer including every member of the same controlled group as the common law employer.

(5) Applicable Large Employer

An Employer subject to the Employer Shared Responsibility Payment. As a general rule, an Employer is an Applicable Large Employer for a given calendar year if it employed 50 or more Full-Time Equivalent Employees on average during the prior calendar year. For purposes of this definition (but not for any other purpose), two or more workers can be considered a Full-Time Equivalent Employee, and therefore counted as a Full-Time Employee, even though none of them alone meets the definition of a Full-Time Employee.

NOTE: Determining ALE status is a complicated counting process and penalties for non-compliance can be expensive. Members are advised to seek the advice of a credible health broker or legal professional.

(6) Applicable Large Employer Member

Each separate legal entity that is part of the same controlled group constituting the Employer if the Employer is an Applicable Large Employer. For example, if Acme Global, Inc. employed 48 Full-Time Employees on average during business days during 2016, and it had a wholly owned subsidiary corporation called Acme Motor Works Company that employed two Full-Time employees throughout 2016, Acme Global, Inc., and Acme Motor Works Company each will be an Applicable Large Employer Member in 2017.

(7) Employer Shared Responsibility Payment

A payment that may become due under Section 4980H of the Code, which was added by the PPACA and becomes effective January 1, 2015.

An Employer Shared Responsibility Payment cannot become due from an Employer if the Employer has offered each of its Full-Time Employees and their Dependents an opportunity at least once per year to enroll for Minimum Essential Coverage under an eligible employer-sponsored plan that meets a minimum value requirement and an affordability requirement. For this reason, the Employer Shared Responsibility Payment is often considered part of an "employer mandate" established by the PPACA, although the phrase "employer mandate" is not a defined term under the statute.

(8) Opportunity to Enroll

In order to avoid the risk of an Employer Shared Responsibility Payment, an Applicable Large Employer must offer each of its Full-Time Employees and their dependents the "opportunity to enroll" for compliant coverage at an affordable price. The PPACA does not define the term "offer" or the phrase "Opportunity to Enroll." However, regulations implementing the Employer Shared Responsibility Payment provisions of the Code state that an employer will not be treated as having offered an opportunity to enroll unless the terms of the offer allow the employee to decline coverage.

(9) Dependent

A child, step-child, foster child, or child placed for adoption with the employee who has not attained age 26 and who may be claimed by the employee as a dependent for purposes of the employee's federal income tax return.

(10) Minimum Essential Coverage

"Minimum Essential Coverage" is the term used to describe the coverage a taxpayer or employer must have to avoid the penalties under the Employer Shared Responsibility provision of the PPACA. The statutory definition of "Minimum Essential Coverage" includes coverage under any of the following: (i) Medicare part A; (ii) Medicaid; (iii) the CHIP program; (iv) coverage under chapter 55 of title 10, United States Code, including coverage under the TRICARE program; (v) VA coverage; (vi) coverage as a Peace Corps volunteer; (vii) the Nonappropriated Fund Health Benefits Program of the Department of Defense, established under section 349 of the National Defense Authorization Act for Fiscal Year 1995; (viii) coverage under an eligible employer-sponsored plan; (ix) coverage under a health plan offered in the individual market within a State; (x) coverage under a grandfathered health plan; and (xi) other health benefits coverage, such as a State health benefits risk pool, as HHS recognizes as minimum essential coverage.

(11) Eligible Employer Sponsored Plan

Includes a group health plan or group health insurance coverage offered by an employer to an employee that is a governmental plan or any other plan or coverage offered in the small or large group market, a

self-insured plan, continuation coverage for former employees under federal or state law, expatriate plans and retiree coverage. Additionally, eligible employer sponsored coverage includes multiemployer and single employer collectively bargained plans, and plans offered by a professional employer organization or leasing company. Effectively, every employer-sponsored group health plan (except one that provides only for limited benefits, such as dental only) constitutes "Minimum Essential Coverage." Final regulations issued in June 2019 announced that individual coverage health reimbursement arrangements ("ICHRA") are considered eligible employer-sponsored plans.

(12) Minimum Value

A plan satisfies the minimum value requirement if it is designed so that, assuming the covered population experiences a pattern of claims typical of a standard population described by HHS, the plan will pay at least 60% of the aggregate allowable cost of certain covered services during the plan year. Proposed regulations issued in September 2019 provide that if an ICHRA is considered affordable it is treated as providing minimum value. These regulations may be relied upon until final regulations are issued.

(13) Affordable

For purposes of Employer Shared Responsibility, coverage is "affordable" only if the employee's contribution or share of the premium for the lowest cost self-only coverage for which he or she is eligible does not exceed 9.61% of the employee's household income in 2022. Employers should note that the March 2021 enactment of the American Rescue Plan (ARP) temporarily reduces the affordability cap to no more than 8.5%. An employer may also rely on any of three safe harbors. Under final regulations issued in June 2021, employers offering an ICHRA may determine affordability based on the lowest cost silver plan for self-only coverage provided on the Exchange for the residence of the employee, or location of the employee's primary site of employment.

(14) Exchange

A government agency or instrumentality that creates an online marketplace for coverage that consists of individual, family, or small group insurance policies and facilitates comparison shopping among insurance products based on a short list of features (actuarial value, customer premium, deductibles, co-payments, out-of-pocket maximums, and a few other criteria). An Exchange is available for every state.

(15) Premium Tax Credit

A refundable credit against the federal income tax on individuals that is intended to help low-income families pay for individual policies purchased through an Exchange. The tax credit is available only to certain taxpayers whose adjusted household income falls between 100%

and 400% of the federal poverty level. Under the American Rescue Plan Act of 2021, eligibility for the tax credit is temporarily extended to include certain with income over 400% of the federal poverty level ($51,520 for single person, $87,840 for a family of three). This expanded eligibility for the tax credit ends after the 2022 calendar year.

(16) Individual Shared Responsibility Payment

Effective January 1, 2019, the Individual Shared Responsibility (Individual Mandate) was eliminated with the passing of the Tax Cuts and Jobs Act (TCJA). Individuals are still obligated to carry health insurance, either through their employers, through the ACA Exchange, or by independently selecting and paying for their own ACA-compliant plans, however, they will no longer pay a financial penalty if they do not.

b. TWO MUTUALLY-EXCLUSIVE TYPES OF PENALTIES

The PPACA prescribes a very harsh penalty if an employer has failed to offer any group health enrollment opportunity to even one of its Full-Time Employees, called the No-Coverage Penalty. If an employer offered an enrollment opportunity to each Full-Time Employee, and merely failed to meet the affordability standard with respect to some Full-Time Employees or offered a less-than-Minimum Value to a group of Full-Time Employees, the employer may be liable only for a far less harsh penalty called the Unaffordable Coverage Penalty.

The No-Coverage Penalty is triggered when an employer fails to make a valid offer of minimum essential coverage to at least 95% (70% in 2015 only for Applicable Large Employers with at least 100 Full-Time Employees) of all Full-Time Employees and their dependents, and at least one Full-Time Employee gets coverage from an Exchange and is determined to be eligible for a Premium Tax Credit and/or Advance Payment as a result. For convenience, each employee who gets a tax credit as a result of getting Exchange coverage is called a "tax credit employee."

The Unaffordable Coverage Penalty is triggered when affordable, minimum value coverage is not provided to a Full-Time Employee and his dependent **and** such Full-Time Employee gets coverage from an Exchange and is determined to be eligible for a Premium Tax Credit and/or Advance Payment as a result.

(1) Formula for the No-Coverage Penalty

a. A = the total number of the Applicable Large Employer Member's Full-Time Employees minus its pro rata share of 30

b. Annualized Penalty = $2,750 x A

The No-Coverage Penalty will be applied on a legal entity-by-legal entity basis. One result of this approach is to reduce the penalty amount in circumstances where one or more but fewer than all employers in a controlled group has failed to offer the required enrollment opportunity. The reduction comes about because the

$2,750 amount is multiplied only by the number of Full-Time Employees employed by the Applicable Large Employer Entity or Entities that failed to make the required offer of coverage.

(2) Formula for the Unaffordable Coverage Penalty

a. A = the total number of the Applicable Large Employer Member's tax credit employees

b. Annualized Penalty = $4,120 x A, but never higher than the No-Coverage Penalty

The Unaffordable Coverage Penalty will be applied on a legal entity-by-legal entity basis. One result of this approach is to reduce the penalty amount in circumstances where one or more but fewer than all employers in a controlled group has failed to offer affordable or minimum value coverage. The reduction comes about because the $4,120 amount is multiplied only by the number of tax credit employees employed by the Applicable Large Employer Entity or Entities that failed to make the required offer of coverage at an affordable price or failed to offer minimum value coverage.

c. AFFORDABILITY DEFINITION AND SAFE HARBOR ALTERNATIVES

(1) Practical Problems with the Statutory Definition of "Affordable" Coverage

Coverage is affordable for a calendar month under the PPACA if the employee's share of coverage for self-only coverage under the lowest cost option offered under the Employer's plan for that month is no more than 9.61% of the Full-Time Employee's adjusted household income for that month. To apply that definition, the Employer would be required to know with great certainty the exact amount of the Full-Time Employee's household income, which includes (for example) income earned by a spouse or dependent (whether or not reported) and/or income from a second job, minus (for example) child support payments (disclosed or not disclosed to current household members) if they are made (but not merely if they are due).

(2) The "Safe Harbor" Alternatives

Guidance provides three safe harbors for determining affordability. For purposes of Employer Shared Responsibility, a coverage option will be regarded as affordable for a month without regard to the Full-Time Employee's actual household income if the employee contribution required for minimum value self-only coverage satisfies any of the following:

(a) W-2 safe harbor – Generally, an employer meets this safe harbor if the lowest cost self-only coverage that provides a minimum value during the entire calendar year does not exceed 9.61% of the

employee's Form W-2 wages from the employer for the calendar year.

(b) Rate of pay safe harbor - Health coverage will be affordable if employee's monthly contribution (for the lowest self-only option) is equal to or lower than 9.61% of the monthly wages (applicable hourly rate of pay at the beginning of the plan year x 130 hours). For salaried employees, the employee's monthly salary is used (instead of 130 x hourly rate of pay), and an employer may use "any reasonable method for converting payroll periods to monthly salary." This safe harbor does not apply if wages are reduced during the year.

(c) Federal Poverty Line ("FPL") safe harbor - An employer will satisfy this safe harbor for a calendar month if the employee's required contribution for the lowest cost self-only coverage that provides a minimum value does not exceed 9.61% of the monthly amount determined based on the federal poverty line for a single individual for the applicable calendar year, divided by 12. Data on the FPL can be found at https://aspe.hhs.gov/poverty-guidelines.

OTHER REQUIREMENTS AND ADMINISTRATIVE PROVISIONS

1. INDIVIDUAL SHARED RESPONSIBILITY

Beginning in 2014, most individuals who are not eligible for Medicare, Medicaid, or other government-sponsored coverage will be required to maintain Minimum Essential Coverage. Generally, coverage offered under an employer sponsored group health plan will meet this requirement. Individuals below a certain household income threshold will also be eligible for a premium assistance tax credit, which is intended to assist in the payment of health insurance premiums. Individuals who do not have access to government or employer sponsored plans will be able to purchase insurance on exchanges called the Health Insurance Marketplace. In some cases, the Health Insurance Marketplace will be administered by states. In those states that declined to administer their own Health Insurance Marketplace, the federal government will handle administration.

The penalty for failure to obtain Minimum Essential Coverage was eliminated with the passing of the 2018 Tax Cuts and Jobs Act. Effective January 1, 2019, the penalty was eliminated.

2. SMALL BUSINESS HEALTH CARE TAX CREDIT

The PPACA provides that if an eligible small employer purchases coverage through Exchange, it may qualify for a credit for two years equal to up to 50 percent of its contribution. Certain tax-exempt employers are eligible for a reduced credit. In previous years, the credit was capped at 35 percent. The credit is intended to help offset the cost of providing coverage to employees. For purposes of the rule, small employers are generally those with no more than 25 employees and average annual

wages of less than $50,000. The credit is gradually phased-out, with employers with 10 or fewer employees earning average annual wages of less than $25,000 eligible for the full credit, which is indexed for inflation.

3. TAX-FREE COVERAGE TO CHILDREN UNDER AGE TWENTY-SEVEN

In conjunction with the requirement to provide coverage to children under age 26, the PPACA also amends the Code so that the value of any employer-paid coverage provided during any plan year ending prior to the year in which the child turns 27 is excluded from income. The Code uses age 27 so that coverage for a child who turns 26 in the middle of a plan year will still enjoy tax-favored status for the rest of the plan year. Otherwise, a group health plan would be required to impute income with respect to coverage provided for that part of the year in which the child was 26 years old. An employer can permit employees to pay premiums for these children on a pre-tax basis through cafeteria plans, so long as the cafeteria plan has been amended to reflect these changes.

4. RULES RELATING TO HSAS, FSAS, HRAS AND CAFETERIA PLANS

a. Health FSA Contribution Cap. For taxable years beginning January 1, 2022, health Flexible Spending Account (FSA) contributions are capped at $2,750 per year. This amount is indexed for inflation.

b. HSA and Archer MSA Penalty Tax Increase. For taxable years beginning January 1, 2011, the additional tax on nonqualified distributions from Health Savings Accounts (HSAs) increased from 10 to 20 percent. The additional tax on Archer Medical Savings Accounts (MSAs) increased from 15 to 20 percent.

c. Qualified Small Employer Health Reimbursement Arrangement. For taxable years beginning January 1, 2017, pursuant to the 21st Century Cures Act and its applicable guidance, small employers are able to establish a qualified small employer (less than 50 full time employees) health reimbursement arrangement (QSEHRA) for eligible employees for reimbursement of qualifying medical expenses and individual health insurance premiums. Participants must be enrolled in a plan that provides minimum essential coverage (as required by the ACA). Annual contribution limit applies and are indexed every year. For 2021, these limits are $5,300 for employee only and $10,700 for an employee plus family members of the employees. A QSEHRA is not considered a group health plan and is not subject to COBRA and the PHSA mandates.

d. Individual Coverage Health Reimbursement Arrangement. Beginning in 2020 and similar to a QSEHRA, these employer funded HRAs allow employers to reimburse participants for qualifying medical expenses and individual health insurance premiums, however, this plan is available to employers of all sizes, can be offered to only a certain employee category, does not have annual contribution limits, is subject to COBRA, and if offered by an Applicable Large Employer (ALE) is required to offer affordable coverage under ACA.

e. Simple Cafeteria Plans. Effective for taxable years beginning January 1, 2011, the PPACA allows certain small employers to establish new "simple cafeteria plans." These plans are treated as meeting nondiscrimination requirements if certain contribution, eligibility and participation requirements are met.

5. REASONABLE BREAKS FOR NURSING MOTHERS

The PPACA amends the Fair Labor Standards Act (FLSA) to require employers to offer "reasonable break" time for an employee who is a nursing mother to express breast milk for her nursing child for one year after the child's birth each time such employee has need to express the milk.

The employee must be offered a private place to express breast milk, which is shielded from view and free from intrusion from coworkers and the public. The rule specifically excludes bathrooms as appropriate places. Employees need not be compensated for taking breaks during work time, but the employer may not dictate the scheduling of the break time. The law provides a limited exception for employers with fewer than 50 employees to the extent the requirements impose an undue hardship.

6. FORM W-2 REPORTING OF HEALTH COVERAGE COSTS

Beginning with the 2012 Taxable Year, Employers are required to disclose the aggregate cost of "applicable employer-sponsored health coverage" that they provide to their employees on each employee's Form W-2. Applicable employer sponsored health coverage generally any includes any group health plan coverage that is sponsored by an employer and excluded from the employee's gross income under relevant provisions of the Code (or would be excluded from gross income if paid for by the employer). However, the cost of certain coverages do not need to be counted, such as long-term care coverage, certain stand-alone dental or vision coverage, some specific disease and fixed indemnity plans, and other excepted benefits. This reporting requirement generally applies to all employers offering Applicable Employer-Sponsored Coverage. Further, this reporting requirement applies only to individuals for whom an employer is otherwise required to issue a Form W-2. As a result, employers are not required to issue a Form W-2 for retirees or other former employees who are no longer receiving compensation, even if they still receive health coverage.

7. PATIENT-CENTERED OUTCOMES RESEARCH INSTITUTE (PCORI FEE)

For each plan year ending after October 1, 2012 and before October 1, 2029, sponsors of self-insured health plans are required to pay a fee to contribute to the funding of the Patient-Centered Outcomes Research Institute. While fees are also paid for insured group health plans, these fees are paid by insurers. For plan years ending on or after October 1, 2020 and before October 1, 2021, the fee is equal to the number of average covered lives multiplied by $2.54. This amount will be adjusted in future years to take into account further increases in health care spending. Guidance regarding the PCORI fee provides several methods for determining the number of average covered lives in a plan: the actual count method, the snapshot method, or the form 5500 method. A plan sponsor must

use the same method for the duration of a plan year but may switch methods from one plan year to the next.

The fee must be paid by the plan sponsor, not by the plan or the trust, and may not be paid by a third-party administrator on behalf of a plan. Plan sponsors must pay the PCORI fee by July 31 of the year following the last day of the plan year. The fee is reported and paid on Form 720, *Quarterly Federal Excise Tax Return*.

8. EXCHANGE NOTICE

Employers that are subject to the FLSA are required to provide each current employee a written notice explaining the existence of the insurance Exchanges, and a statement that if employer's share of total allowed costs of benefits provided under the group health plan offered by the employer is less than 60% of those costs, the employee may be eligible for a premium tax credit when purchasing health insurance coverage through an Exchange. The DOL prepared template notices for employers to use, for situations in which the employer does offer a group health plan, as well as those where the employer does not offer a group health plan. This notice must be provided to all new employees hired after October 1, 2013 within fourteen days of their date of hire.

9. INFORMATION REPORTING OF HEALTH INSURANCE COVERAGE

Effective January 1, 2015, applicable large employers are required to report to the IRS whether they offer the opportunity to enroll in minimum essential coverage under an employer sponsored group health plan to their full-time employees and their employee's dependents. The report to the IRS is generally reported on Form 1094-C, *Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns, and Form 1095-C, Employer-Provided Health Insurance Offer and Coverage*. The forms are due to the IRS by February 28 (March 31 if filing electronically) for the prior calendar year. Forms are required to be filed electronically if you must file 250 or more.

Form 1094-C must be used to report to the IRS summary information for each employer and to transmit Forms 1095-C to the IRS. Form 1095-C is used to report information about each employee. The information reported on Form 1094-C and Form 1095-C is used in determining whether an employer owes an Employer Shared Responsibility Payment. Form 1095-C is also used by the IRS and the employee in determining the eligibility of the employee for the premium tax credit.

Applicable Large Employers must also provide each Full-Time Employee a copy of Form 1095-C by January 31 of each year.

10. TAX ON HIGH-COST HEALTH COVERAGE

Insurance companies and plan administrators of employer-sponsored group health plans will face a 40 percent nondeductible excise tax on high-cost health coverage. The tax will be on the amount by which the monthly cost of an employee's employer-sponsored health coverage exceeds a threshold amount. Currently, the threshold amount is equal to annual premiums in excess of

$10,200 for individuals and $27,500 for families. These amounts will be adjusted for inflation in future years. Further, in certain cases, the PPACA provides for higher premium threshold amounts, such as for non-Medicare retirees age 55 or older, and employees in certain high-risk professions. Initially effective for taxable years beginning after 2017, this provision was later delayed until 2020 and set to take effect in 2022. However, the tax was repealed under the Further Consolidated Appropriations Act of 2020.

C. ACTION REQUIRED BY EMPLOYERS

The primary item for consideration for employers is the implementation of the Employer Shared Responsibility provisions. Employers should review data on Full-Time Employees and determine the potential impact of the Employer Shared Responsibility provisions. Depending on the number of Full-Time Employees, an employer should consider implementing a policy that allows for the use of certain Full-Time Employee safe harbor alternatives outlined in regulatory guidance.

Understanding how the safe harbor methods work requires becoming familiar with a few technical definitions that are explained below. However, to fully understand the definitions, it helps to realize that there are only two ways of determining who is a Full-Time Employee for purposes of the "employer mandate" – measuring Hours of Service on a monthly basis or using the look-back measurement period safe harbor. The look-back measurement period method is described below. This Full-Time Employee safe harbor has one set of rules for "new employees" and one slightly different set of rules for "ongoing employees."

1. TERMINOLOGY

The regulatory definition of the term "ongoing employee" is an employee who has been employed by the employer's controlled group for at least one "Standard Measurement Period," and the term "Standard Measurement Period" is defined to mean, in essence, the measurement period of at least three but not more than 12 consecutive calendar months that applies to an ongoing employee. Thus, the definitions themselves are not quite enough to allow a person to know who is an "ongoing employee" for any given employer. To be able to answer that question, you also need to know the number of consecutive calendar months the employer selected for its Standard Measurement Period.

a. **Standard Measurement Period**, also sometimes referred to as the Standard Look Back Period, means the period of at least 3 but not more than 12 consecutive calendar months selected and used by an employer to determine whether an ongoing employee will be treated as a Full-Time employee during an associated Stability Period. A Standard Measurement Period begins and ends on the same day for all employees in the same category of employees.

b. **Initial Measurement Period**, also sometimes referred to as the Initial Look Back Period, means a period of at least 3 but not more than 12 consecutive calendar months used by an employer to determine whether a particular new variable hour or seasonal employee will be treated as a Full-Time

employee during an associated Stability Period. The beginning and ending dates of an Initial Measurement Period depend on when the employee was hired, so the Initial Measurement Period for each employee will be unique for that employee and other employees hired on the same date or at least in the same month.

c. **Stability Period** means the period of time selected by an employer member that follows, and is associated with, a Standard Measurement Period or an Initial Measurement Period, and is used by the employer as part of the process of determining whether or not an employee is treated as a Full-Time Employee under the safe harbor.

d. **Part-Time Employee** means an employee who, based on the facts and circumstances as of the employee's start date, the employer reasonably expects to average less than 30 hours of service per week during the Initial Measurement Period.

e. **Variable Hour Employee** means an employee if, based on the facts and circumstances as of the employee's start date, the employer cannot determine whether the employee is reasonably expected to be employed on average at least 30 hours of service per week during the Initial Measurement Period because the employee's hours are variable or otherwise uncertain. For this purpose, except with respect to determinations that take effect in 2015, the employer cannot take into account the likelihood that the employee may terminate employment with the employer before the end of the Initial Measurement Period.

f. **Seasonal Employee** means an employee who is hired into a position that is typically for a period of six months or less and each year begins at approximately the same part of the year.

2. SAFE HARBOR RULES FOR NEWLY HIRED EMPLOYEES

Once it is determined that an employee is a new employee, he or she is placed into one of two categories: (1) if the employer cannot determine whether the employee is reasonably expected to be employed on average at least 30 hours of service per week during the Initial Measurement Period because the employee's hours are variable or otherwise uncertain, the new employee is placed into the Variable Hour Employee category; and (2) otherwise, the employee is not placed into the Variable Hour Employee category. Instead, the latter group is divided further into two groups: (i) Seasonal Employees; and (ii) employees who are not Seasonal Employees.

a. A new employee who is not a Variable Hour Employee and is not a Seasonal Employee must be treated as a Full-Time Employee for purposes of the Employer Shared Responsibility Penalties beginning on his or her date of hire. The hours of service of the employee who falls into this group during his or her Initial Measurement Period make no difference to the employee's status as being entitled to treatment as a Full-Time Employee. As discussed below, this employee might someday lose his or her entitlement to treatment as a Full-Time Employee. After this employee has completed one full

Standard Measurement Period, the results from that Standard Measuring Period will be applied during the Stability Period associated with that Standard Measuring Period.

A new employee in this category must be offered the opportunity to enroll for coverage with an effective date no later than the day immediately after the employee's initial three calendar months of employment.

b. A new employee who is either a Variable Hour Employee or a Seasonal Employee need not treated as a Full-Time Employee until after the employee's Initial Measurement Period and any Administrative Period, and only if the results of the Initial Measurement Period show that the employee worked on average 30 or more hours of service per week during the Initial Measurement Period.

i. If the results of the Initial Measurement Period show that the employee worked on average 30 or more hours of service per week during the Initial Measurement Period, then (after the Administrative Period) the employee must be treated as a Full-Time Employee for the Stability Period associated with that Initial Measurement Period. The employee will be subject to re-evaluation as an ongoing employee based on the results of complete Standard Measurement Periods after that.

ii. If the results of the Initial Measurement Period do not show that the employee worked on average 30 or more hours of service per week during the Initial Measurement Period, then the employee will be subject to re-evaluation as an ongoing employee based on the results of the next full Standard Measurement Period he or she completes.

3. SAFE HARBOR RULES FOR ONGOING EMPLOYEES

Under the safe harbor method for ongoing employees, the employer first determines the months in which the Standard Measurement Period starts and ends. There can be a different Standard Measuring Period associated with a limited number of permissible categories of employees. The permitted categories are (1) collectively bargained/non-collectively bargained; (2) collectively bargained covered under by separate collective bargaining agreements; (3) salaried/hourly; (4) employees employed in different states. The Standard Measurement Period for a given classification of employees can differ from the others in length and/or with respect to the starting and stopping date of the measuring period. However, the Standard Measuring Period must be the same for each employee within each category.

The employer determines each ongoing employee's full-time status by looking back at Hours of Service the employee had during the most recently-ended Standard Measurement Period applicable to the employee.

An employee who was employed on average at least 30 hours of service per week during the standard measurement period must be treated as a Full-Time Employee for a Stability Period that begins immediately after the Standard Measurement Period and any applicable Administrative Period. The Stability

Period must be at least six consecutive calendar months but no shorter in duration than the Standard Measurement Period.

Note: Under the current regulatory guidance, every common law employee of an employer is either an ongoing employee or a new employee. Every new employee is (1) a Full-Time Employee; (2) a Part-Time Employee; (3) a Variable Hour Employee; or (4) a Seasonal Employee. No other categories or labels an employer may apply to a given employee make any difference under the Employer Shared Responsibility provisions or the safe harbors.

4. MINIMUM STABILITY PERIODS

The regulatory guidance effectively establishes minimum stability periods in two stages. First, there is a general rule for establishing a minimum stability period. The general rules are slightly different for a Standard Measurement Period (which applies to ongoing employees) and an Initial Measuring Period (which applies only to new employees). Then, the regulations raise or lower the minimum stability period under specified circumstances.

a. The Stability Period for a Standard Measurement Period

The Stability Period for a Standard Measurement Period must be at least six months long and cannot be shorter than the Standard Measuring Period.

Note that the Administrative Period can be up to 90 days, but the Administrative Period cannot reduce the Stability Period. In addition, if the employee already is entitled to be treated as a Full-Time Employee based on the results of a prior determination, the employee does not lose eligibility for coverage during the Administrative Period.

b. Stability Period for an Initial Measurement Period.

The Stability Period for an Initial Measurement Period works somewhat differently. The Initial Measurement Period also can be anywhere between three months and twelve months long, inclusive. The Initial Measurement Period does not need to be the same length as the Standard Measurement Period. However, the Stability Period for the new employee based on the Initial Measurement Period must be equal to the Stability Period associated with the Standard Measurement Period unless a special rule applies that causes the Stability Period to be longer.

In essence, there is a special rule that can lengthen the Stability Period associated with an Initial Measurement Period if the longer Stability Period would be to the employee's advantage. If the data for the new employee for the Initial Measurement Period shows that the new employee worked on average at least 30 Hours of Service per week, the Stability Period must be equal to the longer of Standard Measurement Period or the Initial Measurement Period.

There is another special rule that can shorten the Stability Period associated with an Initial Measurement Period if the shorter Stability Period would be to the employee's advantage. If the data for the new employee for the Initial Measurement Period shows that the new employee did not work on average

at least 30 Hours of Service per week, the Stability Period cannot be more than one month longer than the Initial Measurement Period and even if it is unexpired, it must end at the end of the Standard Measurement Period (plus Administrative Period) in which the Initial Measurement Period ends.

D. TIPS FOR EMPLOYERS

1. FORMULATING A STRATEGY

Formulating a strategy for dealing with the Employer Shared Responsibility Provisions depends on access to timely and accurate personnel data. For that reason, formulating a strategy for dealing with these provisions should take into account how reliable personnel data is likely to be. If a significant number of recorded dates of hire might be off by a full seven days, for example, it might be prudent to treat the seventh day prior to the recorded date of hire as the start date for purposes of these requirements.

a. Judicious enterprise restructuring could limit an employer's penalty exposure.

b. Limited exposure to the Unaffordable Coverage Penalty may be tolerable for some employers.

2. STRATEGIES CAN BE JEOPARDIZED BY WORKER MISCLASSIFICATION

As discussed above, the application of the Employer Shared Responsibility provisions to a given worker depends on the common law relationship of employer and employee. Within that category, the Full-Time Employee Safe Harbor recognizes only two types of on-going employees (Full-Time Employees and non-Full-Time Employees) and four types of new employees (Full-Time, Part-Time, Variable Hour, and Seasonal employees). Categories such as hourly/salaried or organized/non-organized may be important for how Hours of Service are counted, or when an Initial Measurement Period begins, but not for the purpose of deciding whether a worker is the type of worker who might be entitled to treatment as a Full-Time Employee. In fact, no other label an employer may place on members of its workforce has any significance for that purpose.

One important consequence of this fact is that the Employer Share Responsibility penalties can be triggered as the result of innocent reliance on a misclassification that causes a common law employee to be considered a contractor. Under the current regulatory guidance, an Applicable Large Employer Member will be exposed to the No-Coverage Penalty if it offers coverage to 650 of its 700 workers, but fails to offer coverage to 50 full-time workers who are misclassified as contractors. The resulting penalty on an annualized basis would be at least $1.34 million.

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