

# What you Should Know About Employment Laws, When STARTING A COMPANY?

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## I. INTRODUCTION

At Prior & Daniel our first goal is to help our clients avoid litigation. When a company is sued, even if the company wins the suit, the defense cost can be extensive. This article is offered to our clients so that they may be aware of the potential pitfalls and liabilities arising in the employment arena.

When you start a business and hire employees, you become an employer in the eyes of State and Federal Law and subject yourself to potential legal exposure if you fail to comply with those laws. You must understand your responsibilities when you consider what types of policies you will adopt for your employees. For example, will you offer paid vacation time? If so, how will your leave policy integrate with the Family and Medical Leave Act of 1993, if applicable, and other relevant laws? Will you offer group health coverage? If so, what procedures will you put in place to meet the requirement of the Employer Retirement Insurance Security Act, if applicable, and other relevant laws?

As you can see, each decision on how you operate as an employer has legal consequences.

What follows is a brief introduction to some of the laws that you should be sure to address with whomever you consult to develop your employment policies. This information is intended only to provide an overview of labor and employment laws, some of which may affect your operation. This information should not be used as a substitute for a consultation with an attorney in your area, who is familiar with the laws that will specifically apply to your new business.

## II. AN OVERVIEW OF FEDERAL EMPLOYMENT LAW

### A. Fair Labor Standards Act (FLSA)

The Fair Labor Standards Act of 1938 is a federal law of general application that regulates minimum wage and overtime, and contains child labor regulations, the Equal Pay Act<sup>2</sup>, and other various labor standards. While the child labor regulations tend to be fairly straight forward, much of the litigation under the FLSA arises under the minimum wage and overtime regulations. These provisions of the FLSA are enforced by the Wage and Hour Division of the U.S. Department of Labor (DOL), hence this area of law is commonly known as “Wage and Hour” law.

#### 1. *Coverage of Wage and Hour Law*

The FLSA Wage and Hour regulations apply to any employee of any company who produces goods for interstate commerce or engages in duties affecting interstate commerce during any work week. This legal definition is given a broad interpretation to effectuate the statutory purpose of protecting employees. Thus, most employees are governed by the FLSA, but some exceptions to coverage do exist. There are two general types of exceptions: (1) Some jobs are specifically excluded in the statute itself (for example, employees of movie theaters and many agricultural workers are not governed by the FLSA overtime rules), and (2) generally, if a specific job is governed by some other federal labor law, the FLSA does not apply (for example, most railroad workers are governed by the Railway Labor Act, and many truck drivers are governed by the Motor Carriers Act, and not the FLSA). As a general rule, employees working in a restaurant will be governed by the FLSA.

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<sup>2</sup>The provisions of the Equal Pay Act are discussed in Section E *infra*, and will not be addressed in this section despite that it is contained within the FLSA.

Every employee governed by the FLSA Wage and Hour regulations is classified as either an “exempt” or “nonexempt” employee. That is, certain types of employees are within the scope of the FLSA’s coverage, but for various reasons, are not entitled to the same overtime and minimum wage rights. Employees that are non-exempt generally include the hourly, staff employees who are not in a professional or supervisory position. However, the mere fact that an employee is a salaried employee is not sufficient to guarantee that they will be classified as an exempt employee. In fact, employers can, and do, accidentally cause an otherwise exempt employee to be re-classified as nonexempt.

With limited exceptions, to qualify as exempt an employee must (1) be paid on a salary basis,<sup>3</sup> and (2) perform exempt job duties. Thus, any employee who is not paid on a salary basis is nonexempt. However, the converse is not also true; merely to be paid a salary is not enough to ensure exemption. Additionally, some jobs are exempt by statutory definition. For example, “outside sales” employees are statutorily exempt, whereas “inside sales” employees are not.

Typically, an employee is paid on a salary basis if they receive a “guaranteed minimum” pay for any work period during which they perform “any” work. This salary generally cannot be reduced based on either the quality or quantity of the work performed during such period so long as some work is performed. Thus, for example, a true salaried employee would receive the same base pay if they worked 30 hours or 35 hours in a work period. This rule is sometimes referred to as the “no docking” rule. This rule, however, applies only to reductions in pay; employers may require a salaried employee to charge absences from work to leave accruals so long as the dollar amount of the paycheck remains the same. Similarly, paying an employee more, when they work more than the normal number of hours, is typically allowed because it does not result in any reduction in the base pay.

Nevertheless, because salary basis pay rules are primarily designed to prohibit reductions for absences occasioned by the employer, absences occasioned by the employee may sometimes validly result in reductions in the salary without changing the employee’s salaried status. Thus, a salary basis employee’s pay may be reduced for absences of a day or longer (but not for partial day absences) for personal reasons, or for sickness under a bona fide sick leave plan. Salary may not be reduced, however, for absences caused by lack of work, or “furloughs” or layoffs, or disciplinary suspensions (provided that the employee does “some” work in the work period).

The FLSA Regulations provide that actual reductions in pay are not strictly necessary to compromise an employee’s salary basis pay status (and thus the employee’s exempt status). Generally, an employee is not paid on a salary basis if the base pay is “subject to” reduction for reasons inconsistent with salary basis pay status, even if such a reduction never actually occurred to the employee at issue. To be “subject to” such reductions requires more than a merely theoretical possibility that an employee’s base salary might be reduced for absences. Instead, the salary is “subject to” reduction when there is an actual practice by the employer of docking the salaries of similar employees, or if there is a specific employment policy requiring reductions in salaries of similar employees in specified situations. The facts sufficient to show a salary is “subject to” reduction will necessarily vary in the specific circumstances.

Some “rules of thumb” to look for in determining whether an employee is paid on a salary basis include whether an employee’s base pay is computed from an annual figure divided by the number of paydays in a year, or whether an employee’s actual pay is lower in work periods when s/he works fewer than the normal number of hours. However, the determination is not affected by whether the employees’ pay is expressed in hourly terms (as this is a fairly common requirement of many payroll computer programs), but instead whether the employee is in fact paid a “guaranteed minimum” amount not subject to impermissible docking based on the quality or quantity of work performed.

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<sup>3</sup>For example, the salary basis pay requirement does not apply to some of the “learned professions,” such as lawyers, doctors, or schoolteachers. These jobs are exempt even if the employees are paid hourly. Another exception is for “computer professionals” (as defined under the FLSA), who may be exempt if they are paid on a salary basis or if they are paid hourly at a rate of at least \$27.63.

Once it is determined that an employee is paid on a salary basis (or exempt from the requirement as, a member of a learned profession for example), the employee is still only exempt if they also perform exempt job duties. These exempt duties are generally fairly high-level work that involves the exercise of independent judgment and discretion and whether the duties of a particular job qualify is determined on a case by case basis. The employee's job title or description is not determinative on this issue; a mail clerk is a mail clerk even if they are called the CEO. Instead, the actual job tasks must be evaluated, in light of the way the job tasks fit onto the employer's business. There are three typical categories of exempt job duties, called "executive," "professional," and "administrative."

An employee's job duties are exempt executive duties if the employee (1) regularly supervises two or more other employees, and (2) is in charge of a unit or subunit of the employer's organization as a practical matter. Supervision must be of two or more other full-time employees (or enough part-timers to be the equivalent of two full-timers) and must be a regular and normal part of the job duties, (or enough part-timers to be the equivalent of two full-time employees). To be "in charge," the employee must be the head of a unit or subunit such as a "department" or "shift." This inquiry can be thought of as "If someone called the unit or subunit by phone and asked to speak to 'the boss,' to whom would the call be directed?" Usually, only one person can be in charge of a unit or subunit at any particular time. Thus, if an "assistant manager" is never on duty without a "manager" also on duty, the "manager" is in charge. Finally, one whose duties qualify as executive duties may also perform any number of other "regular" duties without jeopardizing their exempt status. For example, the night manager at a fast food restaurant may in reality spend most of the shift preparing food and serving customers, but they are nevertheless "the boss" even when not actively bossing.

An employee's job duties are exempt professional duties if their work involves the application of advanced, usually specialized, learning or credentials of the type commonly associated with the "traditional learned professions," like medicine, law, accounting or engineering. Usually such an employee will hold a specialized degree and will exercise independent judgment and discretion in performing their work. Such discretion is not merely the application of a high-level of skill, but is also not limited to the traditional learned professions. Thus, one highly skilled at grading lumber and in recognizing subtle variations in wood is not performing professionally exempt job duties, whereas a "real" computer programmer who exercises discretion in determining how to write a program to meet their employer's need is performing exempt professional job duties. Further, to be professionally exempt the employee must be actually practicing their profession. A doctor who is acting as a lab technician is not professionally exempt. Finally, the increasing use of computers in business has generated some "special rules" in the FLSA defining "computer professionals" who are "real" programmers, systems analysts, and systems engineers versus employees who simply work with computers. Under these special rules, computer installation and troubleshooting, for example, are not computer *professionals*, even though they may be performing exempt executive or administrative duties if they fit those definitions.

The last type of exempt job duties are administrative duties, and are also the most difficult to define. Generally speaking, administrative job duties are those which include (1) non-manual or office work that (2) "supports" the overall business operations of the employer, and that (3) involves their exercising independent judgment and discretion on important matters. Administrative jobs are support or staff jobs, not "production," "operations," or "line" jobs. That is, administrative duties are those that relate to company policy or general operations rather than to "producing" what the employer "sells," whether selling a service or good, etc. For example, a payroll clerk is doing support work, although likely not exempt work because it does not involve independent discretion. Conversely, a detective is "doing law enforcement" and is thus doing production work as law enforcement is what police produce. Even if work is administrative, to be exempt it must be at a relatively high-level, involve a good deal of judgment and discretion, and be important to the overall operation of the enterprise. Most secretaries, for example, perform administrative work, but their jobs are not usually exempt. Conversely, one who works as a buyer of materials for a factory is also performing administrative work that likely would be exempt. Unfortunately, there is no clear-cut rule on when administrative duties are exempt between the extremes; the determination is made on a case-by-case basis.

## **2. *Rights Guaranteed by the FLSA Wage and Hour Law***

The FLSA provides virtually no rights to exempt employees. Exempt employees are entitled to receive the full amount of their base salary for any work period during which they perform “any” work and not much else. Failure to do so can also lead to the exempt employee losing their exempt status. However, the FLSA does not prohibit an employer from requiring exempt employees to “punch a clock,” work a particular schedule, or “make up” time lost to absences. Most importantly, the FLSA does not limit the amount of work time an employer may require or expect from an exempt employee, including so-called “mandatory overtime.” The protections of the FLSA are instead directed at nonexempt employees.

The FLSA requires “non-exempt” employees be paid a minimum wage set by federal statute for regular hours and overtime pay at one and one-half times their regular rate for all hours worked in excess of forty (40) hours in a work week. Under the FLSA, “overtime” means “time actually worked beyond a prescribed threshold.” Typically, the FLSA “work period” is a seven consecutive day “work week,” and the threshold is 40 hours per work week.<sup>4</sup> Thus, typically the time actually worked over 40 hours in a work week is “FLSA overtime.” Some employers choose to pay overtime on a different basis, which is permissible so long as the pay is at least as much as the employee would be entitled to receive under the FLSA calculations. Thus, for example, even though some employers will pay overtime for hours worked in excess of 8 hours per day, the FLSA rights are based on the 40 hour work week. Therefore, under the FLSA overtime rules unless and until a nonexempt employee has actually worked more than 40 hours in a work week nothing happens.

The number of hours a nonexempt employee has worked includes all actual work time during the given work week. “Work time” includes all time spent by an employee performing activities which are job-related, including “on the clock” work time and “off the clock” time spent performing job-related activities that benefit the employer so long as the employer “suffered or permitted” the employee to do it. An employer suffers or permits work if it knows the employee is doing the work on or off the clock, or it could have learned of the work by looking, and it allows the employee to perform the work. With only a few exceptions, work time includes all time an employee is required to be at the premises of the employer is work time, including any “breaks” and “nonproductive” time (such as time spent waiting for the next assignment). Additionally, work done away from the employer’s premises is also counted, whether it is voluntary, unauthorized, or even unapproved, so long as the employer knows or should know it is being done and permits the employee to do it. Many FLSA lawsuits are spawned by employers failing to include off-the clock time of nonexempt employees performing work activities outside of their normal shifts.<sup>5</sup>

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<sup>4</sup>There are, however, exceptions to this general rule, two of the most important of which may apply to medical care providers, and government police officers, fire fighters. and (some) EMS employees.

<sup>5</sup>For example, employers must count the time of employees who start early or stay late, if they knew or should have known of it. Employers must also count pre-shift “roll calls,” time spent setting up equipment, time spent cleaning equipment after the close of a shift, etc. Post-shift work time could also include other activities performed on the way home, such as requiring an employee to drop off the day’s deposit at the bank. Some employees take work home, and time spent on that work at home must be counted. Similarly, if an employee is contacted at home by phone for work related reasons, the time spent on the call is work time.

Nevertheless, some time need not be included in the FLSA calculations, even if it is counted for other purposes. Those exclusions include:

- “Leave time” is not considered “work time” for purposes of the FLSA, even if it is for some other purpose, such as pension accruals, collective bargaining agreement, etc.
- “Meal periods,” whether paid or unpaid, are not included in work time if the employee is actually relieved of active duties during the meal period for at least thirty (30) minutes. However, an employee who works through lunch is working even if they are simultaneously eating. But a meal period need not be counted as work time if the employee is merely expected to remain available, and even required to stay on the premises or remain in uniform, but is otherwise relieved of active work duties.
- Although most “training time” is work time, it need not be counted if it (a) occurs outside of an employee’s normal work schedule, (b) is truly voluntary with neither direct nor indirect pressure on the employee to attend, (c) is not directly related to the employee’s *current* job, and (d) the employee does no other work during the training.
- As a general rule, “travel time” between home to work and back is not work time, even if the commute is longer than normal, to or from a different work site than normal, or the employee uses a company vehicle for the trips (unless the employee is otherwise working while commuting). Conversely, travel time which occurs between when the employee first arrives at the first work site (where work is performed, including picking up materials or equipment) and before the employee leaves the last work site at the end of the work day is usually included as work time.

In most circumstances, when a nonexempt employee’s work time exceeds 40 hours in a work week, the excess must be paid at time and one-half the employee’s “regular rate” of pay. Typically, the regular rate is a straight forward inquiry, but sometimes the FLSA requires the calculation to be made considering a number of non-intuitive calculations. To determine the regular rate, one must divide the employee’s regular “straight time” compensation received “for work” by the number of hours that the money is intended to compensate. An hourly employee’s “regular rate” is almost always their hourly rate. Nonexempt salaried employees, and employees who receive bonuses, however, present a more difficult challenge.

A nonexempt salaried employee’s regular rate is determined by converting their salary to an hourly rate. To do this, the salary amount must be divided by the expected hours of work it was intended to compensate. Thus, if a salary is \$400 per week, the regular rate could be \$10 per hour if it was based on a 40 hour week, \$8 per hour if based on a 50 hour week, or \$10.67 per hour if based on a 37.5 hour week. If the salary is based on a whatever hours worked, otherwise known as a salary for fluctuating hours, then the regular rate is based on *actual* hours worked in that week. Once the regular rate is determined, you return to the 40 hour work week, even if the regular rate is not based on 40 hours, and determine the amount of overtime worked. Put another way, even if a nonexempt employee’s salary is based on 50 hours, they are entitled to time and a half for anything over 40 hours. However, if the salary is based on 50 hours, then the employee has already received the “time” portion of “Time and a half” for the first 10 hours of overtime. For example, if an employee with a salary based on 50 hours worked 55 hours in a week, they would be owed their regular salary plus one halftime for 10 hours *and* time and a half for the remaining 5 hours. Whereas if the salary was based on 40 hours, they would be owed their regular salary plus time and a half for the entire 15 hours over 40. If the salary was a salary for fluctuating hours, then the employee would get their salary plus halftime for all hours over 40 in the week. These calculations are tricky to master, but crucial to avoid FLSA violations.

The other primary situation that can cause trouble in calculating the regular rate is where the employees receive wage augments in addition to their base wages, including such items as shift

differentials, longevity pay, attendance pay, or other bonuses. In calculating the FLSA regular rate, all of these bonuses received “for work,” like those listed, must be included. In fact, most bonuses must be included in an employee’s regular rate. The only exception is for entirely “discretionary” bonuses. However, a bonus is not discretionary if the employee is entitled to the bonus if they meet predetermined criteria, such as a quota, or if they depend on the employer meeting predetermined goals, such as a profit sharing plan triggered by a set revenue figure. Conversely, employer reimbursement for expenses is not counted in the regular rate because it is not payment for work.

Including wage augments in the regular rate tends to be straight forward with items such as shift differentials. If a nonexempt employee is paid \$10 per hour, plus \$.50 per hour shift differential, the regular rate for that week is \$10.50 per hour. The calculations become more difficult as a practical matter when a bonus is paid only periodically (yearly for example) because the amount of the bonus must be allocated on a pro rata basis among “all” the hours the employee actually worked during the period when the bonus applied. The problem is that this makes it impossible to determine the proper allocation until after the period is over and the total hours worked can be counted. Therefore, the FLSA requires employers to allocate the bonus at the end of the period, and recalculate all FLSA overtime pay during the period with the new regular and overtime rates, and make up any difference. The administrative burden of this recalculation has led some employers to simply allocate the bonus against the normal straight time work weeks, increasing the FLSA regular rate at the outset even though it may provide slightly more overtime than the FLSA strictly requires.

Finally, to ensure that employees may take advantage of their rights under the FLSA, the law strictly forbids employers from discharging or in any way discriminating against any employee because the employee filed a complaint or instituted any or caused to be instituted any **proceeding to protect their FLSA rights, or is called to testify in any such proceeding**. In addition to traditional cases where the employee was fired, retaliation can take the form of blacklisting, refusal to hire applicants who had made FLSA claims at other jobs, firing relatives, reducing job responsibilities, assigning employees to unpopular job duties or shifts, disciplining employees out of proportion to past disciplinary practices, reducing performance evaluations, and declining to recommend “normal” raises, etc. On the other hand, courts recognize that when an employee makes an FLSA claim, management will not likely be pleased, and nasty looks, the cold shoulder, etc., are not deemed actionable retaliation. If retaliation does occur, the employer is potentially subject to fines or even criminal prosecution, and the affected employee may be entitled to reinstatement, promotion, payment of lost wages, a penalty equal to the lost wages, attorneys’ fees, court costs and punitive damages in appropriate cases.

### ***3. Record-keeping Requirements of the Wage and Hour Law***

In addition to the substantive rights guaranteed by the FLSA, the Act requires employers to keep records on wages, hours, and other items, as specified in Department of Labor record-keeping regulations. Most of the information is of the kind generally maintained by employers in ordinary business practice and in compliance with other laws and regulations. The records do not have to be kept in any particular form and time clocks need not be used. Generally, the employer must keep records for at least three years on any employee subject to the minimum wage provisions including: (1) personal information, including employee’s name, home address, occupation, sex, and birth date if under 19 years of age; (2) hour and day when workweek begins; (3) total hours worked each workday and each workweek; (4) total daily or weekly straight-time earnings; (5) regular hourly pay rate for any week when overtime is worked; (6) total overtime pay for the workweek; (7) deductions from or additions to wages; (8) total wages paid each pay period; and (9) the date of payment and pay period covered. The records required for exempt employees differ from those for nonexempt workers. Additionally, special information is required to be maintained on home workers, for employees working under uncommon pay arrangements, for employees to whom lodging or other facilities are furnished, and for employees receiving remedial education.

#### **4. *The FLSA Child Labor Law***

In addition to the Wage and Hour Law, the FLSA contains child labor provisions designed to protect the educational opportunities of minors and prohibit their employment in jobs and under conditions detrimental to their health or wellbeing. These provisions include restrictions on hours of work for minors under 16 and restrictions on the types of jobs that can be performed, and the types of machinery that may be operated, by minors. The FLSA regulations contain lists of hazardous occupations declared by the Secretary of Labor to be too dangerous for minors to perform. Updated lists of these positions can be obtained from the Wage and Hour Division.

A major distinction in the Child Labor laws is between farm and non-farm jobs, recognizing the importance of child labor to the family farm.<sup>6</sup> For non-farm work, generally no youths may work prior to attaining 14 years of age.<sup>7</sup> Generally, in non-farm work, the permissible jobs and hours of work, by age, are as follows: (1) Youths 18 years or older may perform any job, whether hazardous or not, for unlimited hours; (2) Youths 16 and 17 years old may perform any non-hazardous job, for unlimited hours; and (3) Youths 14 and 15 years old may work outside school hours in jobs that are not manufacturing, mining, or hazardous jobs, but no more than 3 hours on any school days,<sup>8</sup> 18 hours in a school week, 8 hours on a non-school day, or 40 hours in a non-school week. Youths 14 and 15 years old also may not begin work before 7 a.m., nor end after 7 p.m., except from June 1 through Labor Day, when evening hours are extended to 9 p.m. Under a special provision, youths 14 and 15 years old enrolled in an approved Work Experience and Career Exploration Program may be employed for up to 23 hours in school weeks and 3 hours on school days.

#### **5. *Damages for Violations of the FLSA***

Employees can bring grievances against their employers for violation of the FLSA by filing a complaint with the Department of Labor, or they may file a civil action in federal court. For wage and Hour violations, the FLSA authorizes the aggrieved employee to recover any pay to which they were entitled but not paid during the reach-back period. The reach-back period is generally two (2) years from the date of suit or three (3) years from the date of suit if the violation(s) are found to have been willful. The FLSA plaintiff may also recover an amount equal to the unpaid wages as liquidated damages, attorney fees and court costs. Finally, the FLSA permits an individual to bring a class action on behalf of other employees.

#### **B. The Civil Rights Act of 1866 (Section 1981)**

The Civil Rights Act of 1866 was originally passed to ensure that all persons in the United States would have the same right as white citizens to make and enforce contracts, and to otherwise have equal treatment under the laws of each state. Today, the 1866 Act provides protection against private employment discrimination against any racial group (white, black, etc.), by any employer no matter their size, thus the Act provides the most expansive coverage of any federal anti-discrimination law. However, to be actionable under the 1866 Act, the discrimination *must* be based upon the plaintiff's race. The 1866 Act does not protect against sexual discrimination, disability discrimination, religious discrimination, etc. Thus, despite its broad coverage, its scope is substantially more limited than the more recent anti-discrimination laws.

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<sup>6</sup>The rules for farm work are not addressed in this discussion.

<sup>7</sup>However, at any age, youths may deliver newspapers; perform in radio, television, movie, or theatrical productions; work for parents in their solely owned non-farm business (except in manufacturing or on hazardous jobs); or, gather evergreens and make evergreen wreaths.

Unlike its more modern counterparts, the text of the 1866 Act is relatively brief, but its interpretation has developed along the lines of the modern law, limited only to racial discrimination. Thus, if discrimination is proven (as more fully discussed in regards to Title VU below), then the plaintiff may recover damages similar to those recoverable in a Title VII suit. These include money damages to compensate for lost or reduced wages and other actual damages, compensatory damages for intangible injuries as emotional distress, attorney fees, and punitive damages in appropriate cases.

Although most of the protections of the 1866 Act have been subsumed by later enactments, and specifically Title VU of the Civil Rights Act of 1964, the 1866 Act provides benefit to victims of racial discrimination that Title VII does not. First, because of its broad wording, it can be used by racial discrimination victims in situations not expressly covered by the later enactments. Additionally, the 1866 Act provides plaintiffs with a way around the procedural requirements of Title VII. As discussed below, one who claims racial discrimination under Title VU must follow certain procedural rules before a suit for discrimination can be brought against the employer. Conversely, a claimant under the 1866 Act is not burdened by the procedural prerequisites of Title VII nor by the compensatory and punitive damage “caps” imposed by Title VU. It has been used, for example, to allow a plaintiff to sue additional parties for racial discrimination that were not named in an Equal Employment Opportunity Commission (the “EEOC”) charge, as is required under Title VII. Thus, the 1866 Act maintains some vitality even today.

### **C. The Civil Rights Act of 1964 (Title VII)**

Title VII bars an employer from discriminating against an individual on the basis of race, color, religion, sex, or national origin. The Equal Employment Opportunity Commission (EEOC), established by Title VII, enforces this law. In general, Title VII protects all individuals from employment discrimination in the United States regardless of their citizenship or work eligibility.<sup>8</sup>

#### ***1. Coverage of Title VII***

Title VII applies to all private employers engaged in an industry affecting commerce and that has 15 or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. Under current law, nearly every business “affects” commerce, so the real question an employer must ask to determine if they are covered is how many employees they have. For the purposes of this calculation, the Supreme Court has broadly interpreted the word “employees.” Thus, the employer must count all full-timers, part-timers, hourly employees, temporary employees, and any joint employees (where the employer exercises significant control over the employee of another company). Generally speaking, most restaurants are covered employers under Title VU if they meet the numerical requirement.

All employees of a covered employer are protected by Title VII. A large exception to coverage is that independent contractors are not employees. Therefore, they are not protected by Title VII and they cannot sue the companies that they work for under Title VII. In determining whether an individual is an employee or independent contractor, the courts look to several factors, including: the kind of work done and the skills required, whether the work can be performed without supervision, the length of time that the person has worked, who furnishes the equipment needed to do the job, where the work is performed, how payment is made, and how the relationship can be ended.

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<sup>8</sup> Although most Federal Circuits have held that Title VII protection extends to all persons, the Fourth Circuit (Maryland, Virginia, West Virginia, North Carolina, and South Carolina) has held that the protections do not extend to unauthorized workers. Nevertheless, the EEOC has publicly stated its disagreement with the Fourth Circuit.

## **2. *Protections of Title VII***

Generally speaking, Title VII prohibits employers from discriminating in any aspect of employment. An employer cannot use discriminatory criteria when it hires, fires, transfers, promotes, assigns work, lays-off, advertises for jobs, recruits, trains, provides fringe benefits, compensates, or awards disability leave. Unlike the 1866 Act, which covers only racial discrimination, Title VII prohibits discrimination due to race, color, religion, sex, and national origin. Title VII has also been held to provide protection against particular types of discrimination based on the general categories. For example, Title VII prohibits an employer from treating a woman's pregnancy any differently than it would any other similarly disabling condition. Furthermore, Title VII strictly prohibits employers from retaliating against any person who makes a complaint under Title VII, or against any person or assisted the complaining party.

As part of its prohibition on discrimination, Title VII prohibits harassment against individuals on racial, sexual, religious, and/or ethnic grounds. Thus, employers can find themselves liable for damages under Title VII if supervisors, coworkers or even by third parties engaging in harassment of an individual. Usually employers are held strictly (or absolutely) liable for discrimination by supervisors that results in tangible loss of job benefits. In other cases of harassment, employers are generally liable only when the company failed to make reasonable efforts to stop the harassment. What constitutes such reasonable measures depends upon the situation, but at a bare minimum, employers should alert their employees of their right to be free from harassment and their right to complain about harassment, and provide a reasonable avenue to receive complaints.

In addition to prohibiting intentional discrimination, Title VII prohibits unintentional discrimination, or discrimination that was practiced without the knowledge or consent of the employer by a manager or other employee. The most common form of unintentional discrimination occurs through the use of employment requirements that have the effect of discriminating against a particular group or class. This "disparate impact" type of discrimination can arise accidentally when an employer installs educational requirements, physical requirements, or other types of restrictions which exclude disproportionate numbers of certain protected groups. However, the employer can avoid Title VII liability if it can prove that the requirements are in fact job-related *and* that the use of these standards is required by a bona fide business necessity.

## **3. *Procedures Under Title VII***

Before a private suit may be brought under title VII, individuals who believe that their rights have been violated must file a charge of discrimination with the EEOC. Also, although not permitted under the 1866 Act, under Title VII an individual, organization, or agency may file a charge on behalf of another person in order to protect the victim's identity. The charge must be filed with the EEOC within 180 days of the date of the alleged violation. However, if an aggrieved person initially files a charge with a state or local anti-discrimination agency, this deadline may be extended. Upon receiving a complaint, the EEOC, will institute an administrative investigation. Depending upon the results of that investigation, the EEOC can act on its own on behalf of the complainant, can issue a right to sue letter, or can issue a determination that no Title VII violation occurred. Additionally, several successful class actions have been brought on the basis of Title VII.

## **4. *Damages for Violation of Title VII***

If a Title VII violation occurs, the damages recoverable depend upon the type of violation. For example, in a failure to hire case, the plaintiff may recover back wages, front wages, damages for emotional distress, punitive damages if there was intentional bias, attorneys fees and costs. In a wrongful termination case or failure to promote, the damages may include reinstatement or promotion respectively, or front-pay if the degree of hostility between employer and employee is too great to make reinstatement a viable option.

## **D. Federal Age Discrimination in Employment Act of 1967 (ADEA)**

The ADEA was intended to promote the employment of older persons based on their ability rather than age and to prohibit age discrimination in employment. The ADEA's prohibitions against age discrimination apply to employers, employment agencies and labor organizations.

### ***1. Coverage of the ADEA***

The ADEA covers all private employers that are engaged in an industry affecting commerce and has 20 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. Thus, the definition is very similar to that under Title VII, but the 15 employee test is replaced by a 20 employee test. As with Title VII, the definition of an employee that is counted to meet this test is expansive.

Even if an employer is covered by the ADEA, there are several express exceptions in the type of employees the ADEA protects. First, the ADEA expressly limits its coverage of employees to those who are at least 40 years of age. The Act also provides various other exemptions, like the executive or high policy makers exemption. This exemption excludes top level managers from the ADEA's protections so long as they are not less than 65 years of age, have held their position for at least two years immediately before retirement, and who upon retirement will be immediately entitled to a non-forgettable annual retirement benefit of at least \$44,000. Examples of employees covered under the executive exemption could include the head of a large local or regional operation or the head of certain large departments in company headquarters such as finance, marketing, legal, production and manufacturing.

### ***2. Protections of the ADEA***

Under the ADEA, it is an unlawful employment practice for a covered employer to refuse to hire, to discharge, or to otherwise discriminate against any individual with respect to their compensation, terms, conditions or privileges of employment, because of their age. Additionally, employers are not permitted to limit, segregate or classify employees in ways which would negatively affect their employment status because of age. Similarly, employment agencies may not refuse to recommend an older employee because of age, and covered labor organizations are prohibited from discriminating in offering the privileges of membership or declining to refer for employment individuals in the protected age group. Additionally, ADEA bars employers, employment agencies and labor organizations from discriminating against one who has opposed any practices made unlawful by the Act or has filed a charge, testified, or assisted or participated in an investigation or suit under the Act is also prohibited.

Despite its general prohibition on considering age in employment decisions, the ADEA does provide some exceptions to certain practices and circumstances. For example, the ADEA provides that it is not an unlawful employment practice for a covered entity to observe the terms of a bona fide seniority system, so long as it is not a subterfuge to evade the purposes of the Act. The ADEA regulations provide that a bona fide seniority system must use length of service as a primary criteria for allocating opportunities or benefits, although the system may be qualified by merit factors. If the system gives lesser rights or favors treatment to those with longer service it may be found to be a subterfuge and unlawful. Such seniority systems should be individually evaluated on a case-by-case basis. Additionally, the ADEA permits employers to act on age based criteria where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age. The regulations provide that the employer asserting a bona fide occupational qualification (BFOQ) defense has the burden of proving that the age limit is reasonably necessary. The reasonable factor other than age defense is not particularly susceptible to definition and must be considered on a case by case basis, but in general, differences in the average cost of employing older employees is not permitted.

### **3. Enforcement of the ADEA**

Congress originally intended that the ADEA would be enforced and administered by the Secretary of Labor. Under a reorganization plan adopted in 1978, however, the power to enforce and administer the Act was transferred to the EEOC to consolidate control of anti-discrimination laws. The regulations promulgated under the ADEA require the posting of notices providing information on the applicability of the ADEA in form as prescribed by the EEOC in a prominent and accessible place where it can readily be observed by employees, applicants for employment and union members. Additionally, employers are required to make and maintain certain records, which must be maintained for three years, showing the name, address, date of birth, occupation, rate of pay and weekly compensation of each employee. Additionally, employers must maintain records of applications or other inquiries about employment, records of promotions, demotions, transfers, layoffs, recalls, discharges, tests administered to be considered in connection with personnel actions, physical examination results to be considered in connection with personnel actions and descriptions of employee benefit plans for one year under the ADEA.

Suits to enforce the ADEA may be brought by the EEOC or by the aggrieved individual. An individual may not bring a civil action until 60 days after filing a charge alleging unlawful discrimination with the EEOC. The charge must be filed no later than 180 days after the actions complained of, but filing with a state agency (if any) will toll this period to a maximum of 3000 days after the incident. Additionally, the EEOC may conduct investigations on its own initiative, or may continue with an investigation even if the individual filing the complaint has withdrawn the charge.

The plaintiff in an ADEA suit may recover damages similar to those allowable in a suit under Title VII, including lost wages plus an equal amount as damages if the violation is found to be willful. The plaintiff may also obtain forced hiring, reinstatement, promotion, etc. Where such a remedy is not appropriate, such as where the hostility between the parties is too high to form a working relationship, the plaintiff may receive the payment of lost future wages in lieu of receiving the position or promotion. Additionally, attorney's fees and costs can be awarded to the prevailing plaintiff. Finally, as with the FLSA and Title VII, an individual employee may bring a class action on behalf of other employees, but the class members must opt-in to the suit. Finally, the ADEA prohibits employees with claims for ADEA violations to release those claims in exchange for severance or other benefits, unless the release and exchange meets the requirements of the Older Workers Benefit Protection Act.

#### **E. Equal Pay Act of 1963 (EPA)**

The EPA makes it unlawful to pay employees of one sex at a rate different than that paid to the other sex for equal work on jobs requiring equal skill, effort and responsibility and performed under similar working conditions in the same establishment. The EPA protections specifically relating to pay are cumulative with the general protections against sexual discrimination under Title VII. However, The coverage of the EPA is broader than Title VII. Specifically, any employer that is covered under the FLSA Wage and Hour law, as described above, is covered under the EPA. The protections of the EPA, however, apply to all employees of a covered employer regardless of whether they are exempt or nonexempt employees under the Wage and Hour law.

While the EPA does not require all employees to be paid the same rate, generally a lower wage paid to a female employee must be objectively justifiable. Typically, such differences *may* be explained by differences in education, training, experience, enrollment in a bonafide training program, and possession of specialized skills that will be used on the job. Such differences *cannot*, however, be justified on subjective grounds such as that the female employee did not bargain as well in her employment negotiations. Similarly, it is not lawful to set starting pay rates based solely upon prior salary as such a practice has been found to be a subterfuge for continuing prior sex discrimination.

The EPA, like Title VII, is administered by the EEOC. Individuals who feel that their rights under the EPA have been violated may bring suit against their employers in either a federal or a state court. As an alternative, the EEOC may bring a suit on behalf of the individual, at which time the individual loses his or her right to sue privately. Unlike Title VII, an EPA suit may be instituted without first filing with the EEOC. The damages available for violations of the EPA include back wages during the reach-back period (2 years standard, 3 if intentional), an equal amount of liquidated damages if the violation was willful, interest plus attorney's fees and court costs. Additionally, various employers have been ordered to take specific actions, including discontinuing the illegal practice; reinstatement, promotion, payment of fines (up to \$10,000 for a first offense) and even the possibility of imprisonment.

## **F. The Family and Medical Leave Act (FMLA)**

The FMLA guarantees "eligible employees" of "covered employers" the right to take up to 12 weeks of leave in a 12 month period under circumstances of birth, adoption, or foster care placement of a child, or to care for a spouse, child, or parent with a "serious health condition," or because of the employee's own "serious health condition."

### ***1. Coverage of the FMLA***

An employer covered by FMLA is any person or firm engaged in commerce or in any industry or activity affecting commerce, who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. Additionally, FMLA covered employers also include any person acting, directly or indirectly, in the interest of a covered employer to any of the employees of the employer, any successor in interest of a covered employer, and any public agency. As with the FLSA, the term "affecting commerce" is so widely construed as to be nearly meaningless, and the term employee is also broadly interpreted. However, the numerical requirement of 50 employees substantially limits the application of the FMLA to small businesses, even though the 50 required employees need not all work at the same location.

An "eligible employee" is an employee of a covered employer who: (1) has been employed by the employer for at least 12 months, and (2) has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave, and (3) is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. The 12 months an employee must have been employed by the employer need not be consecutive months. If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer (e.g., workers' compensation, group health plan benefits, etc.), the week counts as a week of employment. For purposes of determining whether intermittent/occasional/casual employment qualifies as "at least 12 months," 52 weeks is deemed to be equal to 12 months.

### ***2. Rights Guaranteed by the FMLA***

The FMLA guarantees eligible employees up to twelve weeks of leave in any twelve month period when such leave is due to a serious health condition that makes the employee unable to perform the functions of their position, to care for a spouse, child or parent with a serious health condition, or for the birth, adoption or placement in foster care of a child. There is no requirement in the FMLA that the employee's period of incapacity exceed a certain number of days. The application of the FMLA is not restricted solely to extended leave. Instead, the reason for the leave must simply qualify under the FMLA. The leave may be paid or unpaid or both, depending upon the decision of the employer. Additionally, the FMLA leave may be taken concurrently with any other leave authorized by the employer, but if so, such a policy must be express. If this policy is expressly stated, the Employers may require an employee to take the remainder of the employees paid leave and FMLA leave concurrently. The interactions between a leave policy and the FMLA can be complicated and should be carefully reviewed prior to implementation.

*Leave related to a new child:* Both male and female employees are entitled to take leave upon the birth, adoption or placement in the foster care of a child in order to take care of the new child. The leave must be taken within one year after the birth or placement and the employee must have provided the employer with at least 30 days prior notice of the intent to take such leave. However, if the date of birth or placement prevents the employee from providing the 30 days notice, the notice that is required is only as much as is practicable.

*Leave to Care for Family Members:* Employees may take leave to care for a spouse, child or parent with a “serious health condition” that requires hospitalization or continuing treatment by a healthcare provider. These terms have special meaning under the FMLA; the family member need not be under constant care of a physician. Depending upon the circumstances, and conditions that require repeated treatment for chronic reoccurrences of a condition, follow-up visits after a period of incapacity, or any hospitalization may qualify. An employee maybe entitled to FMLA leave to care for a family member with anything from a heart attack to chronic asthma, depending on the specifics of the health condition and treatment that is required. As with leave for a new child, the employee must give the employer 30 days notice of intent to take the leave, or as much notice as is practicable given the details of the onset of the health condition of their family member.

*Leave for Employee Disability:* Finally, an employee is entitled to leave due to their own serious health condition which prevents them from performing the duties of their job. As with the definition of a serious health condition of a family member, the precise classification of a health condition must be determined on a case-by-case basis. As a general rule, however, all inpatient hospitalizations will qualify as a serious health condition, and leave must be granted for them and any follow-up care related to the hospitalization. Additionally, treatment for any chronic serious health condition, such as disabling asthma, will also qualify. When an employee requests leave the employer bears the burden of determining if it qualifies for FMLA leave, even if the employee did not even mention the FMLA when making the request. To aid in this determination, the employer can request medical certification of a health condition and treatment to confirm that it meets the definition required for FMLA leave. Once again, the employee is required to give the employer 30 days notice of their intent to take leave, or as much notice as is practicable given the details of the onset of the health condition.

In addition to the right to take leave, the FMLA also recognizes a right to reinstatement upon return from such leave. Without such a right to be reinstated, the right to take leave would simply be a right to resign. However, Courts have recognized that an employee on FMLA leave has no greater right to remain employed than an employee who is not on leave. Therefore, despite the language guaranteeing a right to reinstatement, an employer need not reinstate the returning employee if they can prove that the employee would have been terminated for other reasons (such as layoffs, etc). In such situations, the employer has the burden to show that the termination (or non-reinstatement) decision was not due to the FMLA protected leave.

While an employee is on FMLA leave, their employer must maintain the same health care benefits at the same cost to the employee as if the employee were not on leave. However, seniority and other benefits need not accrue during the leave. The employee may also opt to take the 12 weeks intermittently (e.g., week on, week off), or with a reduced work schedule, over a longer period (e.g., 24 weeks of half-time work). If this option is selected, the employer may require the employee to transfer to a position that better accommodates the new schedule, so long as the position has equivalent pay and benefits. Finally, the FMLA, like other employment right statutes, also prohibits retaliation against employees who exercise FMLA protected rights, file a suit for violation of such rights, or who assist other employees in exercising their rights or suing for their violation.

### ***3. Enforcement of the FMLA***

The FMLA imposes prescriptive mandates on employers to ensure that their employees receive the rights guaranteed by the Act. If an employer interferes with, restrains or denies any employee a right guaranteed by the FMLA, they are subject to strict liability for the violation; it is not necessary that the

violation was committed willfully, or even negligently. As such, the burden is on the employer, and not the employee, to ensure that leave may qualify as FMLA leave is classified as such and that the employee receives the benefits of the Act. The FMLA regulations point out that to request FMLA leave, the employee need not even mention the statute, but must merely report a need for leave for a reason that the employer must evaluate for FMLA qualification.<sup>9</sup>

Generally, this determination must be made within two-days of the request, and the employer must notify the employee that their leave has been classified as FMLA leave. This determination may be deferred in one of two circumstances. First, where the employer was unaware of the reasons leave was taken, but learn of them upon the employee's return the designation can occur up to two days after the return. Second, the employer may temporarily classify leave as FMLA leave and request a medical certification that the condition for which leave is being taken, either of the employee or family member, is a serious health condition, informing the employee that the FMLA determination is subject to revision. If the certification does not support the FMLA classification, the leave can be reclassified as non-FMLA leave.

If an employer violates the mandates of the FMLA, the effected employee may bring a private civil action to recover damages and/or to obtain equitable relief against their employer for violations of the act. The actions may take the form of a claim that the employer retaliated or discriminated against them because they used FMLA leave, or that the employer refused to provide a FMLA benefit to which the employee was entitled. In addition to the private action brought by the employee, the Department of Labor, which administers the Act, can bring its own investigation and action against an offending employer. The damages available in case of a violation are substantially identical to other forms of discrimination damages, including back pay, an equal amount in liquidated damages if the violation was willful, reinstatement, and attorney fees.

## **G. The Americans With Disabilities Act of 1990 (ADA)**

The ADA was enacted to extend anti-discrimination protection to disabled persons, and is administered by the EEOC along with Title VII. In addition to providing discrimination protection, the ADA applies to persons providing public accommodations, such as restaurateurs.

### ***1. Coverage***

The ADA applies to any employer with 15 or more employees. Like the employee number requirements of other laws discussed above, the ADA counts part-time, temporary, joint and other employees in determining if an employer is subject to its coverage. In most circumstances, the coverage breadth of the ADA should match that of Title VII.

The ADA, however, does not apply to everyone as does Title VII. Instead, the ADA protects only persons who (1) have a physical or mental impairment that substantially limits one or more major life activities (like sitting, standing, or sleeping); (2) a person with a record of having such an impairment; or (3) a person who is regarded as having such an impairment. The first avenue of coverage protects not only persons who are deaf, blind, or use wheelchairs, but also people who have other physical conditions like epilepsy, diabetes, HIV infection or severe forms of arthritis, hypertension, or carpal tunnel syndrome, for example, or who have severe mental impairments, such as major depression, bipolar (manic-depressive) disorder, or mental retardation. The second prong protects people who have had such a condition previously, but are not currently effected by it (like a cancer patient in remission). The final prong protects persons who have a condition that carries a stigma of disability, even if the individual is not actually disabled by it. Additionally, the ADA restricts its protection to persons who are qualified for the position they have or are applying for. To be qualified, the individual must (1) meet all job-related requirements, like education, training, or skills requirements, and (2) be able to perform the job's essential functions (i.e., its fundamental duties) with or without a reasonable accommodation.

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<sup>9</sup>One method of obtaining such information from employees taking leave is to require employees to fill out forms listing reasons for absences, which can then be evaluated by the employer for FMLA eligibility.

## **2. Requirements of the ADA**

Employers covered by the ADA must make sure that people who qualify for protection have an equal opportunity to apply for jobs and to work in jobs for which they are qualified; have an equal opportunity to be promoted once they are working; have equal access to benefits and privileges of employment that are offered to other employees, such as employer-provided health insurance or training; and are not harassed because of their disability.

Additionally, the ADA limits the type of medical information that employers can get from a job applicant or employee. Generally, the ADA prohibits employers from asking questions about disability or using medical examinations of applicants until after at least a conditional job offer has been made. Thus, an employer cannot ask questions relating to physical or mental impairment, even if the impairment is obvious, whether the applicant uses medications, or about the applicant's prior workers' compensation history, etc. However, there is a limited exception where it seems likely that an applicant has a disability that will require a reasonable accommodation allowing employers to ask whether the applicant will need an accommodation even before a conditional offer is made. Furthermore, after making a conditional offer or hiring a person with an ADA disability, employers can only ask medical questions of the disabled employee, or conduct medical examinations, if they do the same thing for all employees in the same job category. An employment offer may only be withdrawn if it becomes clear that they cannot do the essential functions of the job or would pose a direct threat (i.e., a significant risk of substantial harm) to the health or safety of themselves or others despite reasonable accommodations.

Once a person with a disability has started working, actual performance, and not the employee's disability, is the best indication of the employee's ability to do the job. The ADA strictly limits the circumstances under which employers may ask questions about disability or require medical examinations of employees. Such questions and exams are only permitted where the employer has a reasonable belief, based on objective evidence, that a particular employee will be unable to perform essential job functions or will pose a direct threat because of a medical condition. Mere poor performance is not sufficient, there must be specific indicators that would lead the employer to connect the performance problems with the disability. Notwithstanding these restrictions, employers are always allowed to request a doctor's note to support an absence or request for leave, or to make inquiries and conduct examinations required by other federal laws.

If an employer learns any medical information about a employee, the ADA imposes a duty upon the employer to keep that information confidential, even if it does not include a diagnosis and/or is not generated by a health care professional. Thus, an employee's request for a reasonable accommodation is considered confidential medical information. Accordingly, such requests, and other medical information, should not ordinarily be kept in the employee's regular personnel file, but in a separate file designated for limited access. Similarly, if such information is stored electronically, it must be adequately encrypted or otherwise safeguarded from disclosure. Notwithstanding the confidentiality rule, the ADA allows disclosure of confidential medical information in the following circumstances: (1) to supervisors and managers where they need medical information in order to provide a reasonable accommodation or to meet an employee's work restrictions; (2) to first aid and safety personnel if an employee would need emergency treatment or require some other assistance (such as help during an emergency evacuation) because of a medical condition; (3) to individuals investigating compliance with the ADA and with similar state and local laws; and (4) pursuant to workers' compensation laws (e.g., to a state workers' compensation office in order to evaluate a claim) or for insurance purposes.

The ADA further requires that employers make "reasonable accommodations" to employees or applicants who suffer from a qualifying disability as necessary to allow the employee or applicant to apply for a job, perform a job, or enjoy benefits equal to those offered to other employees when such accommodations are requested. The request does not have to mention the ADA or reasonable accommodation or even be in writing. Once a request has been made, the employer must work with the employee or applicant to develop a plan of reasonable accommodation. Of course, the accommodations appropriate for any particular individual will necessarily vary depending upon their needs, but some

examples of accommodations include: providing a sign language interpreter during a job interview to a deaf applicant; a diabetic employee may need more frequent breaks to monitor their blood sugar and eat when necessary to maintain it; a blind employee may need someone to read information posted on a bulletin board to them, etc.

The ADA does not require an employer to provide any accommodation that you pose an “undue hardship” on the employer. An accommodation imposes an undue hardship, and is therefore not required, when providing the reasonable accommodation would result in significant difficulty or expense, based on the particular employer’s resources and the operation of its business. It is difficult to establish undue hardship based upon the cost of an accommodation; the EEOC reports that as much as 20% of accommodations cost nothing, and the median cost of accommodation is \$240. Furthermore, the cost of accommodations can be offset by tax credits, vocational rehabilitation funding, and other sources. But regardless of the cost, employers do not need to provide an accommodation that would pose significant difficulty in terms of operation of the business. Additionally, employers are not required to provide an adjustment or modification that would assist the employee both on and off the job (like a prosthetic limb), remove or alter a job’s essential functions; lower production or performance standards; or excuse violations of conduct rules necessary for the operation of the business.

### ***3. Enforcement of the ADA***

The EEOC administers and enforces the ADA. An action for violation of the ADA maybe brought against an employer through the EEOC, or directly by the aggrieved individual after obtaining a right to sue letter from the EEOC. The suit may be based upon discrimination in the workplace or hiring, disclosure of confidential information, or violation of any of the other duties imposed by the ADA. The damages and remedies available will depend upon the nature of the wrong alleged. For discriminatory conduct, the damages and remedies are identical to those available under Title VII.

## **H. Uniform Services Employment and Reemployment Rights Act of 1994 (USERRA)**

USERRA prohibits discrimination by *any* employer, public or private, large or small, against persons who serve in the various branches of the armed services. Specifically, USERRA forbids discrimination against any person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform services in a uniform service. USERRA prohibits such discrimination in hiring, retention and employment, promotion, or as to any benefit of employment by an employer on the basis of the employee’s membership, application for membership, performance of service, application for service or obligation. Additionally, USERRA mandates that employers not deny employees returning from service re-employment due to their service.

When a current employee takes leave to perform service, there are specific deadlines by which an application for re-employment must be filed, based on the time away rather than the category of military service. For example, in the case of a person whose period of time away for military service was less than 31 days, then he/she must report to work not later than the beginning of the first full, regularly scheduled work day on the first full calendar day following the completion of the military service. If the military service lasts more than 30 days but less than 181 days, then the employee must apply for re-employment not later than 14 days after the completion of the period of military service. If the employee is away more than 181 days, the person has 90 days after discharge from service to reapply. With certain exceptions, the amount of aggregate time an employee may be away for military service and retain the protection of USERRA is limited to five years.

During the time in military service, USERRA requires that the employee be treated as if on an unpaid leave of absence. As a result, the employee may opt to continue to receive health benefits and other benefits by the payment of the same sums required from employees on other similar leaves of absence. Generally COBRA rules apply to long term absences and upon reinstatement, full insurance coverage must be immediately returned. Private employers have the discretion to *allow* employees to use their own vacation time or accrued paid leave for military duty, but employers cannot *require* the use of vacation time during the leave of absence for military duty.

An employee who is reinstated following active duty or initial active duty for training must be reinstated with no break in service or benefits, at a rate of pay which includes general increases or raises applied to the job classification during his or her absence, and is entitled to participate in employment benefits without any “waiting period.” While this requirement, typically referred to as the “escalator principle,” was designed to address seniority, it can have a broader application. When other terms and conditions of employment are tied to length of service or some other form of automatic progression, the escalator principle will likely obligate the employer to adjust them accordingly. This means that years spent in service are treated as years of service with the employer.

Recent rules by the Department of Labor require an employer post a notice of USERRA rights. This poster can be found on the DOL website.

Employee’s rights under USERRA can be enforced by the Department of Labor or by a private suit. Possible remedies for violations include reinstatement, back pay, attorney fees and liquidated damages for willful violations.

## **I. Miscellaneous Federal Laws**

The following is a very brief introduction to some other federal laws of general applicability that will or may impact your business operation. As with the preceding section, the information provided below is not intended as a substitute for specific legal advice, which you should seek in educating yourself further about your responsibilities as an employer.

### ***1. National Labor Relations Act (NLRA)***

The NLRA prohibits employers from discriminating against employees based upon their decisions related to union activity. This protects activities such as joining a union or asking others to join a union, or banding together to collectively deal with an employer about working conditions, and other group efforts to negotiate more favorable employment terms. This act provides broad coverage of employees, whether there is a formal union or not. Employers are prohibited from interrogating employees about union-related action and from making threats to dissuade them from engaging in such activity. Additionally, the NLRA restricts the rights of employers, even private employers, to prohibit solicitation of union membership, or distribution of union materials at the workplace by both employees and outside union organizers. Finally, the NLRA governs collective bargaining negotiations, including prohibitions on selective mistreatment of certain employees by the union or employer, kickbacks, and other corruption in the negotiation of union contracts.

The NLRA is administered by the National Labor Relations Board (NLRB). If a violation of the NLRA occurs, a charge must be filed with the NLRB, generally within 6 months of the incident. Once filed, the NLRB has and maintains full control over the action against the employer (or union). After an investigation and hearing, the NLRB has the authority to order reinstatement, payment of back pay, or other relief necessary to make any aggrieved employee whole.

## **2. *Jury Systems Improvement Act***

This Act makes it unlawful to discharge, intimidate, or threaten any permanent employee because of their actual or expected participation as a juror in the *federal*<sup>10</sup> court system. The employee is entitled to be treated as if on leave of absence during his or her jury service, and insurance and other benefits must be offered to the absent employee/juror as would be offered to any other employee on leave. Upon conclusion of the jury service, under the Act the employee is also entitled to full reinstatement of position and benefits, including insurance. In a suit for violation of this Act, the plaintiff can receive the same types of damages as for other types of discrimination, including back pay, reinstatement, possible liquidated damages, attorneys fees, etc.

## **3. *Occupational Safety and Health Act (OSHA)***

OSHA is a very broad statute with extraordinarily specific rules and regulations promulgated by the Department of Labor, which are usually intended to ensure that employers generally provide their employees with a safe work place. The regulations mandate the use of protective equipment, proper maintenance, protocols for exposure to hazardous conditions and chemicals, and numerous other regulations. OSHA and the regulations also require documentation of work-related injuries and exposures. Finally, OSHA requires that employer post a poster in a conspicuous place explaining OSHA to employees and informing employees of how to make a complaint. Of course, because OSHA encourages employees to report violations, the Act also prohibits discrimination against employees who report safety hazards and/or otherwise participates in OSHA proceedings.

To enforce the law and regulations, OSHA inspectors have the right to enter a facility and inspect for compliance with safety standards, and review the required records. Where violations are found, the inspector may impose a fine and demand corrective action be taken by a certain date, when a follow-up investigation will be made. Serious violations or repeated failures to comply with OSHA corrective requirements can lead to substantial fines and penalties. Because the OSHA rules which may be applicable to any particular business are so variable, any general review of specific OSHA regulations would be futile. Instead, every employer must undertake to determine which OSHA standards apply to them, and to maintain compliance with those standards.

## **4. *Employee Retirement Income Security Act (ERISA)***

ERISA is a lengthy and highly complex statute that deals with the administration and provision of benefit plans and retirement plans offered by employers to their employees. The rules apply to any employer who offers benefits to their employees of the type governed by ERISA. The rules and regulations of ERISA govern the administration of such plans, and impose duties upon the plan administrators, including a general duty to act in a prudent manner to protect the assets of plan participants, requiring administrators to advise employees of certain information about the plan, establish procedures for resolving disputes about claims to benefits under the plan, etc. There are also various reporting requirements with respect to the plan, minimum funding requirements, time limits on vesting rights, certain obligations to allow participation, and regulations regarding self-dealing. Additionally, under ERISA retirement plans may be assessed premiums that are used to insure against defaults by certain plans and administrators. Finally, ERISA makes it unlawful to retaliate against an employee who asserts rights under a plan covered by ERISA, and there is a prohibition on terminating an employee in order to prevent the employee from obtaining benefits. If you plan to offer employee benefits, and particularly retirement benefits, you should consult with an attorney experienced in ERISA to determine what requirements the Act will impose upon you.

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<sup>10</sup>The Act does not govern jury service in the State judicial system.

## **5. Consolidated Omnibus Budget Reconciliation (COBRA)**

COBRA generally requires employers sponsoring group health plans, and who normally employ more than 20 employees on a typical business day, to offer employees and their families the opportunity for a temporary extension of health coverage at group rates in certain instances where coverage under the plan would otherwise end. Under the COBRA regulations, the plan administrator must notify the employee or dependent when one of the disqualifying events has occurred and the right to choose continuation coverage. Typically, the employee or dependent has at least 60 days from the date of the triggering event which would cause loss of coverage to choose continuation coverage.

Generally, employees and dependants that are eligible can extend health insurance coverage for up to eighteen months, and in cases of death, disability, or divorce spouses and minor children can extend coverage for thirty-six months. The insurance can be cancelled when the employee gets insurance coverage from another employer without pre-existing condition exclusions, if the employee fails to pay the premiums by the end of the grace period, if the employer stops offering any health insurance plan to any of its employees, or if the employee uses up all COBRA benefits available.

## **6. Health Insurance Portability and Accountability Act (HIPAA)**

HIPAA applies to companies and insurance carriers that provide group health insurance to 2 or more current employees, including self-insured plans. There are also some provisions that apply to individual policies. Generally, HIPAA prohibits plans from adopting eligibility rules based upon health-related factors, limits the ability to restrict the exclusion of pre-existing conditions, and also prohibits the charging of higher premiums due to health factors. If you decide to establish a health plan, you should consult an expert on the impact of HIIPAA.

## **7. Health Maintenance Organization Act (HMOA)**

This Act applies to employers with 25 or more employees that offer health insurance benefits, whether contributory or non-contributory. Under HMOA, such employers must offer an alternative HMO option to all employees if a qualified HMO is available in the area where at least 25 of the employees live. The Act also requires that employers allow employees to make their contributions for their share of the cost through payroll deduction. There is a civil penalty that can be assessed to those employers who do not provide this option. Should you decide to offer insurance to your employees, you should consult an attorney for more specific information on the impact of HMOA.

## **8. Immigration Reform and Control Act (IRCA)**

Under this Act, it is unlawful for an employer to employ an individual with knowledge that the individual is not authorized for work in the United States. Where an employer has required the alien to fill out the necessary paperwork (*I-9*), and has obtained the required documentation, then the employer is usually entitled to a presumption that no intentional violation has occurred. Employers are also obligated to retain documentation on each employee for three years. Violations of the IRCA can lead to civil penalties and fines.

## **9. New Hire Reporting (42 USC § 602 (a) (2))**

This statute was enacted by the federal government to compel states to establish a system for the reporting of new hires to establish a national database that will be used to track non-custodial parents that are failing to meet their child support obligations. Generally, new hires must be reported within 20 days of their hiring to the appropriate agency, as determined by the state in which you operate. Additionally, various states have adopted electronic filing systems to comply with this law.

#### ***10. Electronic Communications Privacy Act (ECPA)***

The ECPA prohibits an employer from using any type of electronic or mechanical device to intercept the conversations of employees, unless either (1) the employee is communicating in a place where they have no reasonable expectation of privacy, or (2) where one party has consented to the interception of the communication. The prohibited types of interceptions include use of a hidden tape recorder, interception of telephone calls or through the audio feed of a video camera. Employers are allowed to monitor phone calls to check for quality; however, as soon as an employer determines the call is private in nature, it is generally unlawful to continue listening.

#### ***11. Consumer Credit Protection Act (CCPA)***

The CCPA, among other things, limits the ability of creditors to garnish the wages of employees. Generally, the law limits garnishments to no more than 25% of “disposable income,” as defined in the statute, and prohibits garnishments from reducing the employee’s weekly wage to an amount less than thirty times the current dollar amount of the federal minimum wage. However, there are some exceptions to the CCPA’s garnishment protections, including exceptions relating to child support, spousal support or to pay a tax lien.

Additionally, the CCPA makes it unlawful for an employer to terminate an employee because of garnishments that arise out of a single debt. Notwithstanding this prohibition, employers *may* terminate an employee based upon garnishments to pay two or more creditors. Employees terminated in violation of this CCPA protection may sue for damages, reinstatement, and other relief.

#### ***12. Federal Bankruptcy Code***

The Federal Bankruptcy Code includes provisions which make it unlawful for an employer to terminate an employee on the grounds that they filed for bankruptcy. Damages for a violation of this prohibition are similar for other wrongful termination suits.

#### ***13. Fair Credit Reporting Act (FCRA)***

The FCRA prohibits an employer from obtaining or using a consumer credit report in connection with a decision about employment without first obtaining a written consent of the potential employee. The applicant or employee must also be given written notice of his or her rights under FCRA, and if adverse action is taken based upon a properly obtained report, the employee has a right to dispute its accuracy. These prohibitions also apply to “investigative consumer reports” about an employee. Violations can be penalized by an award of actual damage, plus punitive damages and attorney fees.

#### ***14. Employee Polygraph Protection Act (EPPA)***

The EPPA prohibits, except in very limited circumstances, any request or suggestion to an employee that they submit to a lie detector test, to use the results of any lie detector test as the basis of an employment decision, or to discipline or terminate an employee who refuses to take a lie detector test. There are some exceptions to the EPPA, and any decision regarding whether to request or use a lie detector test should involve consultation with an attorney in your area who can address the specific facts of the situation you are facing. Violations of the EPPA can give rise to typical wrongful termination and discrimination damages such as back pay, reinstatement, attorney fees, etc.

### ***15. Export Administrative Act of 1977 (50 USC § 2407)***

This Act makes it unlawful to engage in job discrimination in order to further any boycott of a foreign nation. The law is broadly worded so as to protect women, minorities, and members of various ethnic groups from being denied employment as part of any boycott. The law further prohibits disclosure of the information regarding the race, religion, sex, or national origin of the owners, directors, or employees of a business.

### **J. Other Federal Laws**

In addition to the laws described above, there are numerous other federal laws that may impact upon your role as an employer, as well as your general obligations as a provider of public accommodations, a business entity, etc. It is your obligation to educate yourself about the laws described above and any others to which you and your business may be subjected.

### **III. STATE AND LOCAL LAWS**

In addition to the federal laws, numerous state and local laws will govern your role as an employer. For example, every state has its own set of Workers' Compensation Laws, which are generally designed to limit litigation for employers while providing a lesser amount of benefit to injured employees on a no-fault basis. State Workers' Compensation statutes vary and establish the framework for most employers. Additionally, each state has its own system of Unemployment Compensation or Insurance, with which you will need to familiarize yourself.

Furthermore, many of the federal protections described in the preceding pages are established as a baseline. Many state and local laws expand the protection of employees from discrimination, enhance employee rights against their employers, and/or increase the amount and types of relief available to aggrieved employees in suits against their employers. For example, the Florida Civil Rights Act eliminates the ADEA's 40 plus requirement and expands against age discrimination to all persons, even young persons. Other state's laws expand on the right of an employee to serve on a jury, either protecting the employee's right to serve on a state jury, requiring employers to pay employees' salaries while in jury service, or both. Furthermore, some federal statutes, such as the New Hire Reporting Act, specifically allow the states to develop their own system of procedures that must be followed to comply with the law.

Finally, there are unique state and local laws that impose requirements on employers that are completely distinct from those imposed by federal law. For example, in Georgia employers are required to make sure their employees have at least two hours off on Election Day while the polls are open to allow them a chance to vote. Depending upon your business' hours, and the shift schedule of your employees, this law may require you to provide up to two hours time off for the purposes of voting. The possible permutations of such state and locality specific laws are impossible to summarize. Accordingly, before you establish your employment policies, the burden is upon you to learn what you need to do to be in compliance with the law.

### **IV. CONCLUSION**

This primer on employment law is not intended to make you an expert on the law of any state or locality or to provide you with legal advice. It is also not designed to teach you all you will need to know about *any* labor law, federal, state or local. We recommend that you develop a comprehensive review of your employment policies to insure compliance. Should you wish to establish a policy, have old policies reviewed or require assistance in litigation of employment matters; Prior & Daniel would appreciate the opportunity to serve you.

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