

# A BRIEF SURVEY OF IMPORTANT LEGAL ISSUES FOR AGRICULTURAL EMPLOYERS

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## I. HIRING: BASIC LEGAL ISSUES FOR EMPLOYERS

Anyone who employs workers in this country is potentially exposed to a wide variety of state and federal employment laws. While it is true that some partial exemptions apply for many agricultural employers, many laws do still apply, and there are some fundamental common threads running through state and federal statutes that are essential for any employer to know. This Article seeks to highlight some of those principles that are particularly important, with emphasis given to the issues impacting agricultural employers the most. Although many of the examples given refer to Texas law (the author is licensed to practice law in Texas), most states' laws feature very similar principles, and the author has attempted to keep the information as relevant as possible to employers in every state.

### A. *Major Laws Impacting the Hiring Process*

Avoiding employment discrimination is a major concern of all employers. The main thrust of employment discrimination laws nationwide is to make it illegal for employers to treat employees or applicants adversely on the basis of something about themselves that they cannot change, or should not be expected to change. Such factors are called "immutable characteristics."<sup>1</sup> For example,

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one cannot change one's race or color, gender, age, or national origin. Nor can one readily change one's disability status, and should not be expected to change one's religion, as a condition of getting or keeping a job.

Below is a listing of the most important federal statutes relating to employment discrimination.<sup>2</sup>

- *Civil Rights Act of 1964, Title VII*: The Act covers employers with at least fifteen employees and protects against discrimination based upon race, color, sex, national origin, and religion.<sup>3</sup> This law also formed the Equal Employment Opportunity Commission (EEOC) as a federal agency.<sup>4</sup>
- *Pregnancy Discrimination Act of 1978 (PDA)*: Incorporated by amendment into the Title VII statute noted above, the PDA clarifies that pregnancy and related conditions are considered to be a subset of "sex" for discrimination law purposes.<sup>5</sup> The law prohibits employers from treating women with pregnancy or related conditions any less favorably than other employees who have medical conditions that place a similar limitation on their ability to or availability for work.<sup>6</sup>
- *Age Discrimination in Employment Act of 1967 (ADEA)*: The ADEA covers employers with at least twenty employees and protects against discrimination based upon age against people who are age forty or older.<sup>7</sup>

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here with permission. William T. (Tommy) Simmons, *Especially for Texas Employers*, STATE.TX.US (Aug. 31, 2012), <http://www.twc.state.tx.us/news/efte/efte.pdf>.

1. See U.S. Equal Employment Opportunity Commission's website for basic information about race or color discrimination. *Facts About Race/Color Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/publications/fs-race.cfm> (last visited Sept. 29, 2012) ("It is unlawful to discriminate against any employee or applicant for employment because of race or color in regard to hiring, termination, promotion, compensation, job training, or any other term, condition, or privilege of employment.").

2. Unless the statute that creates the employee limit also expressly states that the limit is jurisdictional, an employer with an employee count under the limit could still face liability in a claim or lawsuit unless it affirmatively shows that the limit precludes coverage in that situation. See *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006). See also discussion *infra* Part I.F (discussing employee numbers and applicability of laws).

3. 42 U.S.C. §§ 2000e(b), 2000e-2 (2006).

4. *Id.* § 2000e-4(a).

5. *Id.* § 2000e(k); 29 C.F.R. § 1604.10 (2011).

6. 42 U.S.C. § 2000e(k); 29 C.F.R. § 1604.10.

7. 29 U.S.C. §§ 623, 630(b), 631.

- *Americans with Disabilities Act of 1990 (ADA)*: The ADA covers employers with at least fifteen employees and protects against discrimination based upon disabilities, the perception of disabilities, or association with people with disabilities.<sup>8</sup>
- *Genetic Information Nondiscrimination Act of 2009 (GINA)*: This Act covers employers with at least fifteen employees and prohibits discrimination on the basis of genetic information, as well as the use, gathering, and disclosure of genetic information in the context of employment relationships.<sup>9</sup>
- *Immigration Reform and Control Act of 1986 (IRCA)*: The discrimination protection provisions of IRCA apply to employers with at least four employees and protect against discrimination based upon national origin or citizenship.<sup>10</sup> This law also started the I-9 process.
- *U.S. Bankruptcy Code, Section 525*: This section is applicable to any employer and prohibits discrimination based upon bankruptcy history or bankruptcy claim filing status.<sup>11</sup>
- *Civil Rights Act of 1866*: This law covers all employers with at least one employee, or anyone who hires another person to perform any kind of work or services for pay (thus, it covers even independent contractor situations) and protects against discrimination based upon race or color.<sup>12</sup> As an additional cautionary note, some national origin discrimination claims can be turned into race or color discrimination claims, depending upon the circumstances.

Every state in the United States has one or more laws prohibiting the forms of discrimination covered in the federal laws noted above. Some states provide for additional protected classifications such as sexual orientation, veteran

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8. 42 U.S.C. §§ 12111(5)(A), 12112.

9. *Id.* §§ 2000ff(2)(B)(i), 2000ff-1(a) (Supp. IV 2010); *see also id.* § 2000e(b) (2006).

10. 8 U.S.C. § 1324b(a)(1)–(2) (2006).

11. 11 U.S.C. § 525(a)–(b).

12. *See* 42 U.S.C. § 1981. The provisions of this section have been recognized as repealed by implication, however, to the extent that they conflict with IRCA. *Keller v. City of Freemont*, 8:10CV270, 4:10CV3140, 2012 WL 537527, at \*17 (D. Neb. Feb. 20, 2012) (citing *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 547 (M.D. Pa. 2007)).

status, and history of filing certain types of claims (workers' compensation, discrimination, wage and hour, and so on).<sup>13</sup>

### B. *Promote an Open and Fair Hiring Process*

A person's status is generally not a legal basis for action. In other words, an employer should not hire or fire based upon an applicants' or employees' status, but rather, based upon what they can do, what they cannot do, or what they should do, but fail to do. The entire hiring process, culminating in a hiring decision, should be based strictly on job-related criteria and free of any indication the hiring decision was based in any way upon minority status. When looking to hire, employers should throw a wide net for applicants (the EEOC looks for things like that when examining discrimination claims) and the employer will have a better chance of getting a great employee. Employers should advertise open jobs with the state's public employment service—in most states that will be the same agency that handles unemployment compensation. An employer does not have to take job applications if it has no vacancies or has not advertised a job opening. In evaluating job candidates, an employer must be consistent and judge applicants on qualifications, not assumptions or stereotypes. In general, an employer should avoid asking anything in a job application or interview that is not directly related to the position under consideration. It is prudent to verify references, employment history, and background information, and to document the verification process. Employers with fifteen or more employees are covered by the Americans with Disabilities Act's prohibition against pre-employment medical inquiries.<sup>14</sup>

### C. *Deciding on the Best Candidate for the Job*

Notwithstanding discrimination laws, employers may always hire the best-qualified candidate for the job.<sup>15</sup> The important thing is to be able to explain how the person hired had the best qualifications and was the best fit for the position in terms of legitimate, job-related factors. That, of course, requires a very

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13. See, e.g., IOWA CODE § 216.6(1)(a) (2011) (including "sexual orientation" and "gender identity" among the protected classifications).

14. 42 U.S.C. §§ 12111(5)(A), 12112(d)(2).

15. *EEOC Compliance Manual, Section 15: Race and Color Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, 15-25 (Apr. 19, 2006), <http://www.eeoc.gov/policy/docs/race-color.pdf> [hereinafter *EEOC Compliance Manual*]. "Thus, a sound way for employers both to achieve business goals and to comply with the law is to hire and promote based on job-related ability, as measured by uniform and consistently applied qualification/selection standards." *Id.*

close and careful look at the job applications and other information about applicants, and a meticulous consideration of all factors that are relevant to the job, such as minimum qualifications, prior experience, availability, and work ethic (job reference checks can be helpful for this final component).<sup>16</sup> A hiring standard that results in exclusion of an applicant on the basis of race, color, religion, age, gender, national origin, disability, or genetic information is suspect and presents a risk of an EEOC claim or lawsuit unless there is a bona fide occupational qualification (BFOQ) dictating that one type of person be favored over other types of people for a position.<sup>17</sup> Thus, leave minority status out of the hiring decision to the greatest extent possible. The burden of proving that a BFOQ exists is on the employer.<sup>18</sup> In general, employers do not have to explain why they are not hiring a particular applicant (an exception would be for applicants turned down due to an adverse background or credit check covered by the Fair Credit Reporting Act (FCRA)).<sup>19</sup> It is usually best to restrict any explanations to short and factual, non-inflammatory statements such as, “You seem to have some good qualifications. The one we hired, however, better fit the requirements we had at this time. Please check back with us about any openings we might have in the future. Thank you.”

#### D. *New Hire Paperwork*

The best time to obtain an employee’s agreement to something, or to get him or her to sign required government or company documents, is before they are hired, or at the very start of employment. A good way to handle this is to have an appropriate staff member, such as the office manager or a human resources (HR) department employee, meet with the new employee before any work begins and have the new hire fill out the various forms. The following is a list of the required and optional documents that companies most commonly include in the new hire packet.

#### *Required:*

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16. *Id.* at 15-25 to -31 (comparing sound with unsound employer hiring and promotion practices).

17. *Id.* at 15-9 to -20; *see also* 42 U.S.C. § 2000e-2(e)(1) (setting forth Title VII’s “bona fide occupational qualification” exception, which applies to all Title VII bases except race and color).

18. *See* 42 U.S.C. § 2000e-2(e)(1); *see also* 29 C.F.R. § 1604.2(a) (2011) (“[T]he bona fide occupational qualification exception as to sex should be interpreted narrowly.”); 29 C.F.R. § 1606.4 (indicating that the exception shall be strictly construed as applied to national origin).

19. 15 U.S.C. § 1681m(a); *see also* discussion *infra* Part I.G.

- I-9 form: This is needed for all new hires in order to document that they are authorized to work in the United States;<sup>20</sup>
- W-4 form: This form is for obtaining basic payroll tax information from an employee and enables the company to know how many exemptions to use when computing withholding tax for IRS purposes;<sup>21</sup>
- Consent for background checks (if not already obtained): The best time to obtain consent for a background check is prior to hiring someone, ideally within the job application, so that the background check can be done before making the hiring decision. Regardless of when the background check may be conducted, consent of the applicant or employee is required under the FCRA if the check is done by an outside, for-profit service.<sup>22</sup>

*Optional, but recommended:*

- Acknowledgement of receipt of the employer's policy handbook;
- Consent for drug testing and consent to search, if the company does such things;
- Consent for video surveillance, if the company conducts such surveillance;
- Agreements regarding pay, benefits, schedule, work location, and so on (with employment-at-will disclaimers);<sup>23</sup>
- Documents needed to claim tax incentives, grants, and other benefits associated with hiring applicants from certain targeted groups.<sup>24</sup>

In addition to the paperwork above, other steps the employer must take at the time, or right after, an employee starts work include:

- Entering the employee into the payroll system;<sup>25</sup>

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20. 8 U.S.C. § 1324a(b); U.S. CITIZENSHIP & IMMIGRATION SERV., U.S. DEP'T. OF HOMELAND SECURITY, OMB NO. 1615-0047, FORM I-9, EMPLOYEE ELIGIBILITY VERIFICATION (Aug. 7, 2009) [hereinafter FORM I-9], available at <http://www.uscis.gov/files/form/i-9.pdf>.

21. INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, FORM W-4 (2012), available at <http://www.irs.gov/pub/irs-pdf/fw4.pdf>.

22. 15 U.S.C. §§ 1681a(f), 1681b(b)(2)(A), 1681m(a).

23. William T. (Tommy) Simmons, *Especially for Texas Employers*, STATE.TX.US, 15 (Aug. 31, 2012), <http://www.twc.state.tx.us/news/eft/eft.pdf>.

24. *Id.*; INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, FORM 8850 (Jan. 2012), available at <http://www.irs.gov/pub/irs-pdf/f8850.pdf>.

25. For employee ID purposes, try to use an alpha-numeric identifier other than a Social Security number (SSN)—both government agencies and private-sector experts advise employers to minimize the use and publication of SSNs for anything other than wage reporting and payroll tax purposes. See FEDERAL TRADE COMMISSION, SECURITY IN NUMBERS: SSNs AND ID THEFT 3–5

- Submitting the “New Hire” report to the state within twenty days of hire;<sup>26</sup>
- Signing the employee up for any insurance or other benefits the company may offer;
- Issuing the employee any ID or access cards needed to access company facilities;
- Issuing company equipment, uniforms, and other items.<sup>27</sup>

#### E. *Independent Contractors/Contract Labor*

Independent contractors are self-employed, independent business entities in a position to make a profit or loss based upon how they manage their own independent enterprise. An employer of an independent contractor is merely one of the clients or customers of that contractor. Most states and the IRS use similar tests to determine whether given workers are employees or independent contractors. Whether the test applied is the common-law direction and control test,<sup>28</sup> the ABC test,<sup>29</sup> the economic realities test,<sup>30</sup> or the IRS test,<sup>31</sup> the issues are basically the same—all the tests boil down to whether the employer exercises direction and control over the performance of the services of the worker. An employee’s work is directly integrated into the primary service offered by the employer, while an independent contractor performs work that is outside the usual scope of the employer’s business.<sup>32</sup> All the laws presume that a worker performing services for pay is an employee, and if an employer thinks otherwise, it has the burden of proof in almost any possible legal situation.<sup>33</sup>

Keep these characteristics of independent contractor arrangements in mind:

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(2008), available at <http://www.ftc.gov/os/2008/12/P075414ssnreport.pdf> (describing the use of SNNs as identifiers).

26. 42 U.S.C. § 653a(b)(1)(A), (2)(A).

27. Simmons, *supra* note 23, at 16. Consider using a property return security deposit agreement to minimize the risk of damage or non-return of such property. *Id.*

28. See, e.g., *Critical Health Connection, Inc. v. Texas Workforce Comm’n*, 338 S.W.3d 758, 762 (Tex. Ct. App. 2011) (citing 40 TEX. ADMIN. CODE §§ 815.134, 821.5 (2010) (describing the factors used for analysis under the “right-to-control” test)).

29. See, e.g., *Fleece on Earth v. Dep’t of Emp’t & Training*, 923 A.2d 594, 597 (Vt. 2007) (quoting 21 VT. STAT. ANN. § 1301(6)(B)).

30. See e.g., *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1043–44 (5th Cir. 1987) (citations omitted).

31. See, e.g., *United States v. Porter*, 569 F. Supp. 2d 862, 869–72 (S.D. Iowa 2008) (quoting Rev. Rul. 87-41, 1987-1 C.B. 296).

32. See, e.g., *id.*

33. See, e.g., TEX. LAB. CODE ANN. § 201.041 (West 2006).

- The employer generally seeks the independent contractor out, not vice versa;
- The employer has to negotiate terms with the independent contractor;
- Independent contractors are experts and should not need training;
- The employer is buying a finished project or completed service, rather than hours of work on an ongoing basis;
- These arrangements generally do not include non-competition agreements—such an agreement is strong proof that the worker's services are directly integrated into the primary service provided by the employer and they are serving as an employee;
- These arrangements may or may not contain non-solicitation agreement—if they do, it should be narrowly tailored to protect the company's relations with the clients served by the contractor since anything stronger will resemble a non-competition agreement;
- These arrangements may contain a non-disclosure agreement, but like the non-solicitation agreement, keep it as narrow- and tightly-focused as possible to protect the confidential information to which the contractor will have access during the project.

Additionally, IRS and state payroll tax examiners look for certain “red flags” that may suggest employee rather than independent contractor:

- Terms such as “1099 employees,” “volunteer employees,” or “contract labor;”
- Having contractors wear company badges or uniforms indicating their affiliation with the company;
- Giving contractors a company e-mail address or cc’ing them on company e-mails (instead of sending them separate e-mails);
- Inviting contractors to company parties and other events using the same invitation that goes to regular employees;
- Giving contractors company benefits or wage advances;
- Having contractors sign company policy handbooks; and
- Non-competition agreements (as noted above).

In an audit situation, an employer should try to show the following to demonstrate independent contractor status:

- Contractors’ business cards showing they are in business for themselves;
- Contractors’ invoices to the company on their own stationery;
- Copies of any advertisements they use for their own businesses;
- Links to the contractors’ web sites;

- Written contracts for provision of services or performance of a project, one of the provisions which covers recourse for premature termination of the contract and non-completion of the work (that is to help show that there is not an at-will employment relationship), and another provision which covers any fees paid by the contractor to the company for use of company property (that helps to show a potential for profit or loss);
- E-mails, letters, or other documentation relating to negotiating the parameters of the work.

#### F. *Thresholds for Coverage Under Employment-Related Laws*

Not all employers are covered by all of the various state and federal employment laws that exist. It is important to know which laws apply to which company or organization, because coverage involves the imposition of important duties for employers to satisfy. Here are the most important federal employment-related statutes, organized according to the number of employees required before applicable to an employer:<sup>34</sup>

*One worker, including an independent contractor:*

- Civil Rights Act of 1866.<sup>35</sup>

*One employee or more:*

- Fair Labor Standards Act;<sup>36</sup>
- Migrant & Seasonal Agricultural Worker Protection Act;<sup>37</sup>
- New hire reporting laws;<sup>38</sup>

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34. Unless the statute that creates the employee limit also expressly states that the limit is jurisdictional, an employer with an employee count under the limit could still face liability in a claim or lawsuit unless it affirmatively shows that the limit precludes coverage in that situation. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006).

35. 42 U.S.C. § 1981 (2006) (race/color discrimination). *But see* *Keller v. City of Fremont*, 8:10CV270, 4:10CV3140, 2012 WL 537527, at \*17 (D. Neb. Feb. 20, 2012) (citing *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 547 (M.D. Pa. 2007)) (indicating that the Immigration Reform and Control Act impliedly repealed section 1981 to the extent that section 1981 protected the right of undocumented aliens to enter into contracts).

36. 29 U.S.C. §§ 203(d)–(e); 206; 207; 212 (2006 & Supp. IV 2010) (setting standards for minimum wage, overtime, child labor, and equal pay).

37. *Id.* §§ 1801–1872 (2006) (protecting migrant and seasonal agricultural workers in regards to wages, hours, working conditions, housing conditions, transportation, work agreements, and notice of rights).

38. 42 U.S.C. § 653a(b)(1)(A), (2)(A) (requiring employers to report new hires within twenty days after hire).

- OSHA;<sup>39</sup>
- State wage payment laws;<sup>40</sup>
- State and federal unemployment insurance laws.<sup>41</sup>

*Four or more employees:*

- Immigration Reform and Control Act.<sup>42</sup>

*Fifteen or more employees:*

- Title VII, ADA, GINA, and most state employment discrimination statutes.<sup>43</sup>

*Twenty or more employees:*

- ADEA;<sup>44</sup>
- COBRA.<sup>45</sup>

*Fifty or more employees:*

- FMLA.<sup>46</sup>

*One hundred or more employees:*

- WARN.<sup>47</sup>

### G. *Job References and Background Checks*

The law in most states protects from defamation liability an employer who releases information about a current or former employee to a prospective new employer, unless “the information disclosed was known by that employer to

39. 29 U.S.C. §§ 651–678 (2006 & Supp. 2010) (occupational safety and health).

40. *E.g.*, TEX. LAB. CODE ANN. §§ 61.011, .014, .018 (West 2006) (requiring that employers honor the wage agreement, pay final wages by a state-specified deadline, and obtain written authorization for pay deductions unless they are ordered by a court or required by a law).

41. I.R.C. §§ 3301–3311 (2006 & Supp. IV 2010); *e.g.*, TEX. LAB. CODE ANN. §§ 201.001–.101.

42. 8 U.S.C. § 1324b(a)(1)–(2) (2006) (prohibiting discrimination on basis of national origin or citizenship).

43. *See supra* Part I.A (discussing statutes prohibiting discrimination on the basis of race, color, gender, religion, national origin, disability, age (state law), or genetic information).

44. *Id.* (prohibiting discrimination against those who are forty or older).

45. I.R.C. § 4980B (health benefit continuation upon unemployment).

46. 29 U.S.C. §§ 2611(4)(A)(i), 2612 (2006 & Supp. IV 2010) (providing job-protected family and medical leave for twelve to twenty-six weeks).

47. 29 U.S.C. §§ 2101(a)(1), 2102(a) (2006) (requiring sixty days’ advance notice of work separation, or else sixty days’ wages in lieu of notice, in the event of a plant closing).

be false at the time the disclosure was made or that the disclosure was made with malice or in reckless disregard for the truth or falsity of the information disclosed.”<sup>48</sup> Statutory text aside, the main question for employers becomes how to put the law into practice.

The following are some practical tips for how to avoid liability and decrease the risk of a lawsuit by an employee when acting as a reference.

- *Be careful over the phone:* As a general rule, it is not a good idea to give job reference information over the phone if someone “cold-calls” the company, unless the employer is absolutely certain who is calling and why. A good general practice is to respond to calls about employees with something like “I’m sorry, but we do not release information about current or former employees over the phone. We will be glad, however, to furnish any information that your applicant authorizes us in writing to release to you.” Then, suggest that the caller get the applicant to sign a release or authorization form like the one cited below.
- *Just the facts, please:* When giving a job reference, release only factual information. Factual information is something you can prove, either with witnesses or documentation. Facts do not include opinions, value judgments, or moral criticism.
- *Supply only what is requested:* In addition, it is generally a good idea to provide only what is requested. Unless there is a compelling need to do so, try not to volunteer additional things that are not connected to the information requested by a prospective new employer.
- *Tell the truth:* As the old saying goes, “truth is an absolute defense to a defamation lawsuit.” It’s true. An employer should tell a prospective new employer only what the employer knows to be true. Telling true facts has been protected in the past by court decisions and is now protected by many state statutes.
- *Avoid inflammatory terms:* Inflammatory terms can make a person feel they are being unfairly attacked and can tempt a person to seek an attorney. Use the points above to combine facts with truth in a non-inflammatory manner, as illustrated in the examples below:

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48. TEX. LAB. CODE ANN. § 103.004(a) (West 2006).

- *Inflammatory*: “We fired Joe for stealing.”  
*Non-inflammatory*: “We discharged Joe for failing to properly account for items entrusted to him. Items A and B were checked out to him, they turned up missing, and he failed to give a satisfactory explanation for what happened to them. Under our policy, that was a dischargeable offense.”
- *Inflammatory*: “Jane was fired for using drugs. We don't tolerate druggies.”  
*Non-inflammatory*: “Jane failed a drug test on (date). The initial positive result was confirmed. Employees who fail a drug test under such circumstances are subject to termination.”
- *Inflammatory*: “Frank was terminated for sexually harassing an employee.”  
*Non-inflammatory*: “Frank was terminated for violating our policy prohibiting harassment in the workplace.”
- *Just be fair*: The most important goal is expressing facts in a manner that conveys the relevant information about the employee without sounding like name-calling or moral judgment. As in most other areas of employment relations, the more an employee feels that he or she is being fairly treated, the less likely he or she will be to hire an attorney or complain to a government agency in order to vindicate themselves.
- *Use a written release form*: It can be difficult to get a usable job reference for an applicant from their prior employers. Past employers are often reticent out of fear of defamation lawsuits, or they may suspect that a person requesting information is not really a prospective new employer. It is especially difficult to get usable information out of a “cold call” to another company over the phone. Using a preprinted, fill-in-the-blank form in which the applicant clearly gives permission for the release and use of information can help overcome the reluctance or fear often felt by people asked to give a job reference and can afford a better chance of getting a useful, candid response.<sup>49</sup> It would be advisable to have the applicant fill out one of these forms for each prior employer from which job reference information is sought. Using the

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49. See, e.g., Simmons, *supra* note 23, at 45 (providing a sample employee information release form).

form will make it much more likely that the prior employer will feel at liberty to release the information requested, or at least more information than the usual work dates and salary confirmation that is of little practical value in the hiring decision. If anyone refuses to sign such an authorization, the employer would have the legal right to refuse to consider that person any further for hiring.<sup>50</sup>

#### H. *Other Ways to Obtain Usable Reference or Background Information*

An employer that is considering hiring an applicant sometimes has to function as an investigator and try more creative techniques. In addition to using the form referenced in Part I.G, the employer can ask the applicant to give the contact information for his or her immediate supervisor and try to talk with that person. If that supervisor has been properly trained, they will refer the call to the human resources staff or someone higher up, but sometimes the caller will find someone who is willing to answer directly and give more insight into the applicant's "real" employment history than one might otherwise get from the HR staff at that company. Second, the employer can ask the applicant to give the name and contact information for at least one third-party (customer, vendor, government regulator) who can give a statement as to the applicant's work or expertise. It is also possible to hire an outside professional investigator to do a thorough reference and background check, as long as the employer satisfies the formalities under the FCRA.<sup>51</sup> In order to do a background or reference check under the FCRA, an employer must first notify the applicant that such a check will be done, and then must obtain the applicant's written permission to perform the check.<sup>52</sup> No authorization is needed to obtain information from publicly-available sources, such as court records, or databases maintained by governmental entities.<sup>53</sup> If the applicant refuses to sign such a form, the employer has the option of telling the applicant that the application process is at an end, or, if the employer is already

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50. The author is unaware of any state law that would protect the right of an applicant to refuse to authorize prior employers to release factual information about them to a prospective new employer.

51. 15 U.S.C. § 1681b(b)(2)(A).

52. *Id.*

53. Letter from Clarke W. Brinckerhoff, Attorney, Fed. Trade Comm'n, Div. of Credit Practices, to Gail Goeke, Lathrop & Gage (June 9, 1998), <http://www.ftc.gov/os/statutes/fcra/goeke.shtm> ("In our view, a state agency that is providing information that is generally available to the public should not be considered a 'consumer reporting agency' (CRA) under the FCRA, and the communication of that data by such an agency to an employer or other party should not be considered a 'consumer report.'").

satisfied with what it has been able to find out, it can opt to hire the individual without a more detailed check being done.<sup>54</sup>

### I. EEOC Issues with Background Checks

Sometimes employers will turn down an applicant as the result of a credit check or an unfavorable report on an applicant's criminal history. Aside from the FCRA concerns noted above, an employer needs to worry about the potential EEOC issues involved. Basically, EEOC takes the position that because statistical evidence shows that more minorities than non-minorities have had financial or criminal history problems in the past, taking an adverse job action based upon such factors has an disproportionate and unfair impact (in EEOC terms, "disparate impact") upon minorities, and the burden will be on the employer to show a legitimate, job-related reason for taking the adverse job action.<sup>55</sup> EEOC and the courts expect employers, prior to turning someone down for a job or promotion who has had an unfavorable credit or criminal history report, to do an individualized job-relatedness determination.<sup>56</sup> That means before rejecting someone for a job on the basis of a credit report or criminal history problem, the employer must be able to show that it considered the specific problem and determined that it would not be a good idea or prudent course of action to hire that person in light of their blemished record for the particular position sought after.<sup>57</sup>

## II. PAY AND POLICY ISSUES

### A. General Overview

The basic rule of employment law in most states is "employment at will," which applies to all phases of the employment relationship. Absent a statute or an express agreement (such as an employment contract) to the contrary, either party in an at-will employment relationship may modify any of the terms

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54. Letter from Clarke W. Brinckerhoff, Attorney, Fed. Trade Comm'n, Div. of Credit Practices, to Corrie L. Fischel, Counsel, Equal Emp't Advisory Council (Oct. 1, 1999), <http://www.ftc.gov/os/statutes/fcra/fischel.shtm>. For a good summary of FCRA requirements from the Federal Trade Commission (FTC), see *Using Consumer Reports: What Employers Need to Know*, BUREAU OF CONSUMER PROTECTION, BUS. CTR. (Jan. 2012), <http://business.ftc.gov/documents/bus08-using-consumer-reports-what-employers-need-know>. A much more detailed FTC report may be found at FED. TRADE COMM'N, 40 YEARS OF EXPERIENCE WITH THE FAIR CREDIT REPORTING ACT (July 2011), available at <http://www.ftc.gov/os/2011/07/110720fcrrareport.pdf>.

55. *EEOC Compliance Manual*, *supra* note 15, at 15-20 to -22.

56. See, e.g., *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290, 1295-99 (8th Cir. 1975).

57. See *id.* at 1297-98 (describing the Eighth Circuit's interpretation of the "Business Necessity" test for disparate impact discrimination).

or conditions of employment, or terminate the relationship altogether, for any reason, or no particular reason at all, with or without advance notice.<sup>58</sup> Other than statutes and express agreements, the only significant exception to employment at will is the “public policy” exception; for example, it is against public policy, and therefore impermissible, to terminate or act adversely against an employee in retaliation for the employee having refused to commit a criminal act on the employer’s behalf.<sup>59</sup> Thus, in an employment at will state, and to a lesser extent in other states, employers may develop and change personnel policies, reassign employees, and change such things as work locations, schedules, job titles, job descriptions, pay, and other aspects of jobs at will.<sup>60</sup> “Employment at will” is not the same as “right to work”—under right to work laws, employment may not be conditioned or denied on the basis of membership or non-membership in a union (twenty-three states have such laws).<sup>61</sup> In almost any kind of employment claim or lawsuit, it will help to be able to point to clear, written policies and to state that employees are notified of the standards to which they will be held. Secret policies are useless, and therefore, employees must have access to whatever policies will apply to them. An unknown policy cannot be used against an ex-employee in an unemployment claim or any other kind of employment-related claim or lawsuit.<sup>62</sup>

### B. I-9 Procedures

I-9 forms do not have to be filled out for job applicants—that requirement pertains only to newly-hired employees.<sup>63</sup> Under current rules, only documents that are unexpired when shown can be used for I-9 purposes (once shown, a U.S. passport, an alien registration receipt card/permanent resident card, or a List B document does not need to be reverified, even if it expires after the em-

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58. Eastline & R.R.R. Co. v. Scott, 10 S.W. 99, 102 (Tex. 1888).

59. Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985).

60. See *In re* Dillard Dep’t Stores, Inc., 198 S.W.3d 778, 782 (Tex. 2006) (citing *In re* Halliburton, 80 S.W.3d 566, 569 (Tex. 2002)) (indicating that employers may adopt or amend policies at any time, but employees must be given notice for the changes to be effective).

61. See, e.g., FLA. CONST. art. 1, § 6; IOWA CODE §§ 20.8, 20.10, 731.1–.8 (2011); TEX. GOV’T CODE ANN. § 617.004 (2009); see also *Right to Work Frequently-Asked Questions*, NAT’L RIGHT TO WORK LEGAL DEF. FOUND., INC., [http://www.nrtw.org/b/rtw\\_faq.htm](http://www.nrtw.org/b/rtw_faq.htm) (last visited Sept. 29, 2012) (identifying the twenty-three states with right to work laws, compiling all right to work laws, and discussing questions related to the right to work laws).

62. See, e.g., *Hathaway v. General Mills, Inc.*, 711 S.W.2d 227, 229 (Tex. 1986) (“to prove a modification of an at will employment contract, the party asserting the modification must prove two things: (1) notice of the change; and, (2) acceptance of the change”).

63. See 8 U.S.C. § 1324a(a)–(b) (2006).

ployee was hired).<sup>64</sup> An employer has up to three business days following hire to get the I-9 form filled out.<sup>65</sup> If a new hire shows the proper documentation listed on the form, the I-9 requirements are satisfied; the employer should not make the mistake of requiring documentation above and beyond what is shown on the I-9 form (what the government calls “document abuse”).<sup>66</sup> The employer may make copies of the documents shown by the employee and keep them in a separate I-9 file in case of a U.S. Customs and Immigration Services (USCIS, formerly known as INS) audit.<sup>67</sup> The employer is not required to be a document-authentication expert; as long as the employer satisfies itself in good faith that the documents are genuine and satisfy the requirements, the employer is in compliance.<sup>68</sup> I-9 records must be kept for three years following the date of hire, or for one year after the employee leaves, whichever is later.<sup>69</sup> Recommended practice is to keep this and all employment records for at least seven years after the employee leaves in order to exhaust all the statutes of limitation.

Unless the employment is for less than three business days, a receipt for a lost, stolen, or damaged document will suffice for I-9 purposes as long as the replacement document itself is presented within ninety days of hire or, in the case of reverification, no later than the expiration date of the reverified document.<sup>70</sup> The receipt is not acceptable, though, if the employer has actual or constructive knowledge that the employee is not authorized to work in the United States.<sup>71</sup> Other receipts that are acceptable with restrictions are the arrival portion of the Form I-94 or I-94A containing an unexpired Temporary I-551 stamp and photograph, or the departure portion of Form I-94 or I-94A with an unexpired refugee admission stamp.<sup>72</sup>

ID cards (included in the List B documents) often cause confusion. A frequent issue is whether a driver’s license is required, or if some other form of ID can suffice. A related issue is whether ID cards with expiration dates must be reverified upon expiration. First, the ID document listed first in List B does not have to be a driver’s license—it can be any government-issued ID card, even a

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64. 8 C.F.R. § 274a.2(b)(1)(v) (2012); *see also* U.S. CITIZENSHIP AND IMMIGRATION SERV., HANDBOOK FOR EMPLOYERS: INSTRUCTIONS FOR COMPLETING FORM I-9, at 5, 9 (2011) [hereinafter USCIS, HANDBOOK FOR EMPLOYERS], *available at* <http://www.uscis.gov/files/form/m-274.pdf>.

65. 8 C.F.R. § 274a.2(b)(1)(ii).

66. 8 U.S.C. §§ 1324a(b)(1), 1324b(a)(6).

67. *Id.* § 1324a(b)(4).

68. *Id.* § 1324a(b)(1)(A), (6).

69. *Id.* § 1324a(b)(3)(B).

70. 8 C.F.R. § 274a.2(b)(1)(vi).

71. *Id.*

72. *Id.* § 274a.2(b)(1)(vi)(B). For details on receipts, see USCIS, HANDBOOK FOR EMPLOYERS, *supra* note 64, at 40–41.

parolee's ID card, if the date of birth, gender, height, eye color, and address are on it. Second, regarding reverification of expired ID cards, as the note on the top of page five of the latest I-9 form specifies, "[a]ll documents must be unexpired" when presented for verification.<sup>73</sup> The only expirable documents that require a tickler-based reverification procedure, however, are those that involve work authorization, not identity.<sup>74</sup> Thus, the Department of Homeland Security employment authorization documents that expire would have to be reverified upon expiration—new, unexpired documents would have to be presented. As noted above, identity documents do not require reverification.<sup>75</sup>

Social Security Administration regulations provide that

[A] restrictive legend may appear on the face of an SSN card to indicate [work authorization]. This restrictive legend appears on the card above the individual's name and SSN. Individuals without work authorization in the U.S. receive SSN cards showing the restrictive legend, 'Not Valid for Employment;' and SSN cards for those individuals who have temporary work authorization in the U.S. show the restrictive legend, 'Valid For Work Only With DHS Authorization.' U.S. citizens and individuals who are permanent residents receive SSN cards without a restrictive legend.<sup>76</sup>

### C. New Hire Reporting Requirements

All employers are required to report certain information on newly-hired employees to a State Directory of New Hires.<sup>77</sup> In many states, that office is connected with the child support enforcement agency. The main rationales for new hire reporting requirements are to improve the collection of child support and reduce various types of state and federal benefit fraud. Employers must report the following information within twenty days of the first day on the job for all new employees: federal employer identification number, employer's name, employer's address, employee's name, employee's address, employee's Social Security number, and employee's first day of work.<sup>78</sup>

73. FORM I-9, *supra* note 20, at 5; *see also* 8 C.F.R. § 274a.2(b)(1)(v).

74. *See* USCIS, HANDBOOK FOR EMPLOYERS, *supra* note 64, at 9.

75. *Id.*

76. 20 C.F.R. § 422.103(e)(3); *see also* FORM I-9, *supra* note 20, at 5.

77. 42 U.S.C. § 653a(b)(1)(A), (2)(A) (2006).

78. 42 U.S.C. § 653a(b)(1)(A); *New Hire Reporting*, U.S. DEP'T OF HEALTH & HUMAN SERVS., <http://www.acf.hhs.gov/programs/css/employers/new-hire-reporting> (last visited Sept. 29, 2012). SSNs can be verified by various means. *See The Social Security Number Verification Service*, SOC. SECURITY ADMIN. (Aug. 20, 2012), [www.ssa.gov/employer/ssnv.htm](http://www.ssa.gov/employer/ssnv.htm); *see also* discussion *infra* Part II.E.

Employers can report the information by mail, fax, magnetic tape, diskette, or e-mail.<sup>79</sup> In many states, there is a per-employee penalty for knowingly failing to report new hires, as well as a higher penalty for conspiring with new hires to fail to make the report.<sup>80</sup> The U.S. Department of Health and Human Services provides basic information about reporting requirements.<sup>81</sup> Most states make a new hire reporting form available; employers generally may also design their own forms, as long as the required information is included.<sup>82</sup> It is acceptable to use a W-4 form as well.<sup>83</sup> Employers with multi-state operations may designate a single state to report all new hires, or they can choose to report in the individual states where they have employees.<sup>84</sup>

*D. What If the New Hire Fails to Give a Social Security Number?*

If a new hire tells you he or she does not have a SSN, due to immigration issues or to waiting for one to come through, your company is entitled to require the employee to document that they have an application for the number being processed. If they state that they have not applied for one, give them the basic information on how to apply to the Social Security Administration for a number and tell them how important it is to get that task done promptly.<sup>85</sup>

If a new hire refuses to give you his or her SSN or address despite having such information, it may be a sign of other problems to come, but the bottom line is that your business does not have to continue such an employee's employment.<sup>86</sup> If the employee claims not to have an SSN for religious reasons, the

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79. *Id.* § 653a(c). Some states, such as Texas, may allow telephone reporting as well for the convenience of the employer. *See New Hires*, ATT'Y GEN. OF TEX. <https://portal.cs.oag.state.tx.us/wps/portal/NewHiresReportingMethods> (last visited Sept. 29, 2012).

80. *See, e.g.*, TEX. FAM. CODE ANN. § 234.105 (West 2008) (providing a \$25 fine for failure to report an employee or a \$500 fine for a conspiracy with an employee not to report the employee).

81. *Employers*, U.S. DEP'T OF HEALTH & HUMAN SERVS. <http://www.acf.hhs.gov/programs/css/employers> (last visited Sept. 29, 2012).

82. *See State New Hire Reporting Information*, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Aug. 2012), [http://www.acf.hhs.gov/sites/default/files/ocse/state\\_new\\_hire\\_reporting\\_contacts\\_and\\_program\\_infomation.pdf](http://www.acf.hhs.gov/sites/default/files/ocse/state_new_hire_reporting_contacts_and_program_infomation.pdf) (outlining state-by-state requirements).

83. *See id.*

84. 42 U.S.C. § 653a(b)(1)(B).

85. *See Get or Replace a Social Security Card*, SOC. SECURITY ADMIN. (Sept. 24, 2012), <http://www.ssa.gov/ssnumber/>.

86. *See, e.g.*, *Seaworth v. Pearson*, 203 F.3d 1056, 1057 (8th Cir. 2000), *cert. denied*, 531 U.S. 895 (2000) (holding that employers do not have to hire an individual who refuses to supply their SSN for religious reasons).

company is entitled to require the employee to document that fact.<sup>87</sup> Such documentation may consist of a statement, affidavit, or other form of attestation to the effect that the employee has opted out of Social Security due to religious objections to such a number, or to participating in a welfare program, or some similar reason.<sup>88</sup>

#### E. *Refusal to Hire Due to Lack of Social Security Number*

As to the question of whether an employer may legally refuse to hire an applicant due to failure or refusal to furnish a social security number, courts from around the country generally support an employer's right to refuse to hire an applicant for such a reason. In *Seaworth v. Pearson*, the Eighth Circuit Court of Appeals held that the IRS requirement that an employer furnish an employee's correct name and SSN with payroll tax documents along with an employee's refusal to do so is sufficient neutral justification for refusal to hire, even if the refusal infringes on an applicant's religious beliefs.<sup>89</sup> An employer is not obligated to seek a waiver from the IRS in order to get past that requirement (thus, even though an employer may file an affidavit of reasonable cause for failing to furnish the SSN, it is not bound by any law to do so).<sup>90</sup> The *Seaworth* court cited other court decisions along the same line.<sup>91</sup>

The *Sutton v. Providence St. Joseph Med. Ctr.* case further noted that in the absence of proof of some kind of collusion with the government, there is no valid Religious Freedom Restoration Act claim against a private sector employer that is simply complying with the law.<sup>92</sup> A similar decision came in the case of *Weber v. Leaseway Dedicated Logistics, Inc.*, which held that a trucking company did not have to hire an applicant for a commercial driver position who refused

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87. See RM 10225.035 SSNs for the Amish and Mennonites (and Other Religious Exempt Communities), SOC. SECURITY ADMIN. (July 20, 2011), <https://secure.ssa.gov/poms.nsf/lnx/0110225035> (describing IRS Form 4029, which is used to exempt individuals from receiving a SSN for religious reasons).

88. For more details, see discussion *infra* Part II.E.

89. *Seaworth*, 203 F.3d at 1057.

90. *Id.*

91. *Id.* at 1057–58 (citing *EEOC v. Allendale Nursing Ctr.*, 996 F. Supp. 712, 717 (W.D. Mich. 1998) (“requirement that employee obtain SSN is requirement imposed by law, not employment requirement”)); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 830–31 (9th Cir. 1999) (“employer not liable for not hiring person who refused for religious reasons to provide his SSN, because accommodating applicant’s religious beliefs would cause employer to violate federal law, which constituted ‘undue hardship’”); *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67 (1986) (“accommodation causes undue hardship whenever it results in more than *de minimis* cost to employer”).

92. *Sutton*, 192 F.3d at 836–843.

on religious grounds to submit his SSN; according to the court, the SSN was required by both IRS and DOT regulations, and it would have been an undue hardship on the employer to hire the applicant and risk both IRS and DOT penalties.<sup>93</sup> Finally, in *Baltgalvis v. Newport News Shipbuilding Inc.*, the court, agreeing with the decisions cited above, ruled that the employer did not violate religious discrimination laws by acting on the basis of IRS requirements regarding the SSN, and that it would have been an undue hardship on the employer to require the company to either seek a waiver from the IRS or use an identifying number other than the SSN.<sup>94</sup>

#### F. *Personnel Files*

Only one type of record must be kept in a separate file apart from the regular personnel files: medical information (including workers' compensation records). That is because the Americans with Disabilities Act requires that any medical records pertaining to employees be kept in separate confidential medical files.<sup>95</sup> Still, it is a good idea to maintain other types of records in separate files as well, such as I-9s, OSHA-related safety records, investigation records, and payroll records, so that only those with a job-related need to know can get particular information. Keeping separate files also makes it easier to respond to audits from government officials and restrict the audit to just those documents the official needs to see.

The human resources department can develop a security or restricted access procedure for these various files, keeping an overview by cross-referencing in one file the relevant documents in another file. If a person who has access to one file wants to see another document in a separate file, he or she would have to have clearance under the file access procedure in order to do that. Some state laws require an employer to allow an employee to access his or her personnel file, while other states have no such law.<sup>96</sup> Most businesses, however, allow su-

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93. *Weber v. Leaseway Dedicated Logistics, Inc.*, 5 F. Supp. 2d 1219, 1222–23 (D. Kan. 1998), *aff'd*, 166 F.3d 1223 (10th Cir. 1999).

94. *Baltgalvis v. Newport News Shipbuilding Inc.*, 132 F. Supp. 2d 414, 420 (E.D. Va. 2001), *aff'd*, 15 Fed. Appx. 172 (4th Cir. 2001).

95. 42 U.S.C. § 12112(d)(3)(B) (2006).

96. *See, e.g.*, CAL. LAB. CODE § 1198.5(a) (West 2011) (“Every employee has the right to inspect the personnel records that the employer maintains relating to the employee’s performance or to any grievance concerning the employee.”); 820 ILL. COMP. STAT. 40/2 (2011) (requiring employees be permitted access); MICH. COMP. LAWS ANN. § 423.503 (2001 West) (requiring employees be permitted access).

pervised access and copying of file contents at the employee's cost.<sup>97</sup> Because of the possibility of disclosure, a company should never place anything in a personnel file that it would be ashamed to show other people (such as twelve average jurors). Keep in mind that anything in any file relating to an employee is generally discoverable in a claim or lawsuit filed by or on behalf of that employee.<sup>98</sup>

A federal regulation under OSHA requires a company to give employees and former employees access to OSHA-required records of their work-related illnesses and injuries, such as those medical conditions that would be covered by OSHA recordkeeping requirements.<sup>99</sup> Generally, those documents would be OSHA Log 300 and the OSHA 301 Incident Report.<sup>100</sup> "Access" includes providing the employee with copies.<sup>101</sup> The deadline for the access or copies is the end of the next business day following the request, so there is no particular requirement for a twenty-four hour response.<sup>102</sup> As the rule notes, the first copy of a covered document is free to the former employee or their designated representative, but subsequent copies can be furnished at a "reasonable charge."<sup>103</sup>

### G. Pay and Benefits

Compensation agreements and benefits produce certain basic issues for consideration. Compensation agreements can be oral or written, and based on hourly, weekly, biweekly, semi-monthly, monthly, commission, piece, book, flag, day, ticket, or job rates, as well as other components such as bonuses or dividends. If unusual pay methods are contemplated, the employer should have the employee sign a written pay agreement that precisely spells out the conditions for pay in order to avoid misunderstandings and possible wage claims. An em-

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97. See *This Week's E-Tip: Personnel Files – When to Allow Employee Access?*, PERSONNEL POL'Y SERV., INC. (Apr. 13, 2009), <http://www.ppspublishers.com/ez/html/041309txtb.html> (discussing legal and public policy implications of allowing employees (current and former) to look at and copy their employment records).

98. See, e.g., TEX. R. CIV. P. 192.3(a) ("a party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action . . ."); *Humphreys v. Caldwell*, 881 S.W.2d 940, 946 (Tex. App. 1994) (indicating that personnel files are generally discoverable if they are relevant to the issues in the specific case).

99. 29 C.F.R. § 1904.35(b)(2) (2011).

100. See OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LABOR, FORMS FOR RECORDING WORK-RELATED INJURIES AND ILLNESSES, at 2, 10 (2004), available at <http://www.osha.gov/recordkeeping/new-osh300form1-1-04.pdf>.

101. See 29 C.F.R. § 1904.35(b)(2)(iii), (v).

102. 29 C.F.R. § 1904.35(b)(2)(iii), (v)(A). In the case of employees involved in a collective bargaining agreement, a copy must be given to a requesting authorized employee representative within seven calendar days. *Id.* § 1904.35(b)(2)(v)(B).

103. *Id.* § 1904.35(b)(2)(vi).

ployer may change both the method and the rate of pay, but only prospectively, never retroactively, due to the risk of wage payment or breach of contract claims.<sup>104</sup> Always give advance written notice of changes in pay. Whether any particular benefit, such as health insurance, retirement benefits, paid leave, or breaks, is required is a matter of each state's laws, but no matter what benefits are offered, the specifics should be clear and in writing.

Some benefits, however, have specific rules if the company chooses to offer them:

- *Pension or retirement benefits:* If a company offers such benefits, the federal law known as ERISA provides that an employee who works at least 1000 hours in a twelve-month period must be given the chance to elect participation in the pension or retirement plan (this is known informally as the “thousand-hour rule”);<sup>105</sup>
- *Health insurance benefits:* If an employer has a health insurance plan, the state insurance law or regulations will define what an “eligible employee” is—for example, in Texas, “eligible employee” is defined as anyone who usually works at least thirty hours per week.<sup>106</sup>

### III. WORKPLACE POLICIES

#### A. *Drug and Alcohol Policies*

Many states, including Texas, leave the issue of drug testing to an employer's discretion, while others restrict it to some extent. Regulation of drug testing varies from state to state, but regardless of what a particular state may allow, it is universally regarded as a best practice to give advance written notice of the policy and apply it fairly to everyone (limiting the risk of discrimination claims). Some employers are obligated by law to have written drug-free work-

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104. See, e.g., TEX. LAB. CODE ANN. § 61.018 (2006) (explaining proper deduction of wages); *Pennington v. Thompson Bros. Lumber Co.*, 122 S.W. 923, 924 (Tex. Civ. App. 1909) (holding that actual notice is necessary in order to “create an implied contract that less wages would be given and accepted”); *Stowers v. Harper*, 376 S.W.2d 34, 39 (Tex. Civ. App. 1964), *reh'g denied* (indicating that in order to prove modification of a contract, the employer “must prove that the proposed modification was made known to the [employee] and that the [employee] accepted the terms of [the] proposed modification”).

105. 29 U.S.C. §§ 1052(a)(1)(A), 1052(a)(3)(A) (2006). See 29 U.S.C. §§ 1001–1461 (2006 & Supp. IV 2010) for additional requirements of ERISA.

106. 28 TEX. ADMIN. CODE § 26.4(15) (2012).

place policies (federal contractors, for example).<sup>107</sup> Employees should be required to acknowledge receipt of whatever policy the company adopts. Be as specific as possible about the types of testing that will be done, such as pre-employment, random, post-accident, and “for cause” testing. Specific drug test results should be obtained from the testing lab—an employer should not use a lab that is not willing to give the company a copy of the results and the chain of custody of the sample that was tested.<sup>108</sup> It is best to use a vendor that has the testing done by a nationally-certified testing lab that will follow strict procedures and furnish complete documentation to support the employer in case a claim or lawsuit is filed. The documentation should show at least the following: the type of tests performed; types and concentrations of substances found, along with specified cut-off levels for positive results; initial results confirmed by GC/MS (gas chromatography/mass spectrometry) method; and a complete chain of custody form showing who handled the sample at all pertinent times (this is for dealing with the common excuse that the samples must have been switched).<sup>109</sup>

### B. *English-Only Policies*

Policies requiring employees to speak only English in the workplace are very tricky and controversial. EEOC’s position is that such policies potentially have a disparate impact on ethnic and national origin minorities.<sup>110</sup> Courts will uphold such policies if they are based on business necessity, such as public safety, customer service, or minimizing complaints from other employees, but the burden is on the employer to show such necessity.<sup>111</sup> Prior to implementing such a policy, an employer should, if possible, have documentation to support whatever business necessity exists, such as reports of safety problems, comments from

107. 41 U.S.C. § 8102(a)(1)(A) (Supp. IV 2010).

108. See TEXAS WORKFORCE COMM’N, APPEALS POLICY AND PRECEDENT MANUAL, MC 485.46(2) (2009), available at <http://www.twc.state.tx.us/ui/appl/mc.pdf>.

109. *Id.*

110. 29 C.F.R. § 1606.7(a).

111. *Id.* § 1606.7(a)–(b); 42 U.S.C. § 2000e–2(a)(1); see, e.g., *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1486 (9th Cir. 1993) (quoting 42 U.S.C. § 2000e–2(k)(1)(A)) (finding that once the plaintiff establishes a prima facie case, the burden shifts to the employer to “demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.”); *EEOC v. Premier Operator Servs., Inc.*, 113 F. Supp. 2d 1066, 1073 (N.D. Tex. 2000) (“Blanket English-only rules have a significant adverse impact on national origin groups whose primary language or language of national origin is not English. Further, even a tailored English-only rule must be justified by business necessity, if there is one that could conceivably exist . . . .”); *Roman v. Cornell Univ.*, 53 F. Supp. 2d 223, 236–37 (N.D.N.Y. 1999); *Dimaranan v. Pomona Valley Hosp. Med. Ctr.*, 775 F. Supp. 338 (C.D. Cal. 1991), *withdrawn* 1993 WL 326559 (C.D. Cal. 1993).

customers about lack of service, or complaints from coworkers that speakers of a different language appeared to be commenting about them in such a way that they felt excluded or targeted.<sup>112</sup> The policy should be carefully focused on the business needs at issue. Unless there is a very compelling reason to do otherwise, do not attempt to prohibit speaking of other languages 1) during off-duty times, 2) in instances where employees need to speak a language other than English in order to better do their jobs, or 3) while employees are speaking among themselves in an isolated context that is unlikely to make bystanders feel like they are being “talked about” or excluded. This consideration applies not only in the context of different languages—it is certainly possible for English speakers to create morale problems by the way they talk around each other and *about* each other. It is important for employers to address such concerns anytime they become aware of the issue.

Even the most well-written policy can be useless, though, if the managers are not properly trained in how to explain and apply it. For example, if a manager tells employees that the policy prohibits any speaking of a minority language, even during breaks, a fact issue arises which can make it much harder to deal with a discrimination claim or lawsuit.<sup>113</sup> Thus, proper training is essential, and human resources staff and top management should carefully monitor how the policy is actually applied in the workplace. The main idea is that such a policy should be applied no more than is necessary to get the job done well and to minimize friction between employees—beyond that, employees should be left to whatever language they prefer to use.<sup>114</sup> The policy should remind all employees, regardless of what language they speak at a particular time, that cooperation and good communications are vital to the company’s interests and that they will be held accountable for the degree to which they exhibit good teamwork and effective communications with coworkers and customers. Once employees understand that smooth relations and effective communications have a direct bearing on advancement opportunities and potential pay raises, they will generally handle language issues accordingly.

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112. See, e.g., *Dimaranan*, 775 F. Supp. at 341. Non-Tagalog speaking nurses complained about the Plaintiff, a Filipina nurse who spoke Tagalog, because they felt that “the use of Tagalog was rude and disruptive, and [they] felt left out when Tagalog was spoken.” *Id.*

113. *Maldonado v. City of Altus*, 433 F.3d 1294, 1306–07 (10th Cir. 2006) (finding that the employer failed to produce enough evidence to support a business necessity justification for an English-only policy).

114. 29 C.F.R. § 1606.7.

### C. Weapons at Work

Preventing possession of weapons while in company vehicles or on company business, or even restricting an employee from carrying a concealed weapon during work hours in his or her own car that is used for company business, requires consideration of personal rights as well as safety matters. The constitutional protection afforded to U.S. citizens in the Second Amendment does not apply to disputes or controversies between private citizens, so a company would not be constrained under the U.S. Constitution from enforcing such a policy.<sup>115</sup> Most state constitutions would also not apply in such a way.<sup>116</sup> There is no federal law that would prohibit a company from enforcing such a policy and insisting that employees follow it as a condition of employment.

A weapons policy should be specific enough to cover the general categories that include the usual implements of combat, mayhem, and personal violence (firearms, clubs, sharp or pointed objects, explosive or incendiary devices, and noxious, caustic, or toxic chemicals, for example), and may prohibit anything that the employer believes could be used by someone to inflict harm upon another. The policy may also cover ordinary objects that are used as weapons against others. The property right of an owner or custodian of business premises to control who and what comes onto the property overrides the right of a person to carry a weapon onto the premises; in many states that applies even to a holder of a “concealed carry” license.<sup>117</sup> It would be best, from the standpoints of enforceability, public relations, and morale, to restrict the permissible range of weapon allowed under the policy to strictly those needed for safety and other relevant business considerations.

## IV. FAIR LABOR STANDARDS ACT: WHAT IT DOES AND DOES NOT DO

### A. Overview

The FLSA covers:

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115. U.S. CONST. amend. II; Fla. Retail Fed'n v. Att'y Gen. of Fla., 576 F. Supp. 2d 1281, 1295 (N.D. Fla. 2008) (“[A] private business's banning of guns on its own property plainly is not unconstitutional; there is no constitutional right to bear arms on private property against the owner's wishes.”); *Walczyk v. Rio*, 339 F. Supp. 2d 385, 390 (D. Conn. 2004) (holding that except as related to maintenance of a militia, there is no private right of action under Second Amendment).

116. See, e.g., *Walczyk*, 339 F. Supp. 2d at 391 (holding that no private right of action is available under the Connecticut constitution).

117. See, e.g., TEX. LAB. CODE ANN. §§ 52.061–.062 (West Supp. 2012). The Texas law applies only to lawfully-possessed weapons left in locked personal vehicles on the employer's parking lot. *Id.*

- *Minimum wage and overtime*: The federal minimum wage is \$7.25 per hour (it is the same level under many state laws), and overtime is generally at time-and-a-half for all hours worked in excess of forty in a seven-day workweek.<sup>118</sup> Individual state minimum wage laws do not apply unless the FLSA does not apply—for all practical purposes, businesses can assume that all of their employees are covered under the federal wage and hour laws.<sup>119</sup> An agreement between an employer and an employee that minimum wage and overtime will not be paid is void and unenforceable (even in the event of unauthorized overtime);<sup>120</sup>
- *Equal pay for men and women (Equal Pay Act)*: Men and women who perform the same job at the same levels of skill, experience, and responsibility must be paid the same.<sup>121</sup> Differences in pay must be supported by business-related factors and may not be based on gender or other minority characteristics;<sup>122</sup>
- *Child labor*: In most situations, children younger than fourteen may not work for an employer, except in certain small agricultural businesses and family-owned farms.<sup>123</sup> Children ages fourteen and fifteen may work, but only in non-hazardous occupations and only during non-school hours; there is also a substantial limitation on the number of hours they can work each day and week whether school is in session or not.<sup>124</sup> Children ages sixteen and seventeen may work any hours they want, but may not work in hazardous occupations.<sup>125</sup> Once a person reaches age eighteen, there is no limitation on either hours or duties (other than OSHA rules);<sup>126</sup>

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118. 29 U.S.C. §§ 206(a), 207(a) (2006 & Supp. IV 2010).

119. See *Minimum Wage Laws in the States*, WAGE AND HOUR DIV., U.S. DEP'T OF LAB. (Jan. 1, 2012), <http://www.dol.gov/whd/minwage/america.htm> (comparing state minimum wage laws with the federal standard).

120. See *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 114 (1946); *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945) (“No one can doubt but that to allow waiver of statutory wages by agreement would nullify the purpose of the [FLSA].”).

121. 29 U.S.C. § 206(d)(1) (2006).

122. *Id.*; 29 C.F.R. § 1620.13(b)(2) (2011).

123. 29 C.F.R. § 570.2(b).

124. See *id.* § 570.35(a) (regulating working hours of fourteen and fifteen year olds).

125. *Id.* § 570.2(a)(1).

126. See *id.* § 570.2; WAGE & HOUR DIV., U.S. DEP'T OF LABOR, FACT SHEET #43: YOUTH EMPLOYMENT PROVISIONS OF THE FAIR LABOR STANDARDS ACT (FLSA) FOR

- *Recordkeeping*: Employers must keep exact records of all days and hours worked by non-exempt employees.<sup>127</sup> Doing so will help defend against unmeritorious wage and hour claims.

The FLSA does not require optional employee benefits and payroll practices not required under any law. This category includes such things as:

- *Breaks*: Although some states require breaks,<sup>128</sup> Texas and most other states do not, and federal law has no break requirement. The only exceptions are found in special regulations relating to highly hazardous occupations.<sup>129</sup> Most companies, however, do allow some sort of employee breaks in their policies;<sup>130</sup>
- *Breast-pumping/nursing breaks*: The 2010 Patient Protection and Affordable Care Act amended section seven of the FLSA, and requires employers to give nursing mothers reasonable break times to express breast milk, or if children are allowed in the office, nurse their infants, during the first year after the baby's birth.<sup>131</sup> These can be unpaid breaks.<sup>132</sup>
- *"Coffee breaks" (rest breaks)*: These are customarily paid when twenty minutes or less in duration, because they are regarded as promoting productivity and efficiency on the part of employees, and thus benefit the employer;<sup>133</sup>

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NONAGRICULTURAL OCCUPATIONS 2 (2010) [hereinafter DEP'T OF LABOR, FACT SHEET #43], *available* at <http://www.dol.gov/whd/regs/compliance/whdfs43.pdf>.

127. 29 C.F.R. § 516.2(a)(5).

128. *See, e.g.*, KY. REV. STAT. ANN. § 337.365 (LexisNexis 2011); MINN. STAT. § 177.253 (2011); NEV. REV. STAT. § 608.145 (2011).

129. *See, e.g.*, 10 C.F.R. § 26.205 (2012) (regarding necessary breaks from work for employees in nuclear facilities); 14 C.F.R. § 65.47 (2012) (regarding hours worked by air traffic control towers).

130. 29 C.F.R. § 785.18.

131. 29 U.S.C. § 207(r)(1)–(3) (Supp. IV 2010). For more information, see Simmons, *supra* note 23, at 68.

132. *Id.* § 207(r)(2).

133. 29 C.F.R. § 785.18.

- “*Smoking breaks*”: Smoking breaks are customarily paid, but are not required.<sup>134</sup> They are in the same category as rest breaks, and may be controlled in any way with appropriate policies;<sup>135</sup>
- “*Lunch breaks*” (*meal breaks*): Meal breaks are defined as breaks of thirty minutes or longer for the purpose of eating a meal.<sup>136</sup> They are unpaid, but the employee must be fully relieved of duties during the meal break; if the employee is working while eating, the “break” is counted as regular work time;<sup>137</sup>
- *Premium, holiday, and weekend pay*: This is extra pay for unusual hours, such as “double time” or “triple time” pay for working extra overtime, or during times when most employees take off. This is not required under any law,<sup>138</sup> but is often a matter of supply and demand, or in other words, whatever is necessary to get employees to be available at unusual times;
- *Shift differentials*: Shift differentials are another type of premium pay and are defined as higher hourly pay for second or third shifts, as opposed to the normal hourly rate given to workers on the daytime shift.<sup>139</sup> As with other “premium pay,” this is a function of supply and demand.

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134. *Id.*; *Breaks*, U.S. DEP’T OF LAB., <http://www.dol.gov/elaws/esa/flsa/hoursworked/screenER5.asp> (last visited Sept. 29, 2012).

135. *Breaks*, *supra* note 134.

136. 29 C.F.R. §785.19(a).

137. *Id.*

138. See WAGE & HOUR DIVISION, U.S. DEP’T OF LABOR, WH PUB. NO. 1282, HANDY REFERENCE GUIDE TO THE FAIR LABOR STANDARDS ACT 1 (2010), available at <http://www.dol.gov/whd/regs/compliance/wh1282.pdf> (identifying pay and wage considerations not covered by the FLSA).

139. John L. Bishow, *A Look at Supplemental Pay: Overtime Pay, Bonuses, and Shift Differentials*, BUREAU OF LAB. STAT., DEP’T OF LAB., n.5 (Mar. 25, 2009), <http://www.bls.gov/opub/cwc/cm20090317ar01p1.htm#5>; see also, e.g., WAGE & HOUR DIV., U.S. DEP’T OF LABOR, FACT SHEET #54: THE HEALTH CARE INDUSTRY AND CALCULATING OVERTIME PAY 4–8 (2009), available at <http://www.dol.gov/whd/regs/compliance/whdfs54.pdf> (providing guidance regarding common FLSA violations in the health care industry in calculation of shift differentials).

## B. Child Labor

### 1. Occupations and Working Hours

As a general rule, children younger than fourteen may not be employed. Exceptions exist, however. Children younger than fourteen may be employed directly by their parents (when their parents are sole proprietors, the only partners of a partnership, or the sole owners of a corporate business) in occupations other than manufacturing, mining, or occupations found to be particularly hazardous by the Secretary of Labor.<sup>140</sup> Child actors under fourteen may be employed under special rules with submission of a valid authorization form.<sup>141</sup> Children may be employed in agricultural enterprises before the age of fourteen as long as the employment does not conflict with established school hours.<sup>142</sup> Despite these child labor exceptions, a child younger than eighteen may not perform any hazardous duties.<sup>143</sup>

The following limitations on hours of work apply to children age fourteen or fifteen:

- No work during school hours;
- No more than three hours during a school day, or more than eighteen hours in a school week;
- No more than eight hours during a non-school day, or more than forty total hours during a non-school week;
- No work between 7:00 p.m. and 7:00 a.m. during the school year;<sup>144</sup>
- If not enrolled in summer school, fourteen and fifteen year olds may work between 7:00 a.m. and 9:00 p.m. from June 1 through Labor Day;<sup>145</sup>
- If interstate commerce is not involved, and the FLSA does not apply, then Texas law provides that fourteen and fifteen year olds may work no more than eight hours per day and no more than forty-eight hours in

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140. 29 C.F.R. § 570.126 (permitting parents to employ their minor children in non-hazardous occupations); *see also* DEP'T OF LABOR, FACT SHEET #43, *supra* note 126, at 2 (indicating that those younger than fourteen can perform tasks such as chores around private homes or babysitting casually).

141. 29 C.F.R. § 570.122(a)(3); *see, e.g.*, LABOR LAW SECTION, TEX. WORKFORCE COMM'N, INFORMATION ABOUT CHILD ACTOR/PERFORMER AUTHORIZATION, *available at* <http://www.twc.state.tx.us/ui/lablaw/llcl73.pdf>.

142. 29 C.F.R. §§ 570.122(a)(1), 570.123.

143. 29 C.F.R. §§ 570.50–72; *see also* DEP'T OF LABOR, FACT SHEET #43, *supra* note 126, at 3–5 (summarizing hazardous duty categories).

144. 29 C.F.R. § 570.35(a).

145. *Id.* § 570.35(a)(6).

a week; may not work between 10:00 p.m. and 5:00 a.m. before a school day; may not work between midnight and 5:00 a.m. before a non-school day; and may not work between midnight and 5:00 a.m. during the summer recess.<sup>146</sup> Other states have similar rules in effect.<sup>147</sup>

There are no limitations on hours of work for children who are sixteen or seventeen, however, employers should take care that their work schedules do not cause problems for the young employees under any applicable school truancy laws or local curfews.<sup>148</sup>

## 2. *Minimum Wage and Payment*

Children are entitled to minimum wage and overtime pay. A sub-minimum wage of \$4.25 per hour is permissible during the first ninety days in a job.<sup>149</sup> Other sub-minimum wages (generally, eighty-five percent of the current minimum wage) may be permissible under special certificates issued by the Department of Labor (DOL) for certain student employees and apprentices.<sup>150</sup> There is no exception to federal payroll tax laws for children, except for certain situations involving children employed directly by their parent(s).<sup>151</sup> If possible, an employer should secure permission from the child's parent or guardian to employ anyone under age eighteen. Special training is advisable for managers and supervisors regarding harassment issues if the business employs children. Complaints from employees younger than eighteen should receive top priority for resolution. Certain offenses (assault and improper photography, for example) may need to be reported to law enforcement.<sup>152</sup> Substantial penalties are possible for child labor law violations, including stiff fines, criminal charges, injunctive relief, and prohibition on sale or transfer of any goods produced by the employer at the time of, or within thirty days after, a child labor violation (such goods are also known as "hot goods").<sup>153</sup>

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146. TEX. LAB. CODE ANN. § 51.013(a)–(c) (West 2006).

147. See, e.g., IOWA CODE §§ 92.2, 92.3, 92.7 (2011).

148. See DEP'T OF LABOR, FACT SHEET #43, *supra* note 126, at 2.

149. 29 U.S.C. § 206(g)(1) (2006).

150. *Id.* § 214(b)(2)–(3); 29 C.F.R. §§ 520.200, .407(a)(1), .408(a)(1).

151. See INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, (CIRCULAR E), EMPLOYER'S TAX GUIDE 10, 30 (2012), available at <http://www.irs.gov/pub/irs-pdf/p15.pdf>.

152. Whether and how crimes against children must be reported to law enforcement is a matter of state law. An employer should contact law enforcement or legal counsel for guidance.

153. 29 U.S.C. §§ 212(a), 216(e) (2006 & Supp. IV 2010).

### C. OSHA Workplace Safety and Health Requirements

The nation's main workplace safety and health law is the Occupational Safety and Health Act of 1970, which requires all private-sector employers to furnish a safe workplace, free of recognized hazards, to their employees, and requires employers and employees to comply with occupational safety and health standards adopted by the U.S. Department of Labor's OSHA division.<sup>154</sup>

Compliance with OSHA standards can not only help prevent needless workplace tragedies, but also help minimize the number of injury-related employee absences, keep workers' compensation and other insurance costs to a minimum, and promote higher productivity from employees who can feel secure that the company is looking out for their safety, and can thus concentrate on doing their jobs well.

A myth about OSHA is that the regulations are too complex to understand. Although the regulations are numerous and occasionally very comprehensive and detailed, almost all of them stem directly from common sense, best practices, and what experienced and prudent employees would do in their jobs anyway. For example, the regulations require such things as wearing seat belts when driving vehicles or operating machines with seats,<sup>155</sup> using roll-over protection for farm workers operating agricultural tractors,<sup>156</sup> ensuring that safe scaffolding and fall protection are in place for employees working at heights,<sup>157</sup> wearing goggles or other face protection during welding or while working with abrasive materials,<sup>158</sup> using cave-in protection when working in trenches,<sup>159</sup> using guards on any tools with moving blades, using guards and other protective barriers on machines with large moving parts,<sup>160</sup> providing lockout protection and kill switches on machinery for immediate shut-off if anything goes wrong,<sup>161</sup> providing adequate ventilation for workers in enclosed areas where fumes are present,<sup>162</sup> protecting health-care workers from accidental pricks from needles and other sharp medical instruments,<sup>163</sup> avoiding sparks near flammable materials,<sup>164</sup> and so on.

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154. 29 U.S.C. § 654 (2006).

155. *See, e.g.*, 29 C.F.R. § 1926.28(a) (2011).

156. *Id.* § 1928.51; *see also id.* §§ 1928.1–.1027 (providing safety regulations specific to agricultural operations).

157. *Id.* § 1910.28.

158. *Id.* § 1910.133.

159. *Id.* § 1926.650.

160. *Id.* § 1910.212.

161. *Id.* § 1910.179(a)(59), (g)(5).

162. *See, e.g., id.* § 1910.252(c).

163. *Id.* § 1910.1030.

164. *See id.* § 1926.152. *See generally Regulations (Standards – 29 CFR)*, OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LAB., <http://www.osha.gov/pls>

OSHA recently issued a special alert for safety measures in grain-handling facilities.<sup>165</sup> Another focus area affecting agriculture is field sanitation, including cool, fresh water for drinking, adequate toilet facilities, provision for hand washing and other sanitary activities, and necessary water and restroom breaks.<sup>166</sup>

Although employers have the right to take appropriate corrective action toward employees who violate known safety rules, OSHA protects an employee's right to report workplace safety concerns and violations of safety rules. An employer that retaliates in any way against an employee who reports safety-related problems or participates in an OSHA-related investigation is subject to enforcement action in court by DOL.<sup>167</sup> Non-willful violations can result in civil penalties, which become more substantial for serious or repeated violations, and willful violations can result in both civil penalties and imprisonment for those responsible, depending upon the severity of the violation.<sup>168</sup>

Violations of OSHA are not necessarily enough to prove an employer's negligence as a matter of law in a civil lawsuit arising from a workplace injury, but can be used as evidence of neglect.<sup>169</sup> Similarly, evidence of compliance with OSHA may not be sufficient to avoid liability in such a lawsuit, and compliance is certainly not enough to prevent a workers' compensation claim from being filed, since workers' compensation claims are generally handled without regard to issues of fault.<sup>170</sup>

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/oshaweb/owasrch.search\_form?p\_doc\_type=STANDARDS&p\_toc\_level=0&p\_keyvalue=(last visited Sept. 29, 2012) (providing a complete listing of safety regulations).

165. *Hazard Alert: Dangers of Engulfment and Suffocation in Grain Bins*, OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LAB. (Oct. 19, 2011), [http://www.osha.gov/Publications/hazard-alert\\_grain\\_bins.pdf](http://www.osha.gov/Publications/hazard-alert_grain_bins.pdf) (emphasizing safety precautions for workers in grain bins). Three workers were killed on the job when they were engulfed by grain in June of 2011). *Id.*

166. 29 C.F.R. § 1928.110(c).

167. 29 U.S.C. § 660(c)(1)–(2) (2006).

168. *Id.* § 666.

169. *Id.* § 653(b)(4); see *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706, 709 (5th Cir. 1981) (citing *Barrera v. E.I. duPont de Nemours & Co.*, 653 F.2d 915, 920 (5th Cir. 1981)) (“[N]either [OSHA’s] express provisions nor the regulations adopted pursuant to its authority create a civil cause of action against either a plaintiff’s employer or a third party who is not the plaintiff’s employer.”); see also *Supreme Beef Packers, Inc. v. Maddox*, 67 S.W.3d 453, 458 (Tex. App. 2002) (finding that the employer’s OSHA violations did not constitute negligence per se, as it is the province of the jury to determine if the employer’s conduct was reasonable in the negligence action).

170. See, e.g., TEX. LAB. CODE ANN. § 406.031(a) (West 2006) (placing liability on the insurance carrier for qualified employees whose injury arises out of and in the course of their employment).

OSHA's official PowerPoint and video presentations for workplace safety education in various industries are excellent training tools for employers and employees alike and are available for free download.<sup>171</sup> The department's self-guided study and training tools are available on the OSHA eTools page.<sup>172</sup> In addition, OSHA offers free compliance training and consultation to small and medium-size businesses.<sup>173</sup> As with many federal laws, OSHA does not preempt state laws that provide a greater degree of protection or benefit for employees.<sup>174</sup>

#### D. *Medical Leave-Related Laws*

Potential problems arise when an employee needs medical leave and multiple laws apply.

- *Family and Medical Leave Act (FMLA)*: FMLA applies to employers with fifty or more employees and provides up to twelve weeks of unpaid leave for eligible employees.<sup>175</sup>
- *Americans with Disabilities Act (ADA)*: The ADA applies to employers with fifteen or more employees and requires reasonable accommodation of disabilities, which can include medical leave and has no durational requirement.<sup>176</sup>
- *Pregnancy Discrimination Act (PDA)*: The PDA applies to employers with fifteen or more employees and requires reasonable accommoda-

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171. *Safety and Health Topics*, OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LAB., <http://www.osha.gov/SLTC/> (last visited Sept. 29, 2012).

172. *eTools, eMatrix, Expert Advisors and v-Tools*, OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LAB., <http://www.osha.gov/dts/osta/oshasoft/index.html#eTools> (last visited Sept. 29, 2012).

173. *See On-Site Consultation*, OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LAB., <http://www.osha.gov/dcsp/smallbusiness/consult.html> (last visited Sept. 29, 2012).

174. 29 U.S.C. § 667(a).

175. *Id.* §§ 2611(4)(A), 2612(a)(1), *overruled in part by* *Coleman v. Ct. of Appeals of Md.*, 132 S. Ct. 1327 (2012) (holding that suits against states under section 2612(a)(1)(D) are not permissible under principles of sovereign immunity).

176. 42 U.S.C. § 12111(5)(A), (9); *Cehrs v. Ne. Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 782 (6th Cir. 1998) (citing *Norris v. Allied-Sysco Food Servs., Inc.*, 948 F. Supp. 1418, 1439 (N.D. Cal. 1996) (holding that a reasonable absence could be an indefinite time period, and is not per se invalid)).

tion of pregnancy and related conditions, with no durational requirement.<sup>177</sup>

- *Workers' compensation*: Workers' compensation has no employee limit or durational requirement. The law prohibits retaliation or discrimination against employees who file workers' compensation claims.<sup>178</sup>

Each law has different purposes and requirements. FMLA provides job protection for up to twelve weeks for certain family and medical events affecting the employee.<sup>179</sup> Some FMLA qualifying events may involve disabilities, pregnancies, and even work-related illnesses or injuries.<sup>180</sup> ADA requires reasonable accommodation for people with disabilities.<sup>181</sup> Not all medical problems are ADA-protected disabilities, but many are.<sup>182</sup> PDA requires reasonable accommodation for pregnancy, childbirth, and conditions related to those events.<sup>183</sup> Some pregnancies involve the FMLA and the ADA.<sup>184</sup> Workers' compensation provides temporary income replacement for employees with job-related medical problems. Most job injuries do not result in disabilities, but some do, and some will involve the FMLA as well.<sup>185</sup>

As noted above, some conditions or events may involve multiple laws, depending upon the number of employees and type of condition or event involved. As a general rule, if two or more leave-related laws apply to an employee, the employer should consider how much leave or other protection or benefit each applicable law would require for the employee, and then apply the outcome that would provide the greatest benefit to the employee. As a way of maintaining

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177. 42 U.S.C. § 2000e(k); 29 C.F.R. § 1604.10(b) (2011); *see also Pregnancy Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/laws/types/pregnancy.cfm> (last visited Sept. 29, 2012) (describing pregnancy discrimination in the workplace).

178. TEX. LAB. CODE ANN. § 451.001 (West 2006).

179. 29 U.S.C. § 2612.

180. *Id.* § 2612(a)(1). *But see Coleman*, 132 S. Ct. at 1329.

181. 42 U.S.C. § 12111(9); 29 C.F.R. § 1630.2(o).

182. 29 C.F.R. § 1630.15(f) (indicating that a determination that impairment is "transitory and minor" is an acceptable defense to an ADA claim for accommodation).

183. *Id.* § 1604.10.

184. *Id.* § 825.120(a)(1)–(3). Normal pregnancy is not ordinarily considered a disability for purposes of the ADA, but pregnancy-related impairments may be covered if they "substantially limit" a life activity covered by the Act. *See id.* § 1630.2(g)(1)(i), (h).

185. *See generally id.* § 825.702(d)(1)–(2) (describing the relationship of state and federal laws and restrictions on employers regarding employee leave); U.S. EQUAL EMP'T OPPORTUNITY COMMISSION, EEOC NOTICE 915.002, EEOC ENFORCEMENT GUIDANCE: WORKERS' COMPENSATION AND THE ADA (2000), <http://www.eeoc.gov/policy/docs/workcomp.html> (providing guidance on the interplay of the ADA and state workers' compensation laws).

an outside limit on the overall amount of absenteeism that might result from medical or family conditions, many companies adopt neutral absence control policies. Courts will enforce such a policy if it is evenly and consistently applied and provides for reasonable accommodation of protected disabilities.<sup>186</sup>

## V. EXEMPT/NON-EXEMPT STATUS UNDER THE FLSA

### A. FLSA Exemptions for Agriculture

The Fair Labor Standards Act has many exemptions.<sup>187</sup> Some exemptions are extremely broad, as in the case of exemptions from the definition of “employee.”<sup>188</sup> Others are narrower, such as various exemptions from overtime pay.<sup>189</sup> Still other exemptions apply to two or more protections normally afforded by the FLSA.<sup>190</sup> The following are the major categories of exemptions that are directly or indirectly related to agriculture:

*Exempt from minimum wage, overtime, and child labor provisions:*

- Homeworkers who make wreaths from evergreens.<sup>191</sup>

*Exempt from minimum wage and overtime:*

- Employees involved in cultivation, propagation, catching, harvesting, or first processing at sea of aquatic forms of animal or vegetable life;<sup>192</sup>
- Certain agricultural employees of small farms or family-owned farms.<sup>193</sup>  
The exemption does not apply to farms operating in conjunction with

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186. See *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1237, 1241 (9th Cir. 2012) (holding that employee’s prima face case for failure to accommodate under the ADA fails because attendance was an essential job function for a NICU nurse); *Hypes v. First Commerce Corp.*, 134 F.3d 721, 727 (5th Cir. 1998) (employee was fired for excessive absenteeism, not because of his disability).

187. See, e.g., 29 U.S.C. § 206(g) (regarding exemption from minimum wage laws for newly hired employees who are less than twenty years old); *id.* § 207(m) (regarding exemption for maximum hours requirement for some employment in the tobacco industry); *id.* § 207(n) (regarding exemption for maximum hours requirement for those employed by a street, suburban, or interurban electric railway, local trolley, or motorbus carrier); *id.* § 213.

188. 29 U.S.C. § 203(e)(3)–(5).

189. *Id.* § 213(b).

190. *Id.* § 213(a) (providing exemptions for minimum wage and overtime requirements in a variety of fields, including agriculture and aquaculture).

191. *Id.* § 213(d).

192. *Id.* § 213(a)(5).

193. *Id.* § 213(a)(6).

other establishments, the combined business volume of which exceeds \$10 million;<sup>194</sup>

- Employees principally engaged in the range production of livestock;<sup>195</sup>
- Employees exempt by regulation or other order, or under special certificates issued under section 214 (apprentices and messengers);<sup>196</sup>
- Students employed in agriculture, under special certificates issued by the Secretary of Labor, in compliance with child labor laws.<sup>197</sup>

*Exempt from overtime pay only:*

- Certain employees paid on a piece rate basis;<sup>198</sup>
- Certain employees who are engaged in activities related to the auction sale of certain types of tobacco, as long as such employees get time and a half for hours worked over ten in a day or forty-eight in a work-week.<sup>199</sup> The exemption is good for up to fourteen weeks in a fifty-two-week period;<sup>200</sup>
- Certain employees of motor carriers regulated by the U.S. Department of Transportation;<sup>201</sup>
- Outside buyers of “poultry, eggs, cream, or milk, in their raw or natural state”;<sup>202</sup>
- Certain employees of automobile, truck, farm implement, trailer, boat, or aircraft dealerships;<sup>203</sup>
- Local delivery drivers or driver’s helpers compensated on a trip rate or other approved delivery payment basis;<sup>204</sup>
- Any agricultural employee, and employees who operate or maintain ditches, canals, reservoirs, or waterways of which at least ninety percent is delivered for agricultural purposes;<sup>205</sup>
- Employees who are primarily engaged in agricultural work, but who occasionally perform livestock auction duties that are paid at minimum wage or more;<sup>206</sup>

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194. *Id.* § 213(g).

195. *Id.* § 213(a)(6)(E), (g).

196. *Id.* § 213(a)(7).

197. *Id.* § 214(b)(2).

198. *Id.* § 207(g).

199. *Id.* § 207(m).

200. *Id.*

201. *Id.* § 213(b)(1).

202. *Id.* § 213(b)(5).

203. *Id.* § 213(b)(10).

204. *Id.* § 213(b)(11).

205. *Id.* § 213(b)(12).

- Certain employees of small country grain elevators and related establishments;<sup>207</sup>
- Employees who process maple sap into non-refined sugar or syrup;<sup>208</sup>
- Employees who prepare and transport fruits or vegetables from the farm to the place of first processing or first marketing within the same state, and employees who transport fruit or vegetable harvest workers within a state;<sup>209</sup>
- Certain employees of small forestry or lumbering operations;<sup>210</sup>
- Certain employees engaged in cotton ginning, processing of raw cotton or cottonseed, or processing of sugar cane or sugar beets in certain facilities, as long as such employees get time and a half for hours worked over ten in a day or forty-eight in a workweek.<sup>211</sup> Like with tobacco processing employees, the exemption is good for up to fourteen weeks in a calendar year;<sup>212</sup>
- Certain employees who are engaged in cotton ginning for market in a county where cotton is grown in commercial quantities, as long as such employees get time and a half for hours worked over ten in a day or forty-eight in a workweek.<sup>213</sup> Similarly, the exemption is good for up to fourteen weeks in a fifty-two-week period;<sup>214</sup>
- Certain employees who process sugar beets, sugar beet molasses, or sugar cane into sugar (other than refined sugar) or syrup, as long as such employees get time and a half for hours worked over ten in a day or forty-eight in a workweek.<sup>215</sup> This exemption is also good for up to fourteen weeks in a fifty-two-week period.<sup>216</sup>

#### B. *Focus on the White-Collar Exemptions*

The so-called white-collar exemptions (executive, administrative, professional, outside sales representative, and computer employees) are often difficult

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206. *Id.* § 213(b)(13).  
 207. *Id.* § 213(b)(14).  
 208. *Id.* § 213(b)(15).  
 209. *Id.* § 213(b)(16).  
 210. *Id.* § 213(b)(28).  
 211. *Id.* § 213(h).  
 212. *Id.*  
 213. *Id.* § 213(i).  
 214. *Id.*  
 215. *Id.* § 213(j).  
 216. *Id.*

to apply to anyone other than the very top ranking staff of an organization.<sup>217</sup> Such employees must be paid on a true salary basis (at least \$455 per week, with no deductions relating to quality or quantity of work), and must have an exempt duty as their primary duty.<sup>218</sup> A salary or exempt-sounding job title alone is insufficient for an overtime exemption to apply.<sup>219</sup>

Examples of occupations typically encountered in the exempt categories:

- *Executive*: President of the company or the head of a major division of an enterprise, general manager with hiring and firing authority, department heads who have hiring and firing authority;<sup>220</sup>
- *Administrative*: Vice-president of operations, general manager, department heads, personnel director, payroll director, chief financial officer, comptroller, head buyer, head dispatcher;<sup>221</sup>
- *Professional*: Physician, attorney, CPA, engineer, architect, scientist (chemist, physicist, astronomer, geologist, zoologist, biologist, forester, and so on), registered nurses, pharmacists, dentists, teachers, artists, writers, and other creative professionals;<sup>222</sup>
- *Computer employees*: Computer programmers, network administrators;<sup>223</sup>
- *Outside sales representatives*: Outside sales staff spending most of each workweek outside the employer's principal place of business, meeting customers and making sales.<sup>224</sup>

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217. See 29 C.F.R. §§ 541.0–.710 (2011); WAGE & HOUR DIV., U.S. DEP'T OF LABOR, FACT SHEET #17A: EXEMPTION FOR EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL, COMPUTER & OUTSIDE SALES EMPLOYEES UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (2008) [hereinafter DEP'T OF LABOR, FACT SHEET #17A], available at [http://www.dol.gov/whd/regs/compliance/fairpay/fs17a\\_overview.pdf](http://www.dol.gov/whd/regs/compliance/fairpay/fs17a_overview.pdf).

218. 29 C.F.R. §§ 541.600, .700; DEP'T OF LABOR, FACT SHEET #17A, *supra* note 217, at 1.

219. 29 C.F.R. § 541.2.

220. 29 C.F.R. § 541.100(a).

221. *Id.* §§ 541.200–.204.

222. *Id.* §§ 541.300–.304.

223. *Id.* §§ 541.400–.402.

224. *Id.* §§ 541.500–.504.

The DOL cautions against assuming that any particular job title or position will automatically be considered “exempt.”<sup>225</sup> The determination depends upon the facts behind the work relationship, not on what the employer and the employee may call it. However, the regulations do make clear that employees such as company and department heads, personnel directors, executive assistants, financial experts, physicians, and company attorneys are generally considered exempt,<sup>226</sup> while employees such as clerks, errand runners, secretaries, bookkeepers, inspectors, and on-the-job trainees are non-exempt.<sup>227</sup> In general, anyone performing “line duties” as the primary part of their job will be considered non-exempt, and thus entitled to overtime pay, if they work more than forty hours in a week—even if part of that work was in a supervisory capacity.<sup>228</sup>

### C. Calculating Overtime Pay

Overtime pay for a non-exempt employee depends upon the employee’s “regular rate” of pay.<sup>229</sup> Part 778 of the DOL regulations contains all of the various ways to determine an employee’s regular rate.<sup>230</sup> No matter what payment method is used to determine an employee’s pay, the regular rate of pay is an hourly rate, and it must be at least minimum wage.<sup>231</sup> Regardless of whether a non-exempt employee is paid by an hourly rate, salary, piece rate, day rate, book rate, flag rate, job or task rate, commission, or by some other method or combination of methods, the pay must be converted into an hourly equivalent to arrive at the “regular rate” for overtime computation purposes.<sup>232</sup>

DOL provides that “[t]he regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment (except statutory exclusions [under section 207(e)]) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid.”<sup>233</sup> Only hours “actually worked” count toward overtime.<sup>234</sup> “Total remuneration” means all wages earned by the employee during that week from whatever work was done and by whatever pay methods are used. For example, if an employee is paid an hourly rate plus a commission, the regular rate would be the

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225. *See id.* § 541.2.

226. *Id.* §§ 541.102, .203(b), (d)–(e), .301, .304.

227. *See id.* §§ 541.102, .202, .203(g), .301(a)–(d), (e)(5).

228. *Id.* § 541.106(c).

229. *See id.* § 778.109.

230. *Id.* §§ 778.0–.603.

231. *Id.* §§ 778.107, .109.

232. *Id.*; *see also* discussion *infra* Part V.D.

233. *Id.* § 778.109.

234. *Id.*

straight-time hourly earnings plus the commission for that workweek, divided by the total number of hours worked during the workweek. If on top of that a productivity bonus is paid, the bonus would be added to the hourly earnings and the commission and then divided by the number of hours worked to arrive at the regular rate for that workweek.<sup>235</sup>

No matter what pay method is used, the regular rate of pay for overtime calculation purposes must be no less than minimum wage.<sup>236</sup> In calculating overtime pay, the most important things to keep in mind are:

- Overtime pay depends upon the employee's "regular rate of pay" for the workweek, which can vary from week to week, depending upon exactly how the employee is paid;<sup>237</sup>
- The regular rate of pay includes all components of the pay agreement, except for very narrowly-defined exceptions outlined in section 207(e) of the FLSA;<sup>238</sup>
- For all but straight hourly pay or salaries for non-varying workweeks, the general method for calculating overtime is to divide total straight-time pay by total hours worked for the workweek, then pay one-half of the resulting regular rate for each overtime hour worked.<sup>239</sup>

Below is a summary of the various overtime pay calculation methods.

- *Hourly*: Pay time and a half for work in excess of forty hours in a workweek.<sup>240</sup>
- *Hourly plus bonus and/or commission*: Add the regular rate (total hours times hourly rate) to the workweek equivalent of the bonus and/or commission, divided by the total hours in the workweek; then pay half of that regular rate for each overtime hour.<sup>241</sup>
- *Salary*: Divide the regular rate (salary) by number of hours the salary is intended to compensate.
  - If the regular hours are less than forty, add the regular rate for each hour up to forty, then pay time and a half for hours over forty.

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235. *See id.* § 778.110(b).

236. *Id.* § 778.107.

237. *Id.* §§ 778.107–.109.

238. 29 U.S.C. § 207(e) (2006); 29 C.F.R. § 778.108.

239. *See* 29 C.F.R. §§ 778.111(a), .112, .114, .118, .313(b).

240. *Id.* § 778.110(a).

241. *Id.* § 778.110(b).

- If the regular hours equal forty, pay time and a half for hours over forty.
  - If the regular hours are more than forty, pay hours over forty at half-time up to the regular schedule, then time and a half past that.<sup>242</sup>
  - If the hours are irregular, the regular rate is calculated by dividing the salary by the total hours each work week. Pay half-time for all hours over forty.<sup>243</sup>
- *Other pay methods:* The regular rate equals the total pay divided by the total hours. Pay half the regular rate for each overtime hour.<sup>244</sup>

#### D. *Determining Hours Worked for Non-Exempt Employees*

The U.S. Department of Labor has detailed regulations for determining what must be counted as hours worked.<sup>245</sup> For the majority of non-exempt employees, overtime will be required if the hours worked exceed forty in a seven-day workweek.<sup>246</sup> In general, an employer must pay employees for all hours in which they are “suffered or permitted” to work.<sup>247</sup> Only hours actually worked in excess of forty in a seven-day workweek are counted toward overtime pay; paid leave hours and paid holiday hours do not count toward overtime pay.<sup>248</sup> Extra hours worked on a day in a workweek do not result in overtime liability unless they result in the total hours for the workweek going over forty. One notable exception is for non-exempt employees of residential care facilities such as hospitals and nursing homes: A fourteen-day period may be used if the employer pays overtime for hours in excess of eight in one day or eighty in a two-week period.<sup>249</sup> The DOL’s official definition of “workweek” provides that it “is a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods [that can] begin on any day and at any hour of the day.”<sup>250</sup> Most employers have no problem with paying employees for all hours recorded by a time clock or other timekeeping device or for hours worked in a normal week with a normal schedule followed by all employees. Areas of conflict arise primarily in

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242. *Id.* § 778.113(a)–(b).

243. *Id.* § 778.114(a).

244. *Id.* §§ 778.111(a), .112, .114, .118, .313(b).

245. 29 C.F.R. §§ 785.1–.50.

246. 29 U.S.C. § 207(a)(1) (2006).

247. 29 C.F.R. § 785.11.

248. *Id.* §§ 778.109, .218(a).

249. 29 U.S.C. § 207(j). This is sometimes called the “8/80 rule.”

250. 29 C.F.R. § 778.105.

situations involving work outside normal schedules, outside the office, or outside of the usual job duties. These are the main problem areas:

- “*Suffered or permitted to work*”: Under DOL regulations, all time that an employer either knows or should know an employee is working is compensable.<sup>251</sup> Unwanted work time invested on behalf of the employer is a disciplinary matter, not a pay matter.<sup>252</sup>
- *Waiting or on-call time*: Employees who are temporarily idle while waiting for further work in such a way that they are not able to use the time effectively for their own purposes must still be regarded as working.<sup>253</sup> In deciding whether time spent “on call” is compensable, DOL and the courts have traditionally used one variation or another of the test of whether an employee is “wait[ing] to be engaged” (non-compensable time) or is “engaged to wait” (compensable time).<sup>254</sup> The Fifth Circuit and other courts have ruled that the critical question is “whether the employee can use the [on-call] time effectively for his or her own purposes.”<sup>255</sup>
- *Breaks*: Rest breaks (twenty minutes or less) are compensable.<sup>256</sup>
- *Preparatory and concluding activities*: Time spent in preparatory and concluding activities will constitute compensable hours worked if the activities are an integral and indispensable part of a principal activity of the work, like when the job cannot be done safely, effectively, or at all without those duties being performed.<sup>257</sup>

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251. *Id.* § 785.11.

252. *Id.* § 785.13.

253. *Id.* § 785.15. The DOL’s position regarding “on call” time is found in Title 29 of the Code of Federal Regulations, at section 785.16 (policy regarding “off duty”), and section 785.17 (policy regarding “on call”).

254. *Skidmore v. Swift & Co.*, 323 U.S. 134, 136–37 (1944).

255. 29 C.F.R. §§ 785.16–.17; *Halferty v. Pulse Drug Co.*, 864 F.2d 1185, 1189 (5th Cir. 1989); *see also* *Berry v. County of Sonoma*, 30 F.3d 1174 (9th Cir. 1994) (discussing compensable time for coroners); *Martin v. Ohio Turnpike Comm’n*, 968 F.2d 606, 611 (6th Cir. 1992) (“The mere fact that an employer requires employees to leave work where they can be reached will not be sufficient to make the on-call time compensable. Instead, the employees must show that the on-call policy imposes additional burdens that seriously interfere with their ability to use the time for personal pursuits.”); *Birdwell v. City of Gadsden, Alabama*, 970 F.2d 802, 808 (11th Cir. 1992) (discussing compensable time for police officers).

256. 29 C.F.R. § 785.18; *see also* discussion on breaks *supra* Part IV.A.

257. 29 C.F.R. § 790.8(b); *IBP, Inc. v. Alvarez*, 546 U.S. 21, 39–40 (2005).

- *Time spent in meetings and training programs*: Time spent in job-related meetings and training is work time, even if the meeting or training occurs outside of the normal work schedule, unless specific criteria are met.<sup>258</sup>
- *Travel time*: The easiest way to think of the travel time regulations is to remember that basically any travel on company business that cuts across the normal workday is compensable time worked, regardless of whether such travel occurs on a day the employee is normally scheduled for work. The normal home-to-work and work-to-home commutes are not work time,<sup>259</sup> but travel between job sites is payable work time.<sup>260</sup> Home-to-work travel and back again, however, in conjunction with after-hours emergency calls may (read: *will most likely*) be compensable hours worked.<sup>261</sup> Similarly, a special temporary assignment in another city would involve compensable travel time, but the employer could disregard the time corresponding to the normal commute and the time spent on meals. In other words, only the extra travel time need be payable.<sup>262</sup> Many questions arise concerning travel to other locations involving overnight stays. 29 C.F.R. section 785.39 provides that “[t]ravel away from home is clearly worktime when it cuts across the employee's workday. The employee is simply substituting travel for other duties.”<sup>263</sup> If the employee travels as a passenger outside normal working hours, however, the time is not compensable.<sup>264</sup> An employee who serves as a driver or a pilot for other employees would be paid for the entire travel time.<sup>265</sup> This same rule applies even in the case of travel on days not normally worked.<sup>266</sup> For instance, if the normal hours are 8 a.m. to 5 p.m. from Monday through Friday, and the employee must perform job-related travel on Sunday from 3 p.m. to 7 p.m., the employer would need to pay only for the time from 3 p.m. to

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258. 29 C.F.R. § 785.27.

259. *Id.* § 785.35.

260. *Id.* § 785.38.

261. *Id.* § 785.36.

262. *Id.* § 785.37.

263. *Id.* § 785.39.

264. *Id.*

265. *See id.*

266. *See id.*

5 p.m. Work performed while traveling must be counted as hours worked.<sup>267</sup>

- “Hours worked” does not include paid leave: Under the FLSA, the only time counted when determining whether and how much overtime was worked is the time the employee actually spent engaged in work. Time represented by paid holidays or paid leave does not count toward hours worked.<sup>268</sup>

The main things to remember about keeping track of hours worked are the following:

- Employees must be paid for all time that they are at the disposal of an employer;
- Employees do not have to be paid for time they can use effectively for their own purposes;
- If employees work too much time, or work without authorization, they still have to be paid for the time, but the employer can take corrective action to prevent it from occurring in the future.

## VI. PAY DEDUCTIONS AND WAGE CLAIMS

The federal minimum wage is \$7.25 per hour, and whatever wage payment method is used to compensate an employee, it must boil down to at least minimum wage for all hours worked, plus time and a half for hours worked in excess of forty in a seven-day workweek.<sup>269</sup> The greatest source of confusion and trouble with minimum wage lies in the question of what deductions an employer may make from an employee’s pay without violating the minimum wage requirements. The deductions are not listed all in one place, but appear in the statute itself, the regulations, DOL’s Field Operations Handbook, and case law.<sup>270</sup> Note that some of these deductions are also allowable from the salaries of exempt employees, while others would violate the salary basis for the overtime exemptions.<sup>271</sup> The focus of this section is on deductions from non-exempt employees’ pay, whether they are paid on an hourly, salary, commission, or other basis.

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267. *Id.* § 785.41.

268. *Id.* § 778.218(a).

269. 29 U.S.C. §§ 206(a)(1)(C), 207(a) (2006 & Supp. IV 2010); 29 C.F.R. § 778.107.

270. *See* discussion *infra* Part VI.A.

271. *See* 29 C.F.R. § 541.602(b).

### A. Allowable Deductions under the FLSA

Under the Fair Labor Standards Act, allowable deductions from minimum wage include:

- *Meals, lodging, and other facilities*: Limited to reasonable cost (no mark-up or profit allowed);<sup>272</sup>
- *Tip credits*: Difference between \$2.13 per hour and minimum wage;<sup>273</sup>
- *Voluntary wage assignments*: Examples are group health plan contributions by the employee;<sup>274</sup>
- *Loans and wage advances*: Deduction allowed for repayment of principal only— no interest or administrative fees;<sup>275</sup>
- *Vacation pay advances*: Analogous treatment according to loans and wage advances;<sup>276</sup>
- *Uniforms and associated cleaning costs*: Limited to reasonable cost of uniforms, but cannot include the cost of uniforms “primarily for the benefit of the employer” or cleaning required because of the dirty nature of the work or high cleanliness standards of the job;<sup>277</sup>

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272. 29 U.S.C. § 203(m) (2006); 29 C.F.R. § 531.29; WAGE & HOUR DIV., DEP’T OF LABOR, FIELD OPERATIONS HANDBOOK: RECORDS, MINIMUM WAGE, AND PAYMENT OF WAGES §§ 30c00(a), 30c09 (2000) [hereinafter DEP’T OF LABOR, FIELD OPERATIONS HANDBOOK], available at [http://www.dol.gov/whd/FOH/FOH\\_Ch30.pdf](http://www.dol.gov/whd/FOH/FOH_Ch30.pdf); see also 29 C.F.R. § 516.27 (detailing recordkeeping requirements for costs of facilities and items furnished to employees).

273. 29 U.S.C. §§ 203(m)(1)–(2), 203(t); 29 C.F.R. § 531.59; see also *id.* §§ 531.50–60.

274. 29 C.F.R. § 531.40(c); DEP’T OF LABOR, FIELD OPERATIONS HANDBOOK, *supra* note 272, § 30c10(a).

275. DEP’T OF LABOR, FIELD OPERATIONS HANDBOOK, *supra* note 272, § 30c10(b); Wage & Hour Div., U.S. Dep’t of Labor, DOL Opinion Letter: Fair Labor Standards Act, FLSA2004-19NA, 2004 WL 5303047 (Oct. 8, 2004). This includes wage overpayments as well. *Id.*

276. DEP’T OF LABOR, FIELD OPERATIONS HANDBOOK, *supra* note 272, § 30c10(c); Wage & Hour Div., U.S. Dep’t of Labor, DOL Opinion Letter: Fair Labor Standards Act, FLSA2004-17NA, 2004 WL 5303045 (Oct. 6, 2004); Wage & Hour Div., U.S. Dep’t of Labor, DOL Opinion Letter: Fair Labor Standards Act, FLSA-834, 1984 WL 908322 (Oct. 11, 1984).

277. 29 C.F.R. §§ 531.3(d)(2)(iii), 531.32(c); DEP’T OF LABOR, FIELD OPERATIONS HANDBOOK, *supra* note 272, § 30c12.

- *Employee-owed payroll taxes*: If paid by the employer on the employee's behalf;<sup>278</sup>
- *Union dues*;<sup>279</sup>
- *Court-ordered garnishments or statutorily-required wage attachments*:<sup>280</sup> Common examples include payroll taxes, bankruptcy court garnishments, court-ordered child support or "spousal maintenance" payments (alimony), IRS tax levies, and guaranteed student loan wage attachments. Garnishment limits under 29 C.F.R. part 870, I.R.C. § 6334(d), and 20 U.S.C. § 1095a(a)(1) apply.<sup>281</sup> Take special caution in regards to garnishment: Federal law prohibits an employer from discharging an employee due to "any one indebtedness" (a single garnishment) that results in a garnishment order;<sup>282</sup>
- *Cash shortages due to misappropriation by employee*: Applies only to money, and proof of the employee's guilt is necessary.<sup>283</sup>

#### B. *Miscellaneous FLSA Deduction Problems*

Some common types of deductions made by employers will violate the FLSA if they take an employee's pay below minimum wage, such as deductions to cover the cost of tools, safety equipment, and uniforms for the primary "benefit or convenience of the employer"; disciplinary deductions (such as "fines" for tardiness, rule violations, or poor work); deductions to cover the cost of items

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278. 29 C.F.R. § 531.38; DEP'T OF LABOR, FIELD OPERATIONS HANDBOOK, *supra* note 272, § 30c14.

279. 29 C.F.R. § 531.40(c).

280. *Id.* § 531.39(a).

281. 20 U.S.C. § 1095a(a)(1) (2006) (limiting garnishment for educational loans to fifteen percent unless the debtor gives written consent); I.R.C. § 6334(d) (2006) (prohibiting creditors from levying on unemployment compensation); 29 C.F.R. §§ 870.1-.57 (setting maximum limits on the amount of disposable income that may be subjected to garnishment).

282. 15 U.S.C. § 1674(a); 29 C.F.R. § 531.39(a).

283. See *Brennan v. Veterans Cleaning Serv., Inc.*, 482 F.2d 1362, 1369 (5th Cir. 1973); *Mayhue's Super Liquor Stores, Inc. v. Hodgson*, 464 F.2d 1196, 1198 (5th Cir. 1972); *Marshall v. Hendersonville Bowling Ctr., Inc.*, 483 F. Supp. 510, 516 (M.D. Tenn. 1980), *disapproved of for other reasons* by *Fegley v. Higgins*, 19 F.3d 1126, 1130 (6th Cir. 1994); *Conklin v. Joseph C. Hofgesang Sand Co.*, 407 F. Supp. 1090, 1093 (W.D. Ky. 1975).

lost or damaged by the employee;<sup>284</sup> and deductions to cover ordinary cash register shortages not caused by some type of misappropriation.<sup>285</sup>

Employers sometimes question whether different rules apply in the case of minors or child labor. Although the FLSA does provide certain limitations on the hours and duties of workers younger than age eighteen,<sup>286</sup> and although a sub-minimum “training wage” is allowed under restricted circumstances for workers age nineteen or younger,<sup>287</sup> the above rules for deductions from pay apply to all employees, regardless of age.

### C. Deductions for Other Costs to the Employer

In general, almost all costs that an employer might incur in 1) providing a workplace for, and meeting various needs of its employees, 2) in complying with workplace regulations that impose a duty on the employer (such as supplying employees with safety equipment required under OSHA regulations), and 3) in paying for the expenses of an ongoing business operation, will be regarded as part of the normal cost of doing business that may not be deducted from an employee’s wages to the extent that it would take the employee’s pay below minimum wage, or result in payment of less than one and one half times the regular rate of pay for any overtime hours.<sup>288</sup> The general rule notes that expenses for things that are primarily for the benefit and convenience of the employer are not considered “other facilities” and thus may not be credited toward payment of the minimum wage.<sup>289</sup> Regarding overtime pay, “[w]here deductions are made from the stipulated wage of an employee, the regular rate of pay is arrived at on the basis of the stipulated wage before any deductions have been made.”<sup>290</sup> Moreover, the deduction for expenses may “not exceed the amount which could be deducted if the employee had only worked the maximum number of straight-time hours during the workweek.”<sup>291</sup> Together, those two provisions mean that even if the employee is paid more than minimum wage, deductions for expenses incurred for the employer’s benefit and convenience may be made down to minimum

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284. See 29 C.F.R. §§ 778.304; .306; .307.

285. See Simmons, *supra* note 23, at 152 (discussing *Mayhue’s Super Liquor Stores, Inc.*, 464 F.2d 1196 and deductions for misappropriations).

286. 29 C.F.R. §§ 570.1–.142 (regulating child labor).

287. 29 U.S.C. § 206(g) (permitting a training wage for the first ninety days of employment).

288. 29 C.F.R. § 531.32(c).

289. *Id.*

290. *Id.* § 531.37(b).

291. *Id.* § 531.37(a).

wage only for the non-overtime hours; overtime hours must still be compensated at one and one half times the full regular rate of pay.<sup>292</sup>

DOL wrote in an opinion letter dated January 21, 1997 that “it is our longstanding position that the cost of uniforms and safety equipment required by the employer is a business expense of the employer. Thus, even if the employees purchase these items, this cost may not reduce their wages below the minimum wage, nor decrease their overtime compensation.”<sup>293</sup> The same rule would apply to drug and alcohol testing costs; since such costs are usually borne by the employer, wage deductions for such expenses may not take the employees below minimum wage.<sup>294</sup> A DOL opinion letter of September 10, 1998 noted that an employer does not have to pay mileage expenses employees incur during work, “so long as at least the full minimum wage is paid free and clear for all hours worked.”<sup>295</sup> That position coincides with previous DOL opinion letters holding that expenses relating to transporting employees during a workday may not be counted toward minimum wage.<sup>296</sup> In general, any employer contemplating such deductions should definitely consult with legal counsel before proceeding.

To the extent that a deduction for a miscellaneous cost to the employer does not violate the minimum wage laws, an employer is allowed to make such a deduction as long as the employee has authorized it in writing.<sup>297</sup>

#### D. *Wages in Kind*

An employee whose wages are paid in part with meals furnished in connection with the job, by being able to live in housing provided by the employer, or with “other facilities” is considered to be paid “in kind.”<sup>298</sup> Special considera-

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292. The general rule is outlined in several provisions of the Department of Labor’s Field Operations Handbook. *See* DEP’T OF LABOR, FIELD OPERATIONS HANDBOOK, *supra* note 272, §§ 30c03, 30c13 (addressing job-related travel, meals, lodging, and other facilities that primarily benefit the employer).

293. Wage & Hour Div., U.S. Dep’t of Labor, Opinion Letter: Fair Labor Standards Act (FLSA), 1997 WL 997736, at \*1 (Jan. 21, 1997).

294. Wage & Hour Div., U.S. Dep’t of Labor, Opinion Letter: Fair Labor Standards Act (FLSA), 1997 WL 998039, at \*1 (Sept. 15, 1997).

295. Wage & Hour Div., U.S. Dep’t of Labor, Opinion Letter: Fair Labor Standards Act (FLSA), 1998 WL 1147724, at \*2 (Sept. 10, 1998).

296. Wage & Hour Div., U.S. Dep’t of Labor, WH-531, Opinion Letter: Migrant and Seasonal Agricultural Worker Protection Act, 1990 WL 712744 (June 27, 1990); Wage & Hour Div., U.S. Dep’t of Labor, WH-92, Opinion Letter: Fair Labor Standards Act (FLSA), 1970 WL 26461 (Nov. 10, 1970).

297. *See, e.g.*, TEX. LAB. CODE ANN. § 61.018(3) (West 2006). In states that do not require written authorization for wage deductions, such authorization should be regarded as a best practice.

298. 29 C.F.R. § 531.28 (2011); *see, e.g.*, TEX. LAB. CODE ANN. § 61.016(b).

tions apply when wages are paid in kind. Many state wage payment laws specify that payment of wages “in kind or in another form” is acceptable if the employee has agreed in writing to take the wages in such a manner.<sup>299</sup> To be valid, the lodging deduction must also comply with the federal recordkeeping standards found in Part 516 of the federal wage and hour rules.<sup>300</sup>

#### E. *Tips and Strategies*

It is best to have all employees sign a wage deduction authorization agreement listing all the various types of deductions from pay that might be made and the amounts (as specific as possible) that would be deducted in case those situations were to arise.<sup>301</sup> In addition to the wage deduction authorization agreement, it is advisable to get certain deductions individually and specifically authorized in writing to give the employer the greatest amount of protection in case a wage claim is filed. Those would include any type of loan or wage advance. Before the money changes hands, the employer should have the employee sign a detailed receipt and repayment agreement specifying what the installment payments will be and what happens to a balance remaining when an employee leaves the company. Similarly, before an expensive piece of equipment is checked out to an employee, the employee should sign a form acknowledging receipt, promising return of the item in good shape, and specifically authorizing a deduction from pay in a specific dollar amount in the event of damage or non-return of the item.<sup>302</sup>

#### F. *Minimizing the Risk of Wage Claims*

Anyone who has ever had to prepare a paycheck knows how complicated it can be to figure out the requirements of various federal and state laws regarding how to properly pay employees. The risk of a wage claim under the Fair Labor Standards Act or a comparable state law makes compliance with the laws all the more important.

Below are some tips and best practices for avoiding most claims, and for minimizing the risk of liability for claims that are filed.

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299. See, e.g., TEX. LAB. CODE ANN. § 61.016(b).

300. See 29 C.F.R. § 516.27 (regarding recordkeeping).

301. See Simmons, *supra* note 23, at 308–09, for a sample Wage Deduction Authorization Agreement.

302. In this context, consider using a property return security deposit procedure. See *id.* at 296–97 for a sample agreement.

- “*Best evidence*” rule: Whoever has the best evidence of the wage agreement, hours worked, deduction agreements, and the like will generally prevail on those points.<sup>303</sup> Have written wage agreements, keep detailed records of time worked, obtain written authorization for wage deductions, and in general, get everything in writing, preferably signed by each employee.<sup>304</sup>
- *Wage agreements*: Have a clear, written, and signed wage agreement with each employee. Set out each condition for earning pay. Be as specific as possible as to amounts, payment method, and payment intervals. Changes to written agreements should always be in writing and signed by the employee.<sup>305</sup>
- *Recording working time and work performed*: Proper recordkeeping is not only mandatory under the FLSA, it is essential if an employer is to have the best evidence of hours worked.<sup>306</sup> Employees should sign their time records, even digitally if necessary. Include a statement above the signature line to the effect that the employee agrees that the record shows all time that he or she worked. Disputes over time records should be worked out one-on-one with the employee if possible, and the employee should initial any changes.
- *Document the payment of wages*: Related to the issue of good recordkeeping for time worked is the practice of maintaining good documentation proving that your company has properly paid its employees. The riskiest practice is to pay in cash, without a pay stub or receipt for the payment. Issue earnings statements (pay stubs) to employees.<sup>307</sup>

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303. See, e.g., *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687–88 (1946) (“The solution [when employee has records and employer does not] is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer’s failure to keep proper records in conformity with his statutory duty . . .”), *superseded by statute as stated in* *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005).

304. Compare *id.* 687–88 (indicating that courts will not reward employers for failing to keep adequate records), with *Harvill v. Westward Comm’ns, L.L.C.*, 433 F.3d 428, 441 (5th Cir. 2005) (concluding that the employee offered no evidence of overtime work and thus the court did not err in granting summary judgment for the employer).

305. See, e.g., 40 TEX. ADMIN. CODE § 821.26(a)(1) (2012) (requiring changes to commission and bonus agreements to be in writing). The same rule is a best practice for other types of wage agreements.

306. 29 C.F.R. § 516.2 (2011).

307. See *Simmons*, *supra* note 23, at 145.

- *Enforce the work schedules:* Unauthorized or unneeded work is still work that must be paid.<sup>308</sup> Undesired work time invested on behalf of the employer is a disciplinary matter, not a pay matter.<sup>309</sup>
- *Get written authorization for wage deductions:* Obtain signed, written authorization for any pay deduction that is not ordered by a court or required by a law. Every employer should have each employee sign a standard wage deduction authorization agreement covering the most common reasons why deductions might need to occur.<sup>310</sup>
- *Make a clean break with departing employees:* Sometimes wage claims are filed by an employee who the company thought was gone, but who did not get a clear notice that he was no longer on the payroll (primarily those who were permitted to work outside the office). For this reason, it is generally good practice to issue employees a formal notice of work separation listing the ending date of employment, clearly explaining that the employee is no longer an employee and is no longer on the payroll after that date, and letting the employee know when the company will issue the final paycheck.

The federal and state wage and hour laws are very technical and generally employee-oriented. As a result, it is no wonder many employers have problems complying with all of the requirements. Getting pay-related agreements in writing, however, and sticking to written policies and agreements, should help an employer avoid the majority of wage claim situations that might arise.

## VII. CONCLUSION

This Article has sought to highlight some of the most important principles involved in employment laws regarding hiring, managing, and paying employees in business generally, but also more specifically as the laws apply to agricultural enterprises. This area of law is incredibly complex, but any employer will be well served by simply keeping common sense and fair play in mind: Treat all employees fairly and consistently according to known, job-related rules and standards, maintain reliable records of time worked and wages paid, use writ-

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308. 29 C.F.R. § 785.11.

309. *See id.* § 785.13. It is the responsibility of management to see that unauthorized work is not performed. *Id.*

310. *See* Simmons, *supra* note 23, at 308–09 (sample agreement).

ten policies and wage agreements, and pay close attention to any instructions, alerts, or manuals from whatever government agencies regulate a particular employer activity. Following these precautions will enable employers to minimize, and possibly even avoid, time- and money-wasting disputes with employees and instead get down to business.