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STATE

Littler on

Arizona Employment Law

COVERAGE

Scope of Discussion. This publication is designed to help employers operating in a state to identify and apply various state employment law requirements. It follows the chronology of employment—tracking requirements from pre-hire, time of hire, during employment, and the end of employment. Because employers are subject to both federal and state employment laws, each section provides a brief overview of federal law and then summarizes applicable state law.

Although the major developments in Arizona employment law are generally covered, this publication is not all-inclusive and the current status of any decision or principle of law should be verified by counsel. In addition:

- This publication focuses on requirements for private-sector employers; requirements applicable solely to public employers are not covered. Similarly, while some provisions applicable to government contractors may be covered, this publication is not designed to address requirements applicable only to government contractors.
- Local ordinances are generally excluded from this publication. Notwithstanding, local rules may be included to the extent they deal with ban-the-box or criminal history restrictions, local minimum wage, paid sick leave, or antidiscrimination provisions. A detailed discussion of these requirements, however, is outside the scope of this publication. Further, the focus of local ordinances is primarily on jurisdictions with populations of 100,000 or more residents, but laws in locations with populations below that threshold may also be included.
- State law may create special rules or provide exceptions to existing rules for certain industries—for example, the health care industry. This publication does not offer an exhaustive look at these industry-specific exceptions and should not be interpreted to cover all industry-specific requirements.
- Civil and criminal penalties for failure to follow any particular state employment law requirement may be covered to the extent the penalty is specifically included and discussed in the statute. Any penalty discussion that is included, however, is nonexhaustive and may only highlight some of the possible penalties under the statute. In many instances, an individual statute will not include its own penalty provision; rather, a general or catchall penalty provision will apply, and these are not covered here.

To adhere to publication deadlines, developments, and decisions subsequent to **October 11, 2024** are not covered.

DISCLAIMER

This publication is not intended to, and does not, provide legal advice or a legal opinion. It does not establish an attorney-client relationship between Littler Mendelson, P.C. and the user. It also is not a do-it-yourself guide to resolving employment issues or handling employment litigation. Nonetheless, employers involved in ongoing disputes and litigation may find the information useful in understanding the issues raised and their legal context. This publication is not a substitute for experienced legal counsel and does not provide legal advice regarding any particular situation or employer, or attempt to address the numerous factual issues that arise in any employment-related dispute.

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1.1 Classifying Workers: Employees v. Independent Contractors

1.1(a) *Federal Guidelines on Classifying Workers*

A person providing services to another for payment generally can be classified either as an employee or an independent contractor. An independent contractor is considered self-employed, whereas an employee, as the term suggests, works for an employer. The choice between classifying a worker as an independent contractor or an employee is more than a question of terminology and can have many and far-reaching consequences for a company. A company's legal obligation to its workers under various employment and labor laws depends primarily on whether workers are employees. For example, a company using an independent contractor is not required to:

- withhold income taxes from payments for service;
- pay minimum wages mandated by state or federal law;
- provide workers' compensation coverage or unemployment insurance;
- provide protections for various leaves of absences required by law; or
- provide a wide range of employee benefits, such as paid time off or a 401(k) retirement plan, that are offered voluntarily to the employer's employees as part of the terms or conditions of their employment.

As independent contractor use increased, government officials began to scrutinize asserted independent contractor relationships with increasing skepticism. Courts have also proven willing to overturn alleged independent contractor relationships that fail to satisfy the increasingly rigorous standards applied by federal and state agencies for classifying workers as independent contractors.

For companies, misclassification of a worker as an independent contractor can carry significant tax, wage, and benefit liabilities, as well as unanticipated and perhaps under-insured tort liability to third parties for injuries caused by the worker.

There are four principal tests used to determine whether a worker is an employee or an independent contractor:

1. the common-law rules or common-law control test;[1]
2. the economic realities test (with several variations);[2]

[1] The common-law rules or common-law control test, informed in part by the Internal Revenue Service's 20 factors, focus on whether the engaging entity has the right to control the means by which the worker performs their services as well as the end results. *See generally* Treas. Reg. § 31.3121(d)-(1)(c); I.R.S., Internal Revenue Manual, *Technical Guidelines for Employment Tax Issues*, 4.23.5.4, *et seq*. (Nov. 22, 2017), *available at* https://www.irs.gov/irm/part4/irm_04-023-005r.html#d0e183.

[2] In addition to an evaluation of the right to control how the work is to be performed, the economic realities test also requires an examination of the underlying "economic realities" of the work relationship—namely, do the workers "depend upon someone else's business for the opportunity to render service or are [they] in business for themselves." *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988); *see also Rutherford Food Corp. v. McComb*, 328 U.S. 722 (1947).

3. the hybrid test, combining the common law and economic realities test;[3] and
4. the ABC test (or variations of this test).[4]

For a detailed evaluation of the tests and how they apply to the various federal laws, see **LITTLER ON CLASSIFYING WORKERS**.

1.1(b) *State Guidelines on Classifying Workers*

In Arizona, as elsewhere, an individual who provides services to another for payment generally is considered either an independent contractor or an employee. For the most part, the distinction between an independent contractor and an employee is dependent on the applicable state law (see Table 1).

A rebuttable presumption of an independent contractor relationship exists under Arizona's wage and hour, workers' compensation, unemployment, and workplace safety laws if: (1) the independent contractor executes a declaration of independent business status; and (2) the employing unit acts in a manner substantially consistent with the declaration.[5] Execution of a declaration is not mandatory however, and without an executed declaration, a worker may still be considered an independent contractor.[6] Any declaration of independent business status must be signed and dated by the independent contractor and must substantially comply with the form set forth in the statute.[7]

Arizona's workers' compensation law also recognizes a rebuttable presumption of an independent contractor relationship if the parties execute a written independent contractor agreement with a statement that the independent contractor is not entitled to workers' compensation benefits from the other party.[8] The declaration of independent business status, discussed above, is not a substitute and does not have the same effect as the workers' compensation written agreement.[9]

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[3] Under the hybrid test, a court evaluates the entity's right to control the individual's work process, but also looks at additional factors related to the worker's economic situation—such as how the work relationship may be terminated, whether the worker receives yearly leave or accrues retirement benefits, and whether the entity pays social security taxes on the worker's behalf. *Wilde v. County of Kandiyohi*, 15F.3d103, 105(8th Cir. 1994). Because the hybrid test focuses on traditional agency notions of control, as a general rule, it results in a narrower definition of employee than under a pure economic realities test. *Hopkins v. Cornerstone Am.*, 545 F.3d338, 347(5th Cir. 2008).

[4] Under a typical formulation of the ABC test, a worker is an independent contractor if: (A) there is an ABSENCE of control; (B) the BUSINESS is performed outside the usual course of business or performed away from the place of business; and (C) the work is CUSTOMARILY performed by independent contractors.

[5] ARIZ. REV. STAT. ANN. § 23-1601(B).

[6] ARIZ. REV. STAT. ANN. § 23-1601(A), (D).

[7] ARIZ. REV. STAT. ANN. § 23-1601(B).

[8] ARIZ. REV. STAT. ANN. § 23-902(D).

[9] ARIZ. REV. STAT. ANN. § 23-1601(E).

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
Fair Employment Practice Laws	Arizona Civil Rights Division of the Office of the Attorney General	Hybrid of the common-law agency test and the economic realities test.[10]
Income Taxes	Arizona Department of Revenue	The Internal Revenue Service (IRS) twenty-factor test and the common-law control test. Under Arizona's withholding statute, an *employer* is defined as a person for whom an individual performs services, except that if the person for whom the individual performs services does not have control of the payment of the wages for such services, *employer* means the person having control of the payment of wages.[11]
Unemployment Insurance	Arizona Department of Economic Security	Common-law right to control test and statutory test.[12]
Wage & Hour Laws: Arizona Minimum Wage Act	Industrial Commission of Arizona (ICA), Labor Department – Minimum Wage	Economic realities test from the federal Fair Labor Standards Act (FLSA); but importantly, unlike under the FLSA, Arizona law imposes the burden of proof upon the party for whom the

[10] *St. Luke's Health Sys. v. Department of Law, Civil Rights Div.*, 884 P.2d 259259, 264(Ariz. Ct. App. 1994) (applying the hybrid test to determine independent contractor versus employee status under the state antidiscrimination law, and characterizing the hybrid test as consideration of the economic realities of the work relationship, but with focus primarily on the "extent of the employer's right to control the means and manner of the worker's performance").

[11] ARIZ. REV. STAT. ANN. § 43-402. The Arizona Department of Revenue states that a determination by the federal Internal Revenue Service (IRS) regarding a worker's employment status controls the determination for Arizona withholding tax purposes. Arizona Dep't of Revenue, *Frequently Asked Questions*, *available at* https://azdor.gov/businesses-arizona/withholding-tax/employer-withholding-filing-obligations; *see also* Tax Ruling WTR 93-3 (April 23, 1993).

[12] An individual determined to be an employee for purposes of the Federal Unemployment Tax Act (FUTA) is an employee under Arizona's provisions. ARIZ. REV. STAT. § 23-613.01(F). The Arizona Department of Economic Security, in addressing who is an employee for unemployment tax purposes, states that independent contractors are "customarily engaged in an independent trade, occupation, profession, or business. They usually advertise their services, are in a position to realize profit or suffer a loss as a result of their services, and usually have a significant investment in the business." Arizona Dep't of Econ. Sec., *Unemployment Insurance Tax – Employment and Wages FAQ*, *available at* https://des.az.gov/services/employment/unemployment-employer/employer-handbook-unemployment-insurance-tax/employment. The Arizona Court of Appeals has analyzed the determination of status under a totality of the facts, right to control test. *Fullerton v. Arizona Dep't of Econ. Sec.*, 661 P.2d 210 (Ariz. Ct. App. 1983); *see also Dial-A-Messenger v. Arizona Dep't of Econ. Sec.*, 648 P.2d 1053, 1056-57 (Ariz. Ct. App. 1982).

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
		work is performed to show independent contractor status by clear and convincing evidence.[13]
Workers' Compensation	ICA, Workers' Compensation Department	Common-law right to control test.[14] As discussed above, a rebuttable presumption of independent contractor relationship may be created under law, if the parties execute a written agreement.[15]
Workplace Safety: Arizona Occupational Health and Safety Act	ICA, Division of Occupational Safety and Health (ADOSH)	An Arizona court stated that the following factors are considering by the ADOSH in determining the relationship of the parties involved: "(1) whom do the workers consider their employer; (2) who pays the workers' wages; and (3) who has the responsibility to control the workers."[16]

Qualified Marketplace Contractors. Under Arizona law, qualified marketplace contractors are deemed to be independent contractors under state and local laws if certain criteria are met. A *qualified marketplace contractor* is a person or entity that contracts to use a digital platform to provide services to third parties. The law ensures that qualified marketplace contractors are independent contractors under state and local law where certain criteria are met, such as scheduling and income tax requirements.[17]

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[13] ARIZ. REV. STAT. ANN. § 23-362(D); *see also* ARIZ. ADMIN. CODE § 20-5-1205 (addressing the determination of the employment relationship, including factors to be considered in determining whether an individual is economically dependent on the employer under the economic realities test).

[14] ARIZ. REV. STAT. ANN. § 23-902(C) ("A person engaged in work for a business, and who while so engaged is independent of that business in the execution of the work and not subject to the rule or control of the business for which the work is done, but is engaged only in the performance of a definite job or piece of work, and is subordinate to that business only in effecting a result in accordance with that business design, is an independent contractor."). Courts have applied a right to control test. *See, e.g.*, *Central Management Co. v. Industrial Comm'n*, 781 P.2d 1374, 1377 (Ariz. Ct. App. 1989); *Hunt Bldg. Corp. v. Industrial Comm'n*, 713 P.2d 303, 306 (Ariz. 1986); *see also Munoz v. Sonic Rests.*, 318 P.3d 439, 444 (Ariz. Ct. App. 2014) (discussing factors to consider when determining whether a workers' compensation claimant is an independent contractor to determine individual's average monthly wages). The ICA states that courts will consider the "totality of facts" on a case by case basis in determining employee versus independent contractor status. Industrial Comm'n of Ariz., *Workers' Compensation Insurance: Employers' Frequently Asked Questions*, *available at* https://www.azica.gov/sites/default/files/migrated_pdf/Claims_FAQs_WorkersCompensation.pdf.

[15] ARIZ. REV. STAT. ANN. § 23-902(D).

[16] *Arizona Pub. Serv. Co. v. Industrial Comm'n*, 873 P.2d 679, 683 (Ariz. Ct. App. 1994) (citation omitted).

[17] ARIZ. REV. STAT. ANN. § 23-1601.

1.2 Employment Eligibility & Verification Requirements

1.2(a) *Federal Guidelines on Employment Eligibility & Verification Requirements*

The federal Immigration Reform and Control Act of 1986 (IRCA) prohibits knowingly employing workers who are not authorized to work in the United States. Under IRCA, an employer must verify each new hire's identity and employment eligibility. Employers and employees must complete the U.S. Citizenship and Immigration Service's Employment Eligibility Verification form (Form I-9) to fulfill this requirement. The employer must ensure that: (1) the I-9 is complete; (2) the employee provides required documentation; and (3) the documentation appears on its face to be genuine and to relate to the employee. If an employee cannot present the required documents within three business days of hire, the employee cannot continue employment.

Although IRCA requires employers to review specified documents establishing an individual's eligibility to work, it provides no way for employers to verify the documentation's legitimacy. Accordingly, the federal government established the "E-Verify" program to allow employers to verify work authorization using a computerized registry. Employers that choose to participate in the program must enter into a Memorandum of Understanding with the Department of Homeland Security (DHS) which, among other things, specifically prohibits employers from using the program as a screening device. Participation in E-Verify is generally voluntary, except for federal contractors with prime federal contracts valued above the simplified acquisition threshold for work in the United States, and for subcontractors under those prime contracts where the subcontract value exceeds $3,500.[18]

Federal legislative attempts to address illegal immigration have been largely unsuccessful, leading some states to enact their own immigration initiatives. Whether states have the constitutional power to enact immigration-related laws or burden interstate commerce with requirements in addition to those imposed by IRCA largely depends on how a state law intends to use an individual's immigration status. Accordingly, state and local immigration laws have faced legal challenges.[19] An increasing number of states have enacted immigration-related laws, many of which mandate E-Verify usage. These state law E-Verify provisions, most of which include enforcement provisions that penalize employers through license suspension or revocation for knowingly or intentionally employing undocumented workers, have survived constitutional challenges.[20]

For more information on these topics, see **LITTLER ON I-9 COMPLIANCE & WORK AUTHORIZATION VISAS**.

[18] 48 C.F.R. §§ 22.1803, 52.212-5, and 52.222-54 (contracts for commercially available off-the-shelf items and contracts with a period of performance of less than 120 days are excluded from the E-Verify requirement). For additional information, see **LITTLER ON GOVERNMENT CONTRACTORS & EQUAL EMPLOYMENT OPPORTUNITY OBLIGATIONS**.

[19] *See, e.g.*, *Lozano v. Hazelton*, 496 F. Supp. 2d 477 (E.D. Pa. 2007), *aff'd*, 724 F.3d 297 (3d Cir. 2013) (striking down a municipal ordinance requiring proof of immigration status for lease and employment relationship purposes).

[20] *See Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. 582 (2011).

1.2(b) *State Guidelines on Employment Eligibility & Verification Requirements*

1.2(b)(i) *Private Employers*

The Legal Arizona Workers Act (LAWA) places two obligations on Arizona employers:[21]

1. employers must confirm the employment eligibility of all new in-state hires using the federal E-Verify program;[22] and
2. employers cannot "knowingly" or "intentionally" employ an "unauthorized alien" in the state.[23] An *unauthorized alien* means an alien who does not have the legal right or authorization under federal law to work in the United States as described in the IRCA.[24]

The LAWA's requirements apply only to employees and not those properly classified as independent contractors.[25] An employer may not, however, evade the requirements of the Act by knowingly or intentionally retaining the services of an undocumented independent contractor or an independent contractor that employs or contracts with undocumented workers.[26]

Record Keeping & Retention. Employers must keep a record of each employment eligibility verification for either the duration of the worker's employment, or three years from the date of verification, whichever is later.[27] According to the E-Verify Memorandum of Understanding,[28] registered employers must either record the case verification number generated by E-Verify on the Form I-9 or print the screenshot containing the case verification number and attach it to the I-9. It is unclear whether recording the number on the I-9 satisfies the Arizona retention requirement. Therefore, employers may want to print a copy of all E-Verify results, including tentative nonconfirmations, and store them with the I-9.

Entrapment Defense. Employers charged with knowingly or intentionally hiring undocumented workers may avail themselves of an "entrapment" affirmative defense.[29] To avail itself of the defense, an employer must first admit to knowingly or intentionally hire an undocumented worker.[30] The employer must then prove, by a preponderance of the evidence, that the idea for committing the violation originated with law enforcement officers or their agents rather than with the employer and that law enforcement urged and

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[21] ARIZ. REV. STAT. ANN. §§ 23-211 *et seq*. The statute broadly defines *employer* as any individual or organization doing business in Arizona, employing at least one individual in the state and holding an Arizona business license. ARIZ. REV. STAT. ANN. § 23-211(4).

[22] ARIZ. REV. STAT. ANN. § 23-214.

[23] ARIZ. REV. STAT. ANN. §§ 23-212(A), 23-212.01(A); *see also* ARIZ. REV. STAT. ANN. § 13-2009 (an employer that accepts identification information from an applicant to verify their work status and knows that the individual is not the person identified by the documentation is guilty of "knowingly accepting the identity of another," which is a class 3 felony subject to jail time and/or fines).

[24] ARIZ. REV. STAT. ANN. § 23-211(8).

[25] ARIZ. REV. STAT. ANN. § 23-211(3)(b).

[26] ARIZ. REV. STAT. ANN. §§ 23-212(A), 23-212.01(A).

[27] ARIZ. REV. STAT. ANN. § 23-214(A).

[28] E-Verify Memorandum of Understanding, *available at* https://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/E-Verify_Native_Documents/MOU_for_E-Verify_Employer.pdf.

[29] ARIZ. REV. STAT. ANN. §§ 23-212(K), 23-212.01(K).

[30] ARIZ. REV. STAT. ANN. §§ 23-212(K), 23-212.01(K).

induced the employer to commit the violation.[31] The employer must also establish it was not predisposed to commit the violation.[32] The law specifically states entrapment does not occur simply because law enforcement officers or their agents "use a ruse or conceal their identity" or "merely provided the employer with an opportunity to commit the violation."[33]

1.2(b)(ii) *State Contractors*

The LAWA has provisions that impact state contractors and those receiving government incentives. Specifically, state government entities, including political subdivisions, are prohibited from awarding contracts for services to contractors or subcontractors not in compliance with the Act's E-Verify requirement.[34] Any such contract must contain a clause whereby the contractor or subcontractor warrants compliance with federal immigration law and the LAWA's E-Verify requirement.[35] If the contractor or subcontractor subsequently breaches this warranty, the contract is subject to termination.[36] Furthermore, to receive an *economic development incentive*—defined as any grant, loan or performance-based incentive awarded after September 30, 2008 from the state government, including political subdivisions—an employer must register for and use E-Verify.[37]

1.2(b)(iii) *State Enforcement, Remedies & Penalties*

Intentional Employment of Unauthorized Workers. Under the LAWA, an employer is prohibited from intentionally employing an unauthorized alien.[38] After the first violation within a five-year period, the employer will be ordered to terminate the employment of all unauthorized aliens. The court will order appropriate licensing agencies to suspend all licenses held by the employer at the location where the unauthorized worker performed work, for a minimum of 10 days. The court will order the appropriate licensing agencies to suspect all licenses held by the employer at that location unless the employer files a signed sworn affidavit with the county attorney within three business days, indicating that it has terminated all unauthorized aliens and will not intentionally or knowingly employ an unauthorized alien in the state. After the second violation within a five-year period, the court will order appropriate licensing agencies to permanently revoke all licenses held by the employer at the location where the unauthorized worker performed work. In addition, during the five-year probationary period for intentional violations, the employer will be required to file quarterly reports with the county attorney for each new employee hired at the location where the unauthorized alien worked.[39]

Knowing Employment of Unauthorized Workers. An Arizona employer is also prohibited from knowingly employing an unauthorized alien under the LAWA.[40] After the first violation within a three-year period, the employer will be ordered to terminate the employment of all unauthorized aliens. The court will order the appropriate licensing agencies to suspend all licenses held by the employer at that location unless the

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[31] ARIZ. REV. STAT. ANN. §§ 23-212(K)(1)-(2), 23-212.01(K)(1)-(2).

[32] ARIZ. REV. STAT. ANN. §§ 23-212(K)(3), 23-212.01(K)(3).

[33] ARIZ. REV. STAT. ANN. §§ 23-212(L), 23-212.01(L).

[34] ARIZ. REV. STAT. ANN. § 41-4401(A).

[35] ARIZ. REV. STAT. ANN. § 41-4401(A)(1).

[36] ARIZ. REV. STAT. ANN. § 41-4401(A)(2).

[37] ARIZ. REV. STAT. ANN. § 23-214.

[38] ARIZ. REV. STAT. ANN. § 23-212.01(A).

[39] ARIZ. REV. STAT. § 23-212.01(F).

[40] ARIZ. REV. STAT. § 23-212(A).

employer files a sworn affidavit with the county attorney within three business days, indicating that all unauthorized aliens have been terminated and the employer will not intentionally or knowingly employ an unauthorized alien in the state. After the second violation within three-year period, the court will order appropriate licensing agencies to permanently revoke all licenses held by the employer at the location where the unauthorized worker performed work. In addition, during the three-year probationary period for knowing violations, the employer will be required to file quarterly reports with the county attorney for each new employee hired at the location where the unauthorized alien worked.[41]

Failure to Enroll in E-Verify. There is no enforcement mechanism in the LAWA for this violation. However, employers that fail to enroll may face additional scrutiny and lose a defense to a claim of knowing or intentional employment of undocumented workers. In addition, such employers will not be eligible for certain economic development incentives, government contracts or subcontracts.[42]

1.3 Restrictions on Background Screening & Privacy Rights in Hiring

1.3(a) *Restrictions on Employer Inquiries About & Use of Criminal History*

1.3(a)(i) *Federal Guidelines on Employer Inquiries About & Use of Criminal History*

There is no applicable federal law restricting employer inquiries into an applicant's criminal history. However, the federal Equal Employment Opportunity Commission (EEOC) has issued enforcement guidance pursuant to its authority under Title VII of the Civil Rights Act of 1964 ("Title VII").[43] While there is uncertainty about the level of deference courts will afford the EEOC's guidance, employers should consider the EEOC's guidance related to arrest and conviction records when designing screening policies and practices. The EEOC provides employers with its view of "best practices" for implementing arrest or conviction screening policies in its guidance. In general, the EEOC's positions are:

1. **Arrest Records.** An exclusion from employment based on an arrest itself is not job related and consistent with business necessity as required under Title VII. While, from the EEOC's perspective, an employer cannot rely on arrest records alone to deny employment, an employer can consider the underlying conduct related to the arrest if that conduct makes the person unfit for the particular position.
2. **Conviction Records.** An employer with a policy that excludes persons from employment based on criminal convictions must show that the policy effectively links specific criminal conduct with risks related to the particular job's duties. The EEOC typically will consider three factors when analyzing an employer's policy: (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the offense, conduct, and/or completion of the sentence; and (3) the nature of the job held or sought.

Employers should also familiarize themselves with the federal Fair Credit Reporting Act (FCRA), discussed in **1.3(b)(i)**. The FCRA does not restrict conviction-reporting *per se*, but impacts the reporting and consideration of criminal history information in other important ways.

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[41] ARIZ. REV. STAT. § 23-212(F).

[42] *See* "Are all Arizona employers required to use the E-Verify program?" and "What if I use the federal I-9 process but do not use E-Verify?" *Available at* https://www.azag.gov/civil-rights/legal-az-workers-act/employers.

[43] EEOC, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e et seq.* (Apr. 25, 2012), *available at* https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

For additional information on these topics, see LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING.

1.3(a)(ii) *State Guidelines on Employer's Use of Arrest Records*

Arizona places no statutory restrictions on a private employer's use of arrest records. In addition, Arizona has not implemented a state "ban-the-box" law covering private employers.

1.3(a)(iii) *State Guidelines on Employer's Use of Conviction Records*

Arizona places no statutory restrictions on a private employer's use of conviction records. However, the state attorney general contends that inquiring about prior convictions (*i.e.*, when, where, and final disposition) is an acceptable preemployment inquiry, but an employer must include a statement that a conviction will not be an absolute bar to employment.[44]

1.3(a)(iv) *State Guidelines on Employer's Use of Sealed or Expunged Criminal Records*

In Arizona, a court may set aside a judgment of conviction under certain circumstances and order that the person be released from the penalties and disabilities resulting from the conviction, with certain exceptions.[45] In addition, any person who is wrongfully arrested, indicted, or otherwise charged for any crime may petition the superior court for entry on all court records, police records, and any other records of any other agency relating to such arrest or indictment a notation that the person has been cleared.[46] However, neither statute expressly addresses whether the individual may deny the existence of records that have been set aside or cleared.

An individual may petition to have all case records related to a criminal offense sealed, if the criminal offense and the circumstances meet the criteria for sealing. Certain offenses are not eligible. A court may grant the petition and order that the records related to the specific criminal offense are sealed. The individual may thereafter state, in all instances, that they have never been arrested for, charged with, or convicted of the crime that is the subject of the records, including in response to questions related to employment, unless the person is applying for a position with certain state and local agencies, or the disclosure is required under state or federal law.[47]

Juvenile Records. Likewise, a court may order the destruction of juvenile records under certain conditions.[48] The statute does not address whether the person may deny the existence of such records in response to direct inquiries on a job application.

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[44] Office of the Ariz. Att'y Gen., *Guide to Pre-Employment Inquiries Under the Arizona Civil Rights Act*, *available at* https://www.azag.gov/outreach/publications/pre-employment-inquiries.

[45] ARIZ. REV. STAT. ANN. § 13-905.

[46] ARIZ. REV. STAT. ANN. § 13-4051.

[47] ARIZ. REV. STAT. ANN. § 13-911.

[48] ARIZ. REV. STAT. ANN. § 8-349.

1.3(b) *Restrictions on Credit Checks*

1.3(b)(i) *Federal Guidelines on Employer's Use of Credit Information & History*

The Fair Credit Reporting Act (FCRA). The FCRA[49] governs an employer's acquisition and use of virtually any type of information gathered by a "consumer reporting agency"[50] regarding job applicants for use in hiring decisions or regarding employees for use in decisions concerning retention, promotion, or termination. Preemployment reports created by a consumer reporting agency (such as credit reports, criminal record reports, and department of motor vehicle reports) are subject to the FCRA, along with any other consumer report used for employment purposes.

The FCRA establishes procedures that an employer must strictly follow when using a consumer report for employment purposes. For example, before requesting a consumer report from a consumer reporting agency, the employer must notify the applicant or employee in writing that a consumer report will be requested and obtain the applicant's or employee's written authorization before obtaining the report. An employer that intends to take an adverse employment action, such as refusing to hire the applicant, based wholly or partly on information contained in a consumer report must also follow certain notification requirements. For additional information on the FCRA, see LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING.

Many states have enacted their own version of the FCRA, referred to as "mini-FCRAs." While these laws often mirror the FCRA's requirements, there may be important distinctions between federal and state requirements.

Discrimination Concerns. While federal law does not prevent employers from asking about financial information provided they follow the FCRA, as noted above, federal antidiscrimination law prohibits employers from applying a financial requirement differently based on an individual's protected status—*e.g.*, race, national origin, religion, sex, disability, age, or genetic information. The EEOC also cautions that an employer must not have a financial requirement "if it *does not help the employer to accurately identify* responsible and reliable employees, and if, at the same time, the requirement significantly disadvantages people of a particular [protected category]."[51]

1.3(b)(ii) *State Guidelines on Employer's Use of Credit Information & History*

Under Arizona's mini-FCRA law, a consumer reporting agency may furnish a "consumer report" to a person who intends to use the information for "employment purposes." However, there are limits on how credit information may be used.[52] An employer that denies an individual employment, a promotion, or retention as an employee, or that does or does not reassign an individual (whichever is disadvantageous to the

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[49] 15 U.S.C. §§ 1681 *et seq*.

[50] A *consumer reporting agency* is any person or entity that regularly collects credit or other information about consumers to provide "consumer reports" for third persons. 15 U.S.C. § 1681a(f). A *consumer report* is any communication by a consumer reporting agency bearing on an individual's "creditworthiness, credit standing, character, general reputation, personal characteristics or mode of living" that is used for employment purposes. 15 U.S.C. § 1681a(d).

[51] EEOC, *Pre-Employment Inquiries and Financial Information*, *available at* https://www.eeoc.gov/laws/practices/financial_information.cfm (emphasis in original).

[52] ARIZ. REV. STAT. ANN. § 44-1692(A)(3)(b).

individual), must disclose the name and address of any consumer reporting agency that furnished the employer with a consumer report that the employer considered in taking the adverse action.[53]

A *consumer report* is any written, oral, or other communication of any information by a consumer reporting agency bearing on an individual's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living that is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the individual's eligibility for employment purposes.[54] *Employment purposes*, when used in connection with a consumer report, means a report used for the purpose of evaluating an individual for employment, promotion, reassignment, or retention as an employee.[55]

Additional Provisions. Employers may not request or require any person to waive their rights under the Arizona mini-FCRA.[56] In addition, employers may not charge any fee to an individual for disclosure of a file, if within a thirty-day period prior to the request, the requestor was denied employment or received other adverse action due to the credit report.[57]

1.3(c) *Restrictions on Access to Applicants' Social Media Accounts*

1.3(c)(i) *Federal Guidelines on Access to Applicants' Social Media Accounts*

There is no federal law governing an employer's ability to request access to applicants' or employees' social media accounts. However, various federal laws, or federal agencies' interpretations and enforcement of these laws, may impact employer actions. For example:

- Preemployment action taken against an applicant, or post-employment action taken against an employee, based on information discovered via social media may run afoul of federal civil rights law (*e.g.*, Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act).
- The National Labor Relations Board, which is charged with enforcing federal labor laws, has taken an active interest in employers' social media policies and practices, and has concluded in many instances that, regardless of whether the workplace is unionized, the existence of such a policy or an adverse employment action taken against an employee based on the employee's violation of the policy can violate the National Labor Relations Act.
- Accessing an individual's social media account without permission may potentially violate the federal Computer Fraud and Abuse Act or the Stored Communications Act.

For additional information on federal law related to background screening, see LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING.

[53] ARIZ. REV. STAT. ANN. § 44-1693(A)(3).

[54] ARIZ. REV. STAT. ANN. § 44-1691(3).

[55] ARIZ. REV. STAT. ANN. § 44-1691(4).

[56] ARIZ. REV. STAT. ANN. § 44-1693(D).

[57] ARIZ. REV. STAT. ANN. § 44-1693(D).

1.3(c)(ii) *State Guidelines on Access to Applicants' Social Media Accounts*

Arizona law contains no express provisions regulating employer access to applicants' or employees' social media accounts.

1.3(d) *Polygraph / Lie Detector Testing Restrictions*

1.3(d)(i) *Federal Guidelines on Polygraph Examinations*

The federal Employee Polygraph Protection Act (EPPA) imposes severe restrictions on using lie detector tests.[58] The law bars most private-sector employers from requiring, requesting, or suggesting that an employee or job applicant submit to a polygraph test, and from using or accepting the results of such a test.

The EPPA further prohibits employers from disciplining, discharging, or discriminating against any employee or applicant:

- for refusing to take a lie detector test;
- based on the results of such a test; and
- for taking any actions to preserve employee rights under the law.

There are some limited exceptions to the general ban. The exception applicable to most private employers allows a covered employer to test current employees reasonably suspected of involvement in a workplace incident that resulted in economic loss or injury to the employer's business. There is also a narrow exemption for prospective employees of security guard firms and companies that manufacture, distribute, or dispense controlled substances.

Notably, the EPPA prohibits only mechanical or electrical devices, not paper-and-pencil tests, chemical tests, or other nonmechanical or nonelectrical means that purport to measure an individual's honesty. For more information on federal restrictions on polygraph tests, including specific procedural and notice requirements and disclosure prohibitions, see LITTLER ON EMPLOYMENT TESTING.

Most states have laws that mirror the federal law. Some of these state laws place greater restrictions on testing by prohibiting lie detector "or similar" tests, such as pencil-and-paper honesty tests.

1.3(d)(ii) *State Guidelines on Polygraph Examinations*

Arizona law contains no express provisions regulating polygraph examinations for applicants or employees.

1.3(e) *Drug & Alcohol Testing of Applicants*

1.3(e)(i) *Federal Guidelines on Drug & Alcohol Testing of Applicants*

Whether an employer must implement a drug testing program for its employees under federal law is often determined by the industry in which it operates. For example, the Omnibus Transportation Employee Testing Act requires testing certain applicants and employees in the transportation industries.[59] The Drug-

[58] 29 U.S.C. §§ 2001 to 2009; *see also* U.S. Dep't of Labor, *Other Workplace Standards: Lie Detector Tests*, *available at* https://webapps.dol.gov/elaws/elg/eppa.htm.

[59] These industries are covered by the Federal Aviation Administration (FAA); the Federal Motor Carrier Safety Administration (FMSCA); the Federal Railroad Administration (FRA); the Federal Transit Administration (FTA); and

Free Workplace Act of 1988 also requires some federal contractors and all federal grantees (but not subcontractors or subgrantees) to certify to the appropriate federal agency that they are providing a drug-free workplace.[60] Employers not legally mandated to implement workplace substance abuse and drug and alcohol testing policies may still do so to promote workplace safety, deter illegal drug use, and diminish absenteeism and turnover. For more information on drug testing requirements under federal law, see LITTLER ON EMPLOYMENT TESTING.

For the most part, workplace drug and alcohol testing is governed by state law, and state laws differ dramatically in this area and continue to evolve.

1.3(e)(ii) *State Guidelines on Drug & Alcohol Testing of Applicants*

Private employers in Arizona may test prospective employees for the presence of drugs, but must first inform prospective employees that they must undergo testing.[61] Should the prospective employee refuse to provide a sample, or should the sample test positive, the employer may refuse to hire the prospective employee.[62] Employers are not required to pay for the cost of drug testing for prospective employees.[63] For more information on drug and alcohol testing in Arizona, see **3.2(b)(ii)**.

1.3(f) *Additional State Guidelines on Preemployment Conduct*

1.3(f)(i) *State Restrictions on Job Application Fees, Deductions, or Other Charges*

Under the Arizona Employment Protection Act, employers may not require employees to pay a fee, commission, or gratuity of any kind as the price of employment.[64]

2. TIME OF HIRE

2.1 Documentation to Provide at Hire

2.1(a) *Federal Guidelines on Hire Documentation*

Table 2 lists the documents that must be provided at the time of hire under federal law.

Table 2. Federal Documents to Provide at Hire

Category	Notes
Benefits & Leave Documents: Affordable Care Act (ACA)	Currently, employers covered under the Fair Labor Standards Act (FLSA) must provide to each employee, at the time of hire, written notice: • informing the employee of the existence of an insurance exchange, including a description of the services provided by such exchange,

the Pipeline and Hazardous Materials Safety Administration (PHMSA). In addition, the U.S. Department of Defense, the Coast Guard, and the Nuclear Regulatory Commission, as well as other government agencies, have adopted regulations requiring mariners, employers, and contractors to maintain a drug-free workplace.

[60] 41 U.S.C. §§ 8101 *et seq*.; *see also* 48 C.F.R. §§ 23.500 *et seq*.

[61] ARIZ. REV. STAT. ANN. §§ 23-493.01, 23-493.04.

[62] ARIZ. REV. STAT. ANN. § 23-493.05.

[63] ARIZ. REV. STAT. ANN. § 23-493.02.

[64] ARIZ. REV. STAT. ANN. § 23-202.

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	and the manner in which the employee may contact the exchange to request assistance; • that if the employer-plan's share of the total allowed costs of benefits provided under the plan is less than 60% of such costs, the employee may be eligible for a premium tax credit under section 36B of the Internal Revenue Code of 1986[65] and a cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act[66] if the employee purchases a qualified health plan through the exchange; and • that if the employee purchases a qualified health plan through the exchange, the employee may lose the employer contribution (if any) to any health benefits plan offered by the employer and that all or a portion of such contribution may be excludable from income for federal income tax purposes.[67] The U.S. Department of Labor's Employee Benefits Security Administration provides a model notice for employers that offer a health plan to some or all employees and a separate notice for employers that do not offer a health plan.[68]
Benefits & Leave Documents: Consolidated Omnibus Budget Reconciliation Act (COBRA)	Employers or group health plan administrators must provide written notice to employees and their spouses outlining their COBRA rights no later than 90 days after employees and spouses become covered under group health plans. Employers or plan administrators can develop their own COBRA rights notice or use the COBRA Model General Notice.[69] Employers or plan administrators can send COBRA rights notices through first-class mail, electronic distribution, or other means that ensure receipt. If employees and their spouses live at the same address, employers or plan administrators can mail one COBRA rights notice addressed to both individuals; alternatively, if employees and their spouses do not live at the same address, employers or plan administrators must send separate COBRA rights notices to each address.[70]

[65] 26 U.S.C. § 36B.

[66] 42 U.S.C. § 18071.

[67] 29 U.S.C. § 218b.

[68] Model notices are available in English and Spanish at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/coverage-options-notice.

[69] The model notice is available in English and Spanish at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra.

[70] 29 C.F.R. § 2590.606-1.

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
Benefits & Leave Documents: Family and Medical Leave Act (FMLA)	In addition to posting requirements, if an FMLA-covered employer has any eligible employees, it must provide a general notice to each employee by including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hiring.[71] In either case, distribution may be accomplished electronically. Employers may use a format other than the FMLA poster as a model notice, if the information provided includes, at a minimum, all of the information contained in that poster.[72] Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer must provide the general notice in a language in which the employees are literate. Employers furnishing FMLA notices to sensory-impaired individuals must also comply with all applicable requirements under federal or state law.[73]
Immigration Documents: Form I-9	Employers must ensure that individuals properly complete Form I-9 section 1 ("Employee Information and Verification") at the time of hire and sign the attestation with a handwritten or electronic signature. Also, individuals must present employers documentation establishing their identity and employment authorization. Within three business days of the first day of employment, employers must physically examine the documentation presented in the employee's presence, ensure that it appears to be genuine and relates to the individual, and complete Form I-9, section 2 ("Employer Review and Verification"). Employers must also, within three business days of hiring, sign the attestation with a handwritten or electronic signature. Employers that hire individuals for a period of less than three business days must comply with these requirements at the time of hire.[74] For additional information on these requirements, see LITTLER ON I-9 COMPLIANCE & WORK AUTHORIZATION VISAS.
Tax Documents	On or before the date employment begins, employees must furnish employers with a signed withholding exemption certificate (Form W-4)

[71] 29 C.F.R. § 825.300(a).

[72] The U.S. Department of Labor's Wage & Hour Division's model FMLA poster, which satisfies the notice requirement, is available at https://www.dol.gov/WHD/fmla/index.htm.

[73] 29 C.F.R. § 825.300(a).

[74] *See generally* 8 C.F.R. § 274a.2. The form is available at https://www.uscis.gov/i-9.

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	relating to their marital status and the number of withholding exemptions they claim.[75]
Uniformed Services Employment and Reemployment Rights Act (USERRA) Documents	Employers must provide to persons covered under USERRA a notice of employee and employer rights, benefits, and obligations. Employers may meet the notice requirement by posting notice where employers customarily place notices for employees.[76]
Wage & Hour Documents	To qualify for the federal tip credit, employers must notify tipped employees: (1) of the minimum cash wage that will be paid; (2) of the tip credit amount, which cannot exceed the value of the tips actually received by the employee; (3) that all tips received by the tipped employee must be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and (4) that the tip credit will not apply to any employee who has not been informed of these requirements.[77]

2.1(b) *State Guidelines on Hire Documentation*

Table 3 lists the documents that must be provided at the time of hire under state law.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
Benefits & Leave Documents: Paid Sick Leave	When employment begins, employers must give employees written notice of the Fair Wages and Health Families Act, including: • that employees are entitled to earned paid sick time; • the amount of earned paid sick leave that employees are entitled to accrue; • the terms of its use guaranteed under the law; • that retaliation against employees requesting sick leave use is prohibited; • that each employee has the right to file a complaint if required sick time is denied by the employer, or the employee is subjected to retaliation for requesting or taking earned paid sick leave; and • contact information for the Industrial Commission of Arizona (ICA) where questions about rights and responsibilities under the law can be answered.

[75] 26 C.F.R. § 31.3402(f)(2)-1. The IRS provides this form at https://www.irs.gov/pub/irs-pdf/fw4.pdf.

[76] 38 U.S.C. § 4334. This notice is available at https://www.dol.gov/sites/dolgov/files/VETS/legacy/files/USERRA_Private.pdf.

[77] 29 C.F.R. § 531.59.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
	The notice must be in English, Spanish, and any language the ICA deems appropriate.[78]
Drug Testing Documents: Notice to Applicants	Private employers in Arizona may test prospective employees for the presence of drugs, but must first inform prospective employees that they must undergo testing.[79]
Fair Employment Practices Documents	No notice requirement located.
Tax Documents	In Arizona, an employee must elect an amount authorized by law to be withheld for application toward the employee's state income tax liability. The election must be exercised by each employee, in writing, on a form prescribed by the Arizona Department of Revenue. The election must be made within five days of employment. Employers must notify the employees of the election made available under the law and have election forms available at all times. Each form must be completed in triplicate, with one copy each for the Department, the employer, and the employee.[80] The Department of Revenue provides a withholding certificate on its website.[81]
Travel Reduction Program	"Major" employers must provide new employees, at the time of hire, with information on alternate mode options and travel reduction measures. A *major employer* is an employer with 100 or more employees working at or reporting to a single worksite during any 24-hour period for at least three days per week during at least six months of the year, except that in Area A, defined by statute, the threshold is 50 employees.[82]
Wage & Hour Documents	**Generally.** At the time of hire, Arizona employers must advise employees, in writing, of the business name, address, and telephone number.[83]

[78] ARIZ. REV. STAT. ANN. § 23-375; *see also* Industrial Comm'n of Ariz., *Frequently Asked Questions (FAQs) About Minimum Wage and Earned Paid Sick Time*, *available at* https://www.azica.gov/frequently-asked-questions-about-wage-and-earned-paid-sick-time-laws. A model notice is also available at https://www.azica.gov/sites/default/files/AZ%20Earned%20Paid%20Sick%20Time%20Poster%202017.pdf.

[79] ARIZ. REV. STAT. ANN. §§ 23-493.01, 23-493.04. Employers must create their own form to satisfy this notice requirement.

[80] ARIZ. REV. STAT. ANN. § 43-401.

[81] *Arizona Form A-4 Withholding Percentage Election*, *available at* https://azdor.gov/forms/withholding-forms.

[82] ARIZ. REV. STAT. ANN. § 49-588; *see also* ARIZ. REV. STAT. ANN. § 49-541 (*Area A* definition). Employers must create their own form to satisfy this notice requirement.

[83] ARIZ. REV. STAT. ANN. § 23-364(D). Employers must create their own form to satisfy this notice requirement.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
	Tipped Employees. Employers with tipped employees must also provide written notice to those employees if the employer intends to exercise the tip credit.[84]

2.2 New Hire Reporting Requirements

2.2(a) *Federal Guidelines on New Hire Reporting*

The federal New Hire Reporting Program requires all states to establish new hire reporting laws that comply with federal requirements.[85] State new hire reporting laws must include these minimum requirements:

1. employers must report to the appropriate state agency the employee's name, address, and Social Security number, as well as the employer's name, address, and federal tax identification number provided by the Internal Revenue Service;
2. employers may file the report by first-class mail, electronically, or magnetically;
3. if the report is transmitted by first-class mail, the report must be made not later than 20 days after the date of hire;
4. if the report is transmitted electronically or magnetically, the employer may report no later than 20 days following the date of hire or through two monthly transmissions not less than 12 days nor more than 16 days apart;
5. the format of the report must be a Form W-4 or, at the option of the employer, an equivalent form; and
6. the maximum penalty a state may set for failure to comply with the state new hire law is $25 (which increases to $500 if the failure to comply is the result of a conspiracy between the employer and the employee to not supply the required report or to supply a false or incomplete report).[86]

These are only the minimum requirements that state new hire reporting laws must satisfy. States may enact new hire reporting laws that, for example, require additional information to be submitted or require a shorter reporting timeframe. Many states have also developed their own reporting form; however, its use is optional.

Multistate Employers. The New Hire Reporting Program includes a simplified reporting method for multistate employers. The statute defines *multistate employers* as employers with employees in two or more states and that file new hire reports either electronically or magnetically. The federal statute permits multistate employers to designate one state to which they will transmit all of their reports twice per month, rather than filing new hire reports in each state. An employer that designates one state must

[84] ARIZ. ADMIN. CODE § 20-5-1207. Employers must create their own form to satisfy this notice requirement.

[85] The New Hire Reporting Program is part of the Personal Responsibility and Work Opportunity Act of 1996. 42 U.S.C. §§ 651 to 669.

[86] 42 U.S.C. § 653a.

notify the Secretary of the U.S. Department of Health and Human Services (HHS) in writing. When notifying the HHS, the multistate employer must include the following information:

- Federal Employer Identification Number (FEIN);
- employer's name, address, and telephone number related to the FEIN;
- state selected for reporting purposes;
- other states in which the company has employees;
- the corporate contact information (name, title, phone, email, and fax number); and
- the signature of person providing the information.

If the company is reporting new hires on behalf of subsidiaries operating under different names and FEINs, it must list the names and FEINs, and the states where those subsidiaries have employees working.

Multistate employers can notify the HHS by mail, fax, or online as follows:

Table 4. Multistate Employer New Hire Information

Contact By Mail or Fax	Contact Online
Department of Health and Human Services Administration for Children and Families Office of Child Support Enforcement Multi-State Employer Registration Box 509 Randallstown, MD 21133 Fax: (410) 277-9325	Register online by submitting a multistate employer notification form over the internet.[87] Multistate employers can receive assistance with registration as a multistate employer from the Multistate Help Desk by calling (410) 277-9470, 9:00 A.M. to 5:00 P.M., Eastern Time.

2.2(b) *State Guidelines on New Hire Reporting*

The following is a summary of the key elements of Arizona's new hire reporting law.[88]

Who Must Be Reported. Arizona employers must submit new hire information for employees hired, rehired, or returning to work due to a layoff, furlough, separation, unpaid leave, or because of a termination of employment.[89]

Report Timeframe. The report must be filed within 20 days after the employee is hired, rehired, or returns to work, or, if magnetically or electronically submitted, twice per month, with transmissions no more than 16 days apart.[90]

[87] HHS offers the form online at http://www.acf.hhs.gov/programs/css/resource/multistate-employer-registration-form-instructions.

[88] ARIZ. REV. STAT. ANN. § 23-722.01.

[89] ARIZ. REV. STAT. ANN. § 23-722.01.

[90] ARIZ. REV. STAT. ANN. § 23-722.01(D).

Information Required. Arizona law requires that employers report the date an employee first performs service for pay, in addition to the employee's name, address, and Social Security number and the employer's name, address, and federal tax identification number.

Form & Submission of Report. The information should be submitted via a federal Form W-4 or an equivalent form at the option of the employer. Reports may be submitted magnetically, electronically, or by first-class mail, telefax, or any other means authorized by the Arizona Department of Economic Security.

Location to Send Information.

Arizona New Hire Reporting
P.O. Box 142901
Austin, Texas 78714
(888) 282-2064
(888) 282-0502 (fax)
https://newhire-reporting.com/AZ-Newhire/default.aspx

Multistate Employers. An employer that has employees who are employed in two or more states and that transmits new hire reports magnetically or electronically may comply with the new hire reporting requirements by designating one state in which the employer has employees to transmit the report. An employer that has employees in two or more states must notify HHS of the state to which the employer must send reports.[91]

2.3 Restrictive Covenants, Trade Secrets & Protection of Business Information

2.3(a) *Federal Guidelines on Restrictive Covenants & Trade Secrets*

Restrictive covenants are limitations placed on an employee's conduct that remain in force after their employment has ended. Post-employment restrictions are designed to protect the employer and typically prevent an individual from disclosing the employer's confidential information or soliciting the employer's employees or customers. These restrictions may also prohibit individuals from engaging in competitive employment, including competitive self-employment, for a specific time period after the employment relationship ends. There is no federal law governing these types of restrictive covenants. Therefore, a restrictive covenant's ability to protect an employer's interests is dependent upon applicable state law and the type of relationship or covenant involved.

As a general rule, a covenant restraining competition (referred to as a "noncompete") is more likely to be viewed critically because restraints of trade are generally disfavored. The typical exception to this general rule is a reasonable restraint that has a legitimate business purpose, such as the protection of trade secrets, confidential information, customer relationships, business goodwill, training, or the sale of a business. Notwithstanding, state laws vary widely regarding which of these interests can be protected through a restrictive covenant. Even where states agree on the interest that can be protected, they may vary on what is seen as a reasonable and enforceable provision for such protection.

Protections against trade secret misappropriation are also available to employers. Until 2016, trade secrets were the only form of intellectual property (*i.e.*, copyrights, patents, trademarks) not predominately governed by federal law. However, the Defend Trade Secrets Act of 2016 (DTSA) now

[91] ARIZ. REV. STAT. ANN. § 23-722.01(E).

provides a federal court civil remedy and original (but not exclusive) jurisdiction in federal court for claims of trade secret misappropriation.[92] As such, the DTSA provides trade secret owners a uniform federal law under which to pursue such claims. The DTSA operates alongside more limited existing protections under the federal Economic Espionage Act of 1996 and the Computer Fraud and Abuse Act, as well as through state laws adopting the Uniform Trade Secrets Act (UTSA).

For more information on these topics, see **LITTLER ON PROTECTION OF BUSINESS INFORMATION & RESTRICTIVE COVENANTS**.

2.3(b) *State Guidelines on Restrictive Covenants & Trade Secrets*

2.3(b)(i) *State Restrictive Covenant Law*

In Arizona, there is no statute of general applicability on restrictive covenants. However, there are specific limitations on noncompete agreements in the broadcasting industry.[93]

Historically, noncompete agreements in Arizona were reviewed as restraints of trade and were invalid at common law.[94] Over time, however, insular post-employment restraints, such as those incidents to employment or partnership agreements, became enforceable, albeit subject to close scrutiny. Therefore, restrictive covenants in Arizona are not favored and are construed narrowly.[95] A noncompete in Arizona will be deemed invalid unless it protects a legitimate business interest beyond the employer's desire to protect itself from competition.[96] Arizona courts will place the highest scrutiny on covenants not to compete dealing with relationships, such as doctor-patient or attorney-client, that specifically affect the public good.[97] In this context, any restraint that is larger than necessary for the protection of the employer is likely to be deemed oppressive and void on grounds of public policy.[98] These concerns must also be balanced with the recognized freedom of contract.[99] Covenants not to compete agreed upon in conjunction with the sale of a business will be reviewed with far less scrutiny and greater deference to the will of the parties.[100] Under such circumstances, the validity of the covenant not to compete will include the balancing of the right to work, the right to contract, and the public's right to competition.[101]

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[92] 18 U.S.C. §§ 1832 *et seq.*

[93] ARIZ. REV. STAT. ANN. § 23-494.

[94] *Valley Med. Specialists v. Farber*, 982 P.2d 1277, 1281 (Ariz. 1999).

[95] 982 P.2d at 1281.

[96] *Amex Distrib. Co. v. Mascari*, 724 P.2d 596, 604 (Ariz. Ct. App. 1986).

[97] *Farber*, 982 P.2d 1277 (doctor-patient relationship); *Fearnow v. Ridenour, Swenson, Cleere & Evans, P.C.*, 138 P.3d 723 (Ariz. 2006) (attorney-client relationship).

[98] *See Farber*, 982 P.2d at 1282-83 (applying public interest to analysis of reasonableness of noncompete between doctors, based on same analysis for legal profession, relying on *Dwyer v. Jung*, 336 A.2d 498 (N.J. Super. Ct. Ch. Div. 1975), *aff'd*, 348 A.2d 208 (N.J. Super. Ct. App. Div. 1975)); *cf. Fearnow*, 138 P.3d at 728-30 (monetary penalty for continued client representation by departing attorney not *per se* unlawful).

[99] *See Fearnow*, 138 P.3d at 729-30 (contract provision requiring former law firm partner to forfeit share of practice for retaining clients of law firm upon departure from the firm was deemed a potentially reasonable economic disincentive on lawyer's practice under the totality of circumstances and was not inherently against public interest).

[100] *Amex Distrib.*, 724 P.2d at 600; *see also Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 600-01 (9th Cir. 1991).

[101] *See Gann v. Morris*, 596 P.2d 43, 44-45 (Ariz. Ct. App. 1979).

Covenants not to compete consist of three principal elements:

1. what activity is restricted;
2. the geographic scope of the restriction; and
3. the duration of the restriction.

When considered as a whole, the restrictions on an employee's ability to work should be no broader than necessary to protect the legitimate recognizable business interests of the employer. These *business interests* may include: (1) customer goodwill; (2) confidential and proprietary information; and (3) ability to replace the departing employee with an employee of equal qualification.[102] Eliminating competition, in and of itself, does not constitute a legitimate protectable business interest of the employer.[103]

The Arizona Supreme Court has reiterated the basic rule for each element by indicating that the main inquiry in determining the scope of a legitimate protection for the business and goodwill of the employer *in the commercial context* is how much time the employer needs to replace a departing employee and train a replacement to establish him/her to the employer's clientele.[104] Arizona courts are unlikely to enforce any restriction that is greater than necessary to achieve that purpose.[105]

2.3(b)(ii) *Consideration for a Noncompete*

Restrictive covenants require an employee to promise not to do something the employee would otherwise have been able to do. For example, by signing a noncompete agreement, an employee is giving up the right to open a competing business or work for an employer in a competing business. Therefore, employers need to provide an employee with "consideration" in return for the agreement to be binding. Providing *consideration* means giving something of value—*i.e.*, a promise to do something that the employer was not otherwise obligated to do—such as extending an offer of employment to a new employee or providing a bonus for an existing employee.

In Arizona, noncompete agreements must be supported by adequate consideration.[106] Arizona courts address the question of what constitutes adequate consideration on a case-by-case basis.

In Arizona, a noncompete signed at inception of employment in exchange for the promise of future employment provides sufficient consideration.[107] In *Lessner Dental Labs. v. Kidney*, the employee signed a contract containing noncompete provisions in exchange for continued employ for as long as the employee wished to remain in the employ of the employer and the employer wished to retain the employee. The Court found adequate consideration because the contract contained "mutual promises and is in writing."[108] A change in terms of employment is also sufficient consideration.[109] In *Demasse v. ITT Corp.*, the Arizona Supreme Court held that continued employment is not sufficient consideration by itself

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[102] *Phoenix Orthopaedic Surgeons, Ltd. v. Peairs*, 790 P.2d 752, 756-57 (Ariz. Ct. App. 1989).

[103] *Bryceland v. Northey*, 772 P.2d 36, 39 (Ariz. Ct. App. 1989); *see also Liss v. Exel Transp. Servs., Inc.,* 2007 WL 891167, at *7 (D. Ariz. Mar. 20, 2007).

[104] *See Valley Med. Specialists v. Farber*, 982 P.2d 1277, 1282-85 (Ariz. 1999); *Bryceland*, 772 P.2d at 40.

[105] *Farber*, 982 P.2d at 1282-83.

[106] *See Demasse v. ITT Corp.*, 984 P.2d 1138, 1144-45 (Ariz. 1999).

[107] *Lessner Dental Labs. v. Kidney*, 492 P.2d 39 (Ariz. Ct. App. 1971).

[108] 492 P.2d at 39-40.

[109] *Amex Distrib. Co v. Mascari*, 724 P.2d 596 (Ariz. Ct. App. 1986).

to support the modification of the terms of an existing employment agreement.[110] In that decision, the court was presented with a set of facts under which a contract had been deemed to exist as a matter of law.[111] If, however, the employment relationship between the parties is purely at will, it appears, based on an earlier decision, that continued employment could constitute sufficient consideration.[112]

2.3(b)(iii) *Ability to Modify or Blue Pencil a Noncompete*

When a restrictive covenant is found to be unreasonable in scope, some states refuse to enforce its terms entirely (sometimes referred to as the "all-or-nothing" rule), while others may permit the court to "blue pencil" or modify an agreement that is unenforceable as written. *Blue penciling* refers to the practice whereby a court strikes portions of a restrictive covenant it deems unenforceable. *Reformation*, on the other hand, refers to a court modifying a restrictive covenant to make it enforceable, which may include introducing new terms into the agreement (sometimes referred to as the "reasonableness" rule). By rewriting an overly broad restrictive covenant rather than simply deeming it unenforceable, courts attempt to effectuate the parties' intentions as demonstrated by their agreement to enter into a restrictive covenant in the first place.

In Arizona, courts cannot add or rewrite agreements. "Blue penciling" is permissible. Courts will "blue pencil" restrictive covenants to eliminate grammatically severable and unreasonable provisions.[113]

2.3(b)(iv) *State Trade Secret Law*

In addition to covenants not to compete, Arizona law provides other means for employers to protect themselves from a recently departed employee's misuse of proprietary information, such as trade secrets, acquired from the employer. Trade secrets, which are partially defined by Arizona statutes, can be protected in a variety of ways. As a starting point, the employer must determine whether the information that may be taken by the employee is a protected trade secret.

Definition of a Trade Secret. Arizona has adopted the Uniform Trade Secret Act. The Arizona Uniform Trade Secrets Act (AUTSA) defines a *trade secret* to include a compilation of information that:

1. derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
2. is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[114]

In general, Arizona courts will consider the following six factors to determine whether information constitutes a trade secret:

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[110] 984 P.2d at 1144-45.

[111] 984 P.2d at 1144.

[112] *See Mattison v. Johnston*, 730 P.2d 286, 289-90 (Ariz. Ct. App. 1986) (distinguished but not overruled by *Demasse*, 984 P.2d at 1147); *American Credit Bureau, Inc. v. Carter*, 462 P.2d 838, 840 (Ariz. Ct. App. 1969) (three years employment and substantial salary provided sufficient consideration for noncompete); *see also Compass Bank v. Hartley*, 430 F. Supp. 2d 973, 978-79 (D. Ariz. 2006).

[113] *Fearnow v. Ridenour, Swenson, Cleere & Evans, P.C.*, 138 P.3d 723, 731 (Ariz. 2006); *Zep, Inc. v. Brody Chem. Co.,* 2010 WL 1381896, at *5 (D. Ariz. Apr. 6, 2010).

[114] ARIZ. REV. STAT. ANN. § 44-401(4).

1. the extent to which the information is known outside of the business;
2. the extent to which it is known by employees and others involved in the business;
3. the extent of measures taken by the owner to guard the secrecy of the information;
4. the value of the information to the business and to its competitors;
5. the amount of effort or money expended in developing the information; and
6. the ease or difficulty with which the information could be properly acquired or duplicated by others.[115]

There are few published decisions in Arizona construing the statutory definition of a trade secret. In *Amex Distributing Co. v. Mascari*, the Arizona Court of Appeals defined what could constitute a *trade secret* to include any formula, pattern, device, or compilation of information used in one's business, and which gives that business a competitive edge, turning, in large part, to the Restatement of Torts for guidance.[116]

Of course, if a customer list is known to the general public or within a given industry, if it is left unprotected or available to former employees, or if competitors can readily ascertain the names of a business's customers, such a list of customers may not constitute a trade secret.[117]

Misappropriation of a Trade Secret. The AUTSA specifically "displaces conflicting tort, restitutionary and other laws of this state providing civil remedies for misappropriation of trade secret."[118] A 2014 Arizona Supreme Court decision interpreted this provision to only preempt claims based on the misappropriation of trade secret information.[119] Therefore, if the misappropriated "confidential" information does not rise to the level of trade secret information, the claim is not preempted by the AUTSA.

2.3(b)(v) *State Guidelines on Employee Inventions & Ideas*

Arizona does not have statutory guidelines addressing ownership of employee inventions and ideas.

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[115] *Enterprise Leasing Co. of Phoenix v. Ehmke*, 3 P.3d 1064, 1069 n.6 (Ariz. Ct. App. 1999).

[116] 724 P.2d 596, 602 (Ariz. Ct. App. 1986) (adopting language from the RESTATEMENT (SECOND) OF TORTS § 757); *see also Enterprise Leasing Co.*, 3 P.3d at 1068-69 (also adopting the language of the RESTATEMENT to define trade secret). There are also unpublished decisions regarding what can constitute a trade secret. *See, e.g.*, *Arizona Office Techs., Inc. v. Infincom, Inc.*, 2011 WL 540297 (Ariz. Ct. App. Feb. 15, 2011) (holding that an employer cannot prevent a former employee from using their skills, including the skill of designing an effective spreadsheet, to help a competitor).

[117] *See Amex Distrib. Co.*, 724 P.2d at 603 (information regarding customers of produce business generally known and accessible to competitors did not constitute a trade secret); *see also Calisi v. United Financial Servs.*, 302 P.3d 628 (Ariz. Ct. App. 2013) (holding that because the company did not explain what unique and original customer information it had acquired and did not show it had invested substantial time and effort to acquire information unknown to competitors, it failed to prove customer lists allegedly misappropriated by a former employee were a trade secret under section 44-401(4) of the Arizona Revised Statutes); *Miller v. Hehlen*, 104 P.3d 193, 201-02 (Ariz. Ct. App. 2005) (allowing former employee to have access to customer list without restriction stripped that list of any trade secret protection); *Wright v. Palmer*, 464 P.2d 363, 366 (Ariz. Ct. App. 1970) (list of printing business consisting of company with well-known printing needs not a trade secret).

[118] ARIZ. REV. STAT. ANN. § 44-407(A).

[119] *Orca Commc'ns Unlimited, L.L.C. v. Noder*, 337 P.3d 545 (Ariz. 2014).

3. DURING EMPLOYMENT

3.1 Posting, Notice & Record-Keeping Requirements

3.1(a) *Posting & Notification Requirements*

3.1(a)(i) *Federal Guidelines on Posting & Notification Requirements*

Several federal employment laws require that specific information be posted in the workplace. Posting requirements vary depending upon the law at issue. For example, employers with fewer than 50 employees are not covered by the Family and Medical Leave Act and, therefore, would not be subject to the law's posting requirements. Table 5 details the federal workplace posting and notice requirements.

Table 5. Federal Posting & Notice Requirements

Poster or Notice	Notes
Employee Polygraph Protection Act (EPPA)	Employers must post and keep posted on their premises a notice explaining the EPPA.[120]
Equal Employment Opportunity (EEO) Act ("EEO is the Law" Poster)	Employers must post and keep posted in conspicuous places upon their premises, in an accessible format, a notice that describes the federal laws prohibiting discrimination in employment.[121]
Fair Labor Standards Act (FLSA)	Employers must post and keep posted a notice, summarizing employee rights under the FLSA, in conspicuous places in every establishment where employees subject to the FLSA are employed.[122]
Family & Medical Leave Act (FMLA)	Employers must conspicuously post, where employees are employed, a notice explaining the FMLA's provisions and providing information on filing complaints of violations.[123]
Migrant and Seasonal Agricultural Worker Protection Act (MSPA)	Farm labor contractors, agricultural employers, and agricultural associations that employ or house any migrant or seasonal agricultural worker must conspicuously post at the place of employment a poster setting forth the MSPA's rights and protections, including the right to request a written statement of the information described in 29 U.S.C. § 1821(a). The poster must be provided in Spanish or other language

[120] 29 C.F.R. § 801.6. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/eppa.htm.

[121] 29 C.F.R. §§ 1601.30 (Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act), 1627.10 (Age Discrimination in Employment Act). This poster is available in English, Spanish, Arabic, and Chinese at https://www1.eeoc.gov/employers/poster.cfm.

[122] 29 C.F.R. § 516.4. This poster is available in English, Spanish, Chinese, Russian, Thai, Hmong, Vietnamese, Korean, Polish, and Haitian Creole at http://www.dol.gov/whd/regs/compliance/posters/flsa.htm.

[123] 29 C.F.R. § 825.300. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/fmla.htm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	common to migrant or seasonal agricultural workers who are not fluent or literate in English.[124]
Notice to Workers with Disabilities/Special Minimum Wage Poster	Employers of workers with disabilities under special minimum wage certificates must at all times display and make available to employees a poster explaining the conditions under which the special wage rate applies. Where an employer finds it inappropriate to post notice, directly providing the poster to its employees is sufficient.[125]
Occupational Safety and Health Act ("the Fed-OSH Act")	Employers must post a notice or notices informing employees of the Fed-OSH Act's protections and obligations, and that for assistance and information employees should contact the employer or nearest U.S. Department of Labor office.[126]
Uniformed Service Employment and Reemployment Rights Act (USERRA)	Employers must provide notice about USERRA's rights, benefits, and obligations to all individuals entitled to such rights and benefits. Employers may provide notice by posting or by other means, such as by distributing or mailing the notice.[127]
In addition to the federal posters required for all employers, government contractors may be required to post the following posters.	
"EEO is the Law" Poster with the EEO is the Law Supplement	Employers subject to Executive Order No. 11246 must prominently post notice, where it can be readily seen by employees and applicants, explaining that discrimination in employment is prohibited on numerous grounds.[128] The second page includes reference to government contractors.
Annual EEO, Affirmative Action Statement	Government contractors covered by the Affirmative Action Program (AAP) requirements are required to post a separate EEO/AA Policy Statement (in addition to the required "EEO is the Law" Poster), which indicates the support of the employer's top U.S. official. This statement should be reaffirmed annually with the employer's AAP.[129]

[124] 29 C.F.R. §§ 500.75, 500.76. This poster is available in English, Spanish, Haitian Creole, Vietnamese, and Hmong at http://www.dol.gov/whd/regs/compliance/posters/mspaensp.htm.

[125] 29 C.F.R. § 525.14. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/disab.htm.

[126] 29 C.F.R § 1903.2. This poster is available in English, Spanish, Arabic, Chinese, Russian, Nepali, Thai, Hmong, Vietnamese, Korean, Polish, Portuguese, and Haitian Creole at https://www.osha.gov/Publications/poster.html.

[127] 20 C.F.R. app. § 1002. This poster is available at http://www.dol.gov/vets/programs/userra/poster.htm.

[128] 41 C.F.R. § 60-1.42; *see also* 41 C.F.R. § 60-741.5(a) (requiring all agencies and contractors to include an equal opportunity clause in contracts, in which the contractor agrees to post this notice). This poster is available at https://www.dol.gov/ofccp/regs/compliance/posters/ofccpost.htm.

[129] 41 C.F.R. §§ 60-300.44, 60-741.44.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
Employee Rights Under the Davis-Bacon Act Poster	Employers performing work covered by the labor standards of the Davis-Bacon and Related Acts must prominently post notice, where accessible to employees, summarizing the protections of the law.[130]
Employee Rights Under the Service Contract or Walsh-Healey Public Contracts Acts Poster	Employers performing work covered by the McNamara-O'Hara Service Contract Act ("Service Contract Act") or the Walsh-Healey Public Contracts Act ("Walsh-Healey Act") must prominently post notice, where accessible to employees, summarizing all required compensation and other entitlements. To comply, employers may notify employees by attaching a notice to the contract, or may post the notice at the worksite.[131]
E-Verify Participation & Right to Work Posters	The Department of Homeland Security requires certain government contractors, under Executive Order Nos. 12989, 13286, and 13465, to post notice informing current and prospective employees of their rights and protections. Notices must be posted in a prominent place that is visible to prospective employees and all employees who are verified through the system.[132]
Notice to Workers with Disabilities/Special Minimum Wage Poster	Employers of workers with disabilities under special minimum wage certificates authorized by the Service Contract Act or the Walsh-Healey Public Contracts Act must post notice, explaining the conditions under which the special minimum wages may be paid. Where an employer finds it inappropriate to post this notice, directly providing the poster to its employees is sufficient.[133]
Notification of Employee Rights Under Federal Labor Laws	Government contractors are required under Executive Order No. 13496 to post this notice in conspicuous locations and, if the employer posts notices to employees electronically, it must also make this poster available where it customarily places other electronic notices to employees about their jobs. Electronic posting cannot be used as a substitute for physical posting. Where a significant portion of the workforce is not proficient in English, the notice must be provided in the languages spoken by employees.[134]

[130] 29 C.F.R. § 5.5(a)(l)(i). This poster is available at https://www.dol.gov/whd/regs/compliance/posters/davis.htm.

[131] 29 C.F.R. § 4.6(e); 29 C.F.R. § 4.184. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/sca.htm.

[132] U.S. Citizenship and Immigration Servs., Dep't of Homeland Sec., *E-Verify Memorandum of Understanding for Employers*, *available at* https://www.e-verify.gov/sites/default/files/everify/memos/MOUforEVerifyEmployer.pdf. The poster is available at https://preview.e-verify.gov/sites/default/files/everify/posters/IER_RightToWorkPoster%20Eng_Es.pdf. According to the U.S. Citizenship and Immigration Services, this poster must be displayed in English and Spanish.

[133] 29 C.F.R. § 525.14. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/disab.htm.

[134] 29 C.F.R. § 471.2. This poster is available at https://www.dol.gov/olms/regs/compliance/EO13496.htm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
Office of the Inspector General's Fraud Hotline Poster	Certain government contractors must prominently post notice, where accessible to employees, addressing fraud and how to report such misconduct.[135]
Paid Sick Leave Under Executive Order No. 13706	Certain government contractors must prominently post notice, where accessible to employees at the worksite, informing employees of their right to earn and use paid sick leave. Notice may be provided electronically if customary to the employer.[136] **Pay Period or Monthly Notice.** A contractor must inform an employee in writing of the amount of accrued paid sick leave no less than once each pay period or each month, whichever is shorter. Additionally, this information must be provided when employment ends and when an employee's accrued but unused paid sick leave is reinstated. Providing these notifications via a pay stub meets the compliance requirements of the executive order. **Pay Stub / Electronic.** A contractor's existing procedure for informing employees of available leave, such as notification accompanying each paycheck or an online system an employee can check at any time, may be used to satisfy or partially satisfy these requirements if it is written (including electronically, if the contractor customarily corresponds with or makes information available to its employees by electronic means).[137]
Pay Transparency Nondiscrimination Provision	Employers covered by Executive Order No. 11246 must either post a copy of this nondiscrimination provision in conspicuous places available to employees and applicants for employment, or post the provision electronically. Additionally, employers must distribute the nondiscrimination provision to their employees by incorporating it into their existing handbooks or manuals.[138]
Worker Rights Under Executive Order Nos. 13658 (contracts entered into on or after January 1, 2015), 14026	Employers that contract with the federal government under Executive Order Nos. 13658 or 14026 must prominently post notice, where

[135] 48 C.F.R. §§ 3.1000 *et seq*. This poster is available at https://oig.hhs.gov/documents/root/243/OIG_Hotline_Ops_Poster_-_Grant__Contract_Fraud.pdf.

[136] 29 C.F.R. § 13.26. This poster is available at https://www.dol.gov/whd/govcontracts/eo13706/index.htm. Additional resources on the sick leave requirement are available at https://www.dol.gov/whd/govcontracts/eo13706/index.htm.

[137] 29 C.F.R. § 13.5.

[138] 41 C.F.R. § 60-1.35(c). This poster is available at https://www.dol.gov/agencies/ofccp/posters.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
(contracts entered into on or after January 30, 2022)	accessible to employees, summarizing the applicable minimum wage rate and other required information.[139]

3.1(a)(ii) *State Guidelines on Posting & Notification Requirements*

Table 6 details the state workplace posting and notice requirements. While local ordinances are generally excluded from this publication, some local ordinances may have posting requirements, especially in the minimum wage or paid leave areas. Local posting requirements may be discussed in the table below or in later sections, but the local ordinance coverage is not comprehensive.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Benefits & Leave: Earned Paid Sick Time	Employers are required to post notice of the Fair Wages and Health Families Act. However, the requirement may be waived for small businesses that would be unreasonably burdened by the obligation. *Small businesses* have less than $500,000 in gross annual revenue.[140]
Constructive Discharge	An employer must provide this notice to employees to compel employees to give 15 days' notice of the employee's intention to resign due to objectively difficult or unpleasant working conditions. Notice may be posted, included in an employee handbook, or provided in a written communication distributed to employees.[141]
Drug Testing Policy	If an employer implements a drug-testing policy under Arizona's workplace drug-testing law, the policy must be distributed to employees in the same manner as the employer informs its employees of other personnel practices, including inclusion in a personnel handbook or manual or posting in a place accessible to employees.[142]
Fair Employment Practices Law	Employers are required to post a notice informing employees of their rights under the Arizona Civil Rights Act. The notice must be posted in a conspicuous well-lighted place frequented by employees, job seekers, applicants for union membership, or patrons.[143]

[139] 29 C.F.R. §§ 10.29, 23.290. The poster, referencing both Executive Orders, is available at https://www.dol.gov/whd/regs/compliance/posters/mw-contractors.htm.

[140] ARIZ. REV. STAT. ANN. § 23-364(D); ARIZ. ADMIN. CODE § R20-5-1208. This poster is available at https://www.azica.gov/posters-employers-must-display.

[141] ARIZ. REV. STAT. ANN. § 23-1502(E). This poster is available at https://hr.az.gov/workplace-posters.

[142] ARIZ. REV. STAT. ANN. § 23-493.04. Employers must create their own form to satisfy this notice requirement.

[143] ARIZ. REV. STAT. ANN. § 41-1483; ARIZ. ADMIN. CODE § 10-3-107. This poster is available at https://www.azag.gov/sites/default/files/publications/2018-07/Discrimination_Brochure.pdf.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Fair Employment Practices Ordinance: Tucson	Employers with between one and 100 employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year must post notice detailing the local antidiscrimination protections.[144]
Unemployment Insurance	Employers are required to post printed statements dealing with claims for unemployment benefits in places readily accessible to employees and must make available to each individual at the time the individual becomes unemployed a printed statement dealing with claims for benefits.[145]
Wages, Hours & Payroll: Maximum Hours (Laundry Workers)	Employers must post in a conspicuous place, in every room where laundry workers are employed, a printed notice stating the number of hours of work required of them on each day of the week.[146]
Wages, Hours & Payroll: Minimum Wage	Employers (except small businesses, those that earn less than $500,000 per year in gross annual revenue and are exempt from having to pay minimum wage under federal law) are required to post notices in conspicuous places notifying employees of their rights under Arizona's minimum wage law.[147]
Workers' Compensation	"Notice to Employees (Workers' Compensation)" must be posted in both English and Spanish. Additionally, if an employer provides workers' compensation insurance or elects to compensate employees directly in cases for workers' compensation, a Notice of Compliance with Compensation Law also must be posted.[148]
Workplace Safety: Employee Safety and Health Protection	Employers are required to post an "Employee Safety and Health Protection" poster, conspicuously, in locations where employees will see them.[149]

[144] TUCSON, ARIZ., CODE OF ORDINANCES § 17-16.

[145] ARIZ. REV. STAT. ANN. § 23-772(D). This poster is available at https://des.az.gov/services/employment/unemployment-employer/employer-requirements-record-keeping.

[146] ARIZ. REV. STAT. ANN. § 23-284(B). Employers must create their own form to satisfy this notice requirement.

[147] ARIZ. REV. STAT. ANN. § 23-364(D). This poster is available at https://www.azica.gov/labor-minimum-wage-main-page.

[148] ARIZ. REV. STAT. ANN. §§ 23-906, 23-964. This poster is available at https://www.azica.gov/claims-workers-compensation-compliance-poster.

[149] ARIZ. REV. STAT. ANN. §§ 23-427, 23-804. This poster is available at https://www.azica.gov/labor-minimum-wage-main-page.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Workplace Safety: No Smoking	Employers are required to post notices at every entrance in their facilities where smoking is prohibited.[150]
Workplace Safety: Work Exposure to Bodily Fluids & Work Exposure to MRSA, Spinal Meningitis, or Tuberculosis (TB)	Employers must post two forms immediately next to the "Employee Safety and Health Protection" poster noted above. One is "Work Exposure to Bodily Fluids (HIV, AIDS, Hepatitis C)," and the other is "Work Exposure to MRSA, Spinal Meningitis, or Tuberculosis (TB)."[151]

3.1(b) *Record-Keeping Requirements*

3.1(b)(i) *Federal Guidelines on Record Keeping*

Table 7 summarizes the federal record-keeping requirements.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Age Discrimination in Employment Act (ADEA): Payroll Records	*Covered employers must maintain the following payroll or other records for each employee:* • employee's name, address, and date of birth; • occupation; • rate of pay; and • compensation earned each week.[152]	At least 3 years from the date of entry.
Age Discrimination in Employment Act (ADEA): Personnel Records	*Employers that maintain the following personnel records in the course of business are required by the ADEA to keep them for the specified period of time:* • job applications, resumes, or other forms of employment inquiry, including records pertaining to the refusal to hire any individual; • promotion, demotion, transfer, selection for training, recall, or discharge of any employee; • job orders submitted by the employer to an employment agency or labor organization for recruitment of personnel for job openings;	At least 1 year from the date of the personnel action to which any records relate.

[150] ARIZ. REV. STAT. ANN. § 36-601.01(E). This poster is available at http://azdhs.gov/preparedness/epidemiology-disease-control/smoke-free-arizona/index.php#download-signs.

[151] ARIZ. REV. STAT. ANN. § 23-1043.02, 23-1043.03; ARIZ. ADMIN. CODE § R20-5-164. These posters are available at https://www.azica.gov/labor-minimum-wage-main-page.

[152] 29 U.S.C. § 626; 29 C.F.R. § 1627.3(a).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• test papers completed by applicants which disclose the results of any employment test considered by the employer; • results of any physical examination considered by the employer in connection with a personnel action; and • any advertisements or notices relating to job openings, promotions, training programs, or opportunities to work overtime.[153]	
Age Discrimination in Employment (ADEA): Benefit Plan Documents	*Employer must keep on file any:* • employee benefit plans, such as pension and insurance plans; and • copies of any seniority systems and merit systems in writing.[154]	For the full period the plan or system is in effect, and for at least 1 year after its termination.
Title VII & the Americans with Disabilities Act (ADA): Personnel Records	*Employers must preserve any personnel or employment record made, including:* • requests for reasonable accommodation; • application forms submitted by applicants; • other records having to do with hiring, promotion, demotion, transfer, lay-off, or termination; • rates of pay or other terms of compensation; and • selection for training or apprenticeship.[155]	At least 1 year from the date the records were made, or from the date of the personnel action involved, whichever is later.
Title VII & the Americans with Disabilities Act (ADA): Complaints of Discrimination	*When a charge of discrimination has been filed or an action brought against the employer, it must:* • make and keep such records relevant to the determination of whether unlawful employment practices have been or are being committed, including personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person; and • retain application forms or test papers completed by unsuccessful applicants or candidates for the position.[156]	Until final disposition of the charge or action (*i.e.*, until the statutory period for bringing an action has expired or, if an action has been brought, the date the

[153] 29 C.F.R. § 1627.3(b).

[154] 29 C.F.R. § 1627.3(b).

[155] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[156] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
		litigation is terminated).
Title VII & the Americans with Disabilities Act (ADA): Other	An employer must keep and maintain its Employer Information Report (EEO-1).[157]	Most recent form must be retained for 1 year.
Employee Polygraph Protection Act (EPPA)	*Records pertaining to a polygraph test must be maintained for the specified time period including, but not limited to, the following:* • a copy of the statement given to the examinee regarding the time and place of the examination and the examinee's right to consult with an attorney; • the notice to the examiner identifying the person to be examined; • copies of opinions, reports, or other records given to the employer by the examiner; • where the test is conducted in connection with an ongoing investigation involving economic loss or injury, a statement setting forth the specific incident or activity under investigation and the basis for testing the particular employee; and • where the test is conducted in connection with an ongoing investigation of criminal or other misconduct involving loss or injury to the manufacture, distribution, or dispensing of a controlled substance, records specifically identifying the loss or injury in question and the nature of the employee's access to the person or property that is the subject of the investigation.[158]	At least 3 years following the date on which the polygraph examination was conducted.
Employee Retirement Income Security Act (ERISA)	Employers that sponsor an ERISA-qualified plan must maintain records that provide in sufficient detail the information from which any plan description, report, or certified information filed under ERISA can be verified, explained, or checked for accuracy and completeness. This includes vouchers, worksheets, receipts, and applicable resolutions.[159]	At least 6 years after documents are filed or would have been filed but for an exemption.

[157] 29 C.F.R. § 1602.7.

[158] 29 U.S.C. §§ 2001 *et seq.*; 29 C.F.R. § 801.30.

[159] 29 U.S.C. § 1027.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Equal Pay Act	Covered employers must maintain the records required to be kept by employers under the Fair Labor Standards Act (29 C.F.R. part 516).[160]	3 years.
Equal Pay Act: Other	*Covered employers must maintain any additional records made in the regular course of business relating to:* • payment of wages; • wage rates; • job evaluations; • job descriptions; • merit and seniority systems; • collective bargaining agreements; and • other matters which describe any pay differentials between the sexes.[161]	At least 2 years.
Fair Labor Standards Act (FLSA): Payroll Records	*Employers must maintain the following records with respect to each employee subject to the minimum wage and/or overtime provisions of the FLSA:* • full name and any identifying symbol used in place of name on time or payroll records; • home address with zip code; • date of birth, if under19; • sex and occupation in which employed; • time of day and day of week on which the employee's workweek begins; • regular hourly rate of pay for any workweek in which overtime compensation is due; • basis on which wages are paid (pay interval); • amount and nature of each payment excluded from the employee's regular rate; • hours worked each workday and total hours worked each workweek; • total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation; • total premium pay for overtime hours; • total additions to or deductions from wages paid each pay period, including employee purchase orders or wage assignments; • total wages paid each pay period;	3 years from the last day of entry.

[160] 29 C.F.R. § 1620.32(a).

[161] 29 C.F.R. § 1620.32(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• date of payment and the pay period covered by the payment; • records of retroactive payment of wages, including the amount of such payment to each employee, the period covered by the payment, and the date of the payment; and • for employees working on a fixed schedule, the schedule of daily and weekly hours the employee normally works (instead of hours worked each day and each workweek).[162] The record should also indicate for each week whether the employee adhered to the schedule and, if not, show the exact number of hours worked each day each week.	
Fair Labor Standards Act (FLSA): Tipped Employees	*Employers must maintain and preserve all Payroll Records noted above as well as:* • a symbol, letter, or other notation on the pay records identifying each employee whose wage is determined in part by tips; • weekly or monthly amounts reported by the employee to the employer of tips received (*e.g.*, information reported on Internal Revenue Service Form 4070); • amount by which the wages of each tipped employee have been deemed to be increased by tips as determined by the employer (not in excess of the difference between $2.13 and the applicable federal minimum wage); • hours worked each workday in which an employee does not receive tips, and total daily or weekly straight-time payment made by the employer for such hours; and • hours worked each workday in occupations in which the employee receives tips, and total daily or weekly straight-time earnings for such hours.[163]	
Fair Labor Standards Act (FLSA): White Collar Exemptions	*For bona fide executive, administrative, and professional employees and outside sales employees (e.g., white collar employees) the following information must be maintained:* • full name and any identifying symbol used in place of name on time or payroll records; • home address with zip code;	3 years from the last day of entry.

[162] 29 C.F.R. §§ 516.2, 516.5.

[163] 29 C.F.R. § 516.28.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• date of birth if under19; • sex and occupation in which employed; • time of day and day of week on which the employee's workweek begins; • total wages paid each pay period; • date of payment and the pay period covered by the payment; and • basis on which wages are paid in sufficient detail to permit calculation for each pay period of the employee's total remuneration for employment including fringe benefits and prerequisites.[164]	
Fair Labor Standards Act (FLSA): Agreements & Other Records	*In addition to payroll information, employers must preserve agreements and other records, including:* • collective bargaining agreements and any amendments or additions; • individual employment contracts or, if not in writing, written memorandum summarizing the terms; • written agreements or memoranda summarizing special compensation arrangements under FLSA sections 7(f) or 7(j); • certain plans and trusts under FLSA section 7(e); • certificates and notices listed or named in the FLSA; and • sales and purchase records.[165]	At least 3 years from the last effective date.
Fair Labor Standards Act (FLSA): Other Records	*In addition to other FLSA requirements, employers must preserve supplemental records, including:* • basic time and earning cards or sheets; • wage rate tables; • order, shipping, and billing records; and • records of additions to or deductions from wages.[166]	At least 2 years from the date of last entry.
Family and Medical Leave Act (FMLA)	*Covered employers must make, keep, and maintain records pertaining to their compliance with the FMLA, including:* • basic payroll and identifying employee data, including name, address, and occupation; • rate or basis of pay and terms of compensation; • daily and weekly hours per pay period;	At least 3 years.

[164] 29 C.F.R. §§ 516.2, 516.3. Presumably the regulation's reference to "prerequisites" is an error and should refer to "perquisites."

[165] 29 C.F.R. § 516.5.

[166] 29 C.F.R. § 516.6.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• additions to or deductions from wages and total compensation paid; • dates FMLA leave is taken by FMLA-eligible employees (leave must be designated in records as FMLA leave, and leave so designated may not include leave required under state law or an employer plan not covered by FMLA); • if FMLA leave is taken in increments of less than one full day, the hours of the leave; • copies of employee notices of leave furnished to the employer under the FMLA, if in writing; • copies of all general and specific notices given to employees in accordance with the FMLA; • any documents that describe employee benefits or employer policies and practices regarding the taking of paid and unpaid leave; • premium payments of employee benefits; and • records of any dispute between the employer and an employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and the disagreement. *Covered employers with no eligible employees must only maintain the following records:* • basic payroll and identifying employee data, including name, address, and occupation; • rate or basis of pay and terms of compensation; • daily and weekly hours worked per pay period; • additions to or deductions from wages; and • total compensation paid. *Covered employers in a joint employment situation must keep all the records required in the first series with respect to any primary employees, and must keep the records required by the second series with respect to any secondary employees.* *Also, if an FMLA-eligible employee is not subject to the FLSA record-keeping requirements for minimum wage and overtime purposes (i.e., not covered by, or exempt from*	

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	FLSA) an employer does not need to keep a record of actual hours worked, provided that: • FMLA eligibility is presumed for any employee employed at least 12 months; and • with respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written, maintained record. *Medical records also must be retained.* Specifically, records and documents relating to certifications, re-certifications, or medical histories of employees or employees' family members, created for purposes of FMLA, must be maintained as confidential medical records in separate files/records from the usual personnel files. If the ADA is also applicable, such records must be maintained in conformance with ADA-confidentially requirements (subject to exceptions). If the Genetic Information Nondiscrimination Act of 2008 (GINA) is applicable, records and documents created for purposes of FMLA containing family medical history or genetic information as defined in GINA must be maintained in accordance with the confidentiality requirements of Title II of GINA.[167]	
Federal Insurance Contributions Act (FICA)	*Employers must keep FICA records, including:* • copies of any return, schedule, or other document relating to the tax; • records of all remuneration (cash or otherwise) paid to employees for employment services. The records must show with respect to each employee receiving such remuneration: ▪ name, address, and account number of the employee and additional information when the employee does not provide a Social Security card; ▪ total amount and date of each payment of remuneration (including any sum withheld as tax or for any other reason) and the period of services covered by such payment;	At least 4 years after the date the tax is due or paid, whichever is later.

[167] 29 U.S.C. § 2616; 29 C.F.R. § 825.500.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	▪ amount of each such remuneration payment that constitutes wages subject to tax; ▪ amount of employee tax, or any amount equivalent to employee tax, collected with respect to such payment, and, if collected at a time other than the time such payment was made, the date collected; and ▪ if the total remuneration payment and the amount thereof which is taxable are not equal, the reason for this; • the details of each adjustment or settlement of taxes under FICA; and • records of all remuneration in the form of tips received by employees, employee statements of tips under section 6053(a) (unless otherwise maintained), and copies of employer statements furnished to employees under section 6053(b).[168]	
Immigration	Employers must retain all completed Form I-9s.[169]	3 years after the date of hire or 1 year following the termination of employment, whichever is later.
Income Tax: Accounting Records	*Any taxpayer required to file an income tax return must maintain accounting records that will enable the filing of tax returns correctly stating taxable income each year, including:* • regular books of account or records, including inventories, sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown by such person in any return of such tax or information.[170]	Required to be maintained for "so long as the contents [of the records] may become material in the administration of any internal revenue law;" this could be as long as 15 years in some cases.

[168] 26 C.F.R. §§ 31.6001-1, 31.6001-2.

[169] 8 C.F.R. § 274a.2.

[170] 26 U.S.C. § 3402; 26 C.F.R. § 1.6001-1.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Income Tax: Employee Payment Records	*Employers are required to maintain records reflecting all remuneration paid to each employee, including:* • employee's name, address, and account number; • total amount and date of each payment; • the period of services covered by the payment; • the amount of remuneration that constitutes wages subject to withholding; • the amount of tax collected and, if collected at a time other than the time the payment was made, the date collected; • an explanation for any discrepancy between total remuneration and taxable income; • the fair market value and date of each payment of noncash remuneration for services performed as a retail commissioned salesperson; and • other supporting documents relating to each employee's individual tax status.[171]	4 years after the return is due or the tax is paid, whichever is later.
Income Tax: W-4 Forms	Employers must retain all completed Form W-4s.[172]	As long as it is in effect and at least 4 years thereafter.
Unemployment Insurance	*Employers are required to maintain all relevant records under the Federal Unemployment Tax Act, including:* • total amount of remuneration paid to employees during the calendar year for services performed; • amount of such remuneration which constitutes wages subject to taxation; • amount of contributions paid into state unemployment funds, showing separately the payments made and not deducted from the remuneration of its employees, and payments made and deducted or to be deducted from employee remuneration; • information required to be shown on the tax return and the extent to which the employer is liable for the tax; • an explanation for any discrepancy between total remuneration paid and the amount subject to tax; and • the dates in each calendar quarter on which each employee performed services not in the course of the	At least 4 years after the later of the date the tax is due or paid for the period covered by the return.

[171] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

[172] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	employer's trade or business, and the amount of the cash remuneration paid for those services.[173]	
Workplace Safety / the Fed-OSH Act: Exposure Records	*Employers must preserve and retain employee exposure records, including:* • environmental monitoring or measuring of a toxic substance or harmful physical agent, including personal, area, grab, wipe, or other form of sampling, as well as related collection and analytical methodologies, calculations, and other background data relevant to an interpretation of the results obtained; • biological monitoring results which directly assess the absorption of a toxic substances or harmful physical agent by body specimens; and • Material Safety Data Sheets (MSDSs), or in the absence of these documents, a chemical inventory or other record reveling the identity of a toxic substances or harmful physical agent and where and when the substance or agent was used. *Exceptions to this requirement include:* • background data to workplace monitoring need only be retained for 1 year provided that the sampling results, collection methodology, analytic methods used, and a summary of other background data is maintained for 30 years; • MSDSs need not be retained for any specified time so long as some record of the identity of the substance, where it was used and when it was used is retained for at least 30 years; and • biological monitoring results designated as exposure records by a specific Fed-OSH Act standard should be retained as required by the specific standard.[174]	At least 30 years.
Workplace Safety / the Fed-OSH Act: Medical Records	*Employers must preserve and retain "employee medical records," including:* • medical and employment questionnaires or histories; • results of medical examinations and laboratory tests;	Duration of employment plus 30 years.

[173] 26 C.F.R. § 31.6001-4.

[174] 29 C.F.R. § 1910.1020(d).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• medical opinions, diagnoses, progress notes, and recommendations; • first aid records; • descriptions of treatments and prescriptions; and • employee medical complaints. *"Employee medical record" does not include:* • physical specimens; • records of health insurance claims maintained separately from employer's medical program; • records created solely in preparation for litigation that are privileged from discovery; • records concerning voluntary employee assistance programs, if maintained separately from the employer's medical program and its records; and • first aid records of one-time treatment which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job, if made on-site by a nonphysician and maintained separately from the employer's medical program and its records.[175]	
Workplace Safety: Analyses Using Medical and Exposure Records	*Employers must preserve and retain analyses using medical and exposure records*, including any compilation of data, or other study based on information collected from individual employee exposure or medical records, or information collected from health insurance claim records, provided that the analysis has been provided to the employer or no further work is being done on the analysis.[176]	At least 30 years.
Workplace Safety: Injuries and Illnesses	*Employers must preserve and retain records of employee injuries and illnesses, including:* • OSHA 300 Log; • the privacy case list (if one exists); • the Annual Summary; • OSHA 301 Incident Report; and • old 200 and 101 Forms.[177]	5 years following the end of the calendar year that the record covers.

[175] 29 C.F.R. § 1910.1020(d).

[176] 29 C.F.R. § 1910.1020(d).

[177] 29 C.F.R. §§ 1904.33, 1904.44.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Additional record-keeping requirements apply to government contractors. The list below, while nonexhaustive, highlights some of these obligations.		
Affirmative Action Programs (AAP)	*Contractors required to develop written affirmative action programs must maintain:* • current AAP and documentation of good faith effort; and • AAP for the immediately preceding AAP year and documentation of good faith effort.[178]	Immediately preceding AAP year.
Equal Employment Opportunity: Personnel & Employment Records	*Government contractors covered by Executive Order No. 11246 and those required to provide affirmative action to persons with disabilities and/or disabled veterans and veterans of the Vietnam Era must retain the following records:* • records pertaining to hiring, assignment, promotion, demotion, transfer, lay off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship; • other records having to do with requests for reasonable accommodation, the results of any physical examination, job advertisements and postings, applications, resumes; and • any and all expressions of interest through the internet or related electronic data technologies as to which the contractor considered the individual for a particular position, such as on-line resumes or internal resume databases, records identifying job seekers contacted regarding their interest in a particular position, regardless of whether the individual qualifies as an internet applicant under 41 C.F.R. § 60–1.3, tests and test results, and interview notes; ▪ for purposes of record keeping with respect to internal resume databases, the contractor must maintain a record of each resume added to the database, a record of the date each resume was added, the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used and the date of the search;	3 years recommended; regulations state "not less than two years from the date of the making of the record or the personnel action involved, whichever occurs later." If the contractor has fewer than 150 employees or does not have a contract of at least $150,000, the minimum retention period is one year from the date of making the record or the personnel action, whichever occurs later.

[178] 41 C.F.R. § 60-1.12(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	▪ for purposes of record keeping with respect to external resume databases, the contractor must maintain a record of the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used, the date of the search, and the resumes of job seekers who met the basic qualifications for the particular position who are considered by the contractor). *Additionally, for any record the contractor maintains pursuant to 41 C.F.R. § 60-1.12, it must be able to identify:* • gender, race, and ethnicity of each employee; and • where possible, the gender, race, and ethnicity of each applicant or internet applicant.[179]	
Equal Employment Opportunity: Complaints of Discrimination	*Where a complaint of discrimination has been filed, an enforcement action commenced, or a compliance review initiated, employers must maintain:* • personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person; and • application forms or test papers completed by unsuccessful applicants and candidates for the same position as the aggrieved person applied and was rejected.[180]	Until final disposition of the complaint, compliance review or action.
Minimum Wage Under Executive Orders Nos. 13658 (contracts entered into on or after January 1, 2015), 14026 (contracts entered into on or after January 30, 2022)	*Covered contractors and subcontractors performing work must maintain for each worker:* • name, address, and Social Security number; • occupation(s) or classification(s); • rate or rates of wages paid; • number of daily and weekly hours worked; • any deductions made; and • total wages paid. These records must be available for inspection and transcription by authorized representatives of the Wage and Hour Division (WHD) of the U.S. Department of Labor.	3 years.

[179] 41 C.F.R. §§ 60-1.12, 60-300.80, and 60-741.80.

[180] 41 C.F.R. §§ 60-1.12, 60-741.80.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	The contractor must also permit authorized representatives of the WHD to conduct interviews with workers at the worksite during normal working hours.[181]	
Paid Sick Leave Under Executive Order No. 13706	*Contractors and subcontractors performing work subject to Executive Order No. 13706 must keep the following records:* • employee's name, address, and Social Security number; • employee's occupation(s) or classification(s); • rate(s) of wages paid (including all pay and benefits provided); • number of daily and weekly hours worked; • any deductions made; • total wages paid (including all pay and benefits provided) each pay period; • a copy of notifications to employees of the amount of accrued paid sick leave; • a copy of employees' requests to use paid sick leave (if in writing) or (if not in writing) any other records reflecting such employee requests; • dates and amounts of paid sick leave used by employees (unless a contractor's paid time off policy satisfies the EO's requirements, leave must be designated in records as paid sick leave pursuant to the EO); • a copy of any written responses to employees' requests to use paid sick leave, including explanations for any denials of such requests; • any records relating to the certification and documentation a contractor may require an employee to provide, including copies of any certification or documentation provided by an employee; • any other records showing any tracking of or calculations related to an employee's accrual and/or use of paid sick leave; • the relevant covered contract; • the regular pay and benefits provided to an employee for each use of paid sick leave; and • any financial payment made for unused paid sick leave upon a separation from employment intended to	During the course of the covered contract as well as after the end of the contract.

[181] 29 C.F.R. § 23.260.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	relieve a contractor from its reinstatement obligation.[182]	
Davis-Bacon Act	*Davis-Bacon Act contractors or subcontractors must maintain the following records with respect to each employee:* • name, address, and Social Security number; • work classification; • hourly rates of wages paid (including rates of contributions or costs anticipated for *bona fide* fringe benefits or cash equivalents); • daily and weekly number of hours worked; and • deductions made and actual wages paid. *Contractors employing apprentices or trainees under approved programs must maintain written evidence of:* • registration of the apprenticeship programs; • certification of trainee programs; • the registration of the apprentices and trainees; • the ratios and wage rates prescribed in the program; and • worker or employee employed in conjunction with the project.[183]	At least 3 years after the work.
Service Contract Act	*Service Contract Act contractors or subcontractors must maintain the following records with respect to each employee:* • name, address, and Social Security number; • work classification; • rates of wage; • fringe benefits; • total daily and weekly compensation; • the number of daily and weekly hours worked; • any deductions, rebates, or refunds from daily or weekly compensation; • list of wages and benefits for employees not included in the wage determination for the contract; • any list of the predecessor contractor's employees which was furnished to the contractor by regulation; and	At least 3 years from the completion of the work records containing the information.

[182] 29 C.F.R. § 13.25.

[183] 29 C.F.R. § 5.5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• a copy of the contract.[184]	
Walsh-Healey Act	*Walsh-Healey Act supply contractors must keep the following records:* • wage and hour records for covered employees showing wage rate, amount paid in each pay period, hours worked each day and week; • the period in which each employee was engaged on a government contract and the contract number; • name, address, sex, and occupation; • date of birth of each employee under 19 years of age; and • a certificate of age for employees under 19 years of age.[185]	At least 3 years from the last date of entry.

3.1(b)(ii) *State Guidelines on Record Keeping*

Table 8 summarizes the state record-keeping requirements.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Fair Employment Practices: Discrimination	Every employer must make and preserve records relevant to determine whether unlawful practices have been or are being committed. Compliance with the federal regulations is sufficient.[186]	None specified.
Immigration	Every employer must keep a record of the employment eligibility verification for each employee as obtained through the E-Verify program.[187]	Length of employment or 3 years, whichever is longer.
Income Tax	*Employers must keep and maintain tax records including:* • all fixed tax returns including attachments; • signature documents used for the tax return, if any; and	Generally, 4 years after the return is required to be

[184] 29 C.F.R. § 4.6.

[185] 41 C.F.R. § 50-201.501.

[186] ARIZ. REV. STAT. ANN. § 41-1482; ARIZ. ADMIN. CODE § 10-3-209.

[187] ARIZ. REV. STAT. ANN. § 23-214.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• suitable records, and other books and accounts necessary to determine tax liability.[188]	filed or is filed, whichever period is later. For certain claims, however, the statute of limitations may be greater than 4 years.
Unemployment Insurance	*Employers must keep true and accurate records of all disbursements made in cash, by check, or in any other medium, including:* • check stubs and cancelled checks for all payments; • cash receipts and disbursement records; • payroll journal; • purchase journal; • general journal; • general ledger; • payroll tax reports for all federal and state agencies; and • individual earnings records. *Such records must include, for each pay period:* • beginning and ending dates; • total amount of remuneration, whether in cash or other medium; and • dates in each calendar week on which there were the largest number of workers in employment and the number of workers. *Such records must include, for each worker:* • full name and Social Security number; • date hired, rehired, or returned to work after temporary layoff; • date of and reason for separation; • amount of remuneration in cash, by check, or other medium paid each quarter; • place (city or town) in which services were performed; and	Not less than 4 full calendar years.

[188] ARIZ. REV. STAT. ANN. §§ 42-1104, 42-1105.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• remuneration showing separately cash, reasonable cash value of noncash remuneration, and special payments.[189]	
Wages, Hours & Payroll	*Each employer must keep true and accurate wage and hour records, including:* • all time and earning cards from their last effective date, all wage-rate tables or schedules of the employer that provide the piece rates or other rates used in computing wages; • records of additions to or deductions from wages paid and records that support or corroborate the additions or deductions; • employee's name in full, and on the same record, the employee's identifying symbol or number if used in place of the employee's name on any time, work or payroll record; • home address, including zip code, date of birth, if under19, and occupation in which employed; • time of day and day of week on which the employee's workweek begins. If the employee is part of a workforce or employed in or by an establishment all of whose workers have a workweek beginning at the same time on the same day, then a single notation of the time of the day and beginning day of the workweek for the whole workforce or establishment is permitted; • regular hourly rate of pay for any workweek and an explanation of the basis of pay by indicating the monetary amount paid on a per hour, per day, per week, per piece, commission on sales, or other basis, including the amount and nature of each payment; • hours worked each workday and total hours worked each workweek; • total daily or weekly wages due for hours worked during the workday or workweek; • total premium pay for overtime hours and an explanation of how the premium pay was calculated exclusive of straight-time wages for overtime hours recorded; • total additions to or deductions from wages paid each pay period including employee purchase orders or	4 years.

[189] ARIZ. REV. STAT. ANN. § 23-721; ARIZ. ADMIN. CODE § 6-3-1702.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	wage assignments, including, for individual employee records, the dates, amounts, and nature of the items that make up the total additions and deductions; • total wages paid each pay period; and • date of payment and the pay period covered by payment.[190] An employer who makes retroactive payment of wages, voluntarily or involuntarily, must record on the pay records the amount of the payment to each employee, the period covered by the payment, and the date of the payment. *For an employee who is compensated on a salary basis at a rate that exceeds the minimum wage required under the Act, and who, under 29 CFR 541 is an exempt bona fide executive, administrative or professional employee, including an employee employed in the capacity of academic administrative personnel or teachers in elementary or secondary school, or in outside sales:* • name in full, and on the same record, the employee's identifying symbol or number if it is used in place of the employee's name on any time, work, or payroll record; • home address, including zip code; • date of birth, if under 19; • occupation in which employed; • time of day and day of week on which the employee's workweek begins. If the employee is part of a workforce or employed in or by an establishment all of whose workers have a workweek beginning at the same time on the same day, then a single notation of the time of the day and beginning day of the workweek for the whole workforce or establishment is permitted; • total wages paid each pay period; • date of payment and the pay period covered by payment; • the amount of earned paid sick time available to the employee; • the amount of earned paid sick time taken by the employee to date in the year; and	

[190] ARIZ. REV. STAT. ANN. § 23-364; ARIZ. ADMIN. CODE § 20-5-1210.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• records containing the basis on which wages are paid in sufficient detail to permit a determination or calculation of whether the salary received exceeds the minimum wage required under the Act, including a record of hours upon which payment of the salary is based, whether full or part time. *With respect to employees working on fixed schedules, an employer may maintain records showing instead of the hours worked each day and each workweek, the schedule of daily and weekly hours the employee normally works provided:* • in weeks in which an employee adheres to this schedule, the employer indicated by check mark, statement, or other method, that the employee actually worked the hours; and • in weeks in which more or fewer than the scheduled hours are worked, the employer records the number of hours actually worked each day and each week. *With respect to an employee that customarily and regularly receives tips, the employer must ensure that the keeps the following records, including:* • a symbol, letter, or other notation placed on the pay records identifying each employee whose wage is determined in part by tips; • amount of tips the employee reports to the employer; • the hourly wage of each tipped employee after taking into consideration the employee's tips; • hours worked each workday in any occupation in which the employee does not receive tips, and total daily or week straight-time payment made by the employer for the hours; • hours worked each workday in occupations in which the employee receives tips and total daily or weekly straight-time wages for the hours; and • a copy of the notice required under R20-5-1207(C).	
Wages, Hours, & Payroll: Paid Sick Leave	*Each employer must keep the following:* • all time and earning cards or sheets on which are entered the daily starting and stopping time of individual employees, or of separate work forces, or	4 years.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	the amounts of work accomplished by individual employees on a daily, weekly, or pay period basis (for example, units produced) when those amounts determine in whole or in part: (1) those employees' the pay period wages; and (2) those employees' earned paid sick time or equivalent paid time off of those employees; • amount of earned paid sick time available to the employee; • amount of earned paid sick time taken by the employee to date in the year; and • amount of pay the employee has received as earned paid sick time.[191]	
Youth Employment	For each minor employee under the age of 16, employers must keep the following records: • number of hours the youth is employed each week; • number of hours the youth is employed each day; • the dates the youth is enrolled in a session of school; • the name of the school district in which the youth is enrolled; and • the specific hours the youth works at the establishment.[192]	None specified.
Workers' Compensation	Records showing wage expenditures of the employer must be open for inspection by the Industrial Commission of Arizona.[193]	None specified.
Workplace Safety	*Each employer must make and maintain records concerning occupational accidents and illnesses, including records:* • relating to work-related deaths, injuries, and illnesses; • relating to hazardous substance exposure; and • required under the Fed-OSH Act (29 C.F.R. § 1904).[194]	None specified (see federal requirement).

[191] ARIZ. REV. STAT. ANN. § 23-364; ARIZ. ADMIN. CODE § 20-5-1210.

[192] ARIZ. ADMIN. CODE § 20-5-903.

[193] ARIZ. REV. STAT. ANN. § 23-926.

[194] ARIZ. REV. STAT. ANN. § 23-427; ARIZ. ADMIN. CODE § 20-5-629.

3.1(c) *Personnel Files*

3.1(c)(i) *Federal Guidelines on Personnel Files*

Federal law does not address access to personnel files for private-sector employees.

3.1(c)(ii) *State Guidelines on Personnel Files*

Arizona does not have a traditional access to personnel files statute, although its paid sick leave law requires employers to permit an employee or the employee's designated representative to inspect and copy payroll records pertaining to that employee.[195] For additional information on Arizona's paid sick leave law, see **3.9(b)(ii)**.

3.2 Privacy Issues for Employees

3.2(a) *Background Screening of Current Employees*

3.2(a)(i) *Federal Guidelines on Background Screening of Current Employees*

For information on federal law related to background screening of current employees, see **1.3**.

3.2(a)(ii) *State Guidelines on Background Screening of Current Employees*

There are no state statutory restrictions on an employer's use of criminal history, credit checks, or social media checks of current employees, other than the state's mini-FCRA law, see **1.3(b)(ii)**.

3.2(b) *Drug & Alcohol Testing of Current Employees*

3.2(b)(i) *Federal Guidelines on Drug & Alcohol Testing of Current Employees*

For information on federal laws requiring drug testing of current employees, see **1.3(e)(i)**.

3.2(b)(ii) *State Guidelines on Drug & Alcohol Testing of Current Employees*

Private Employers

Arizona's Drug Testing of Employees Act gives private employers the right to test employees.[196] This statute limits the ability of employees to sue employers as a result of an adverse action based on a testing program. The statute does not itself mandate that private employers perform drug testing, but if a company must perform drug testing under other state or federal requirements or if the employer voluntarily performs testing on its employees, the employees are protected by the Act. Arizona law allows testing for any job-related purpose consistent with business necessities—for example, to investigate possible employee impairment; to investigate accidents; to ensure a safe work environment; to maintain productivity and quality of products/service; to ensure security of property or information; or to investigate a reasonable suspicion that an employee may be affected by drugs or alcohol that may adversely affect job performance.

Arizona recognizes employers' rights to take disciplinary action against employees who: (1) refuse to participate in testing; or (2) test positive. Disciplinary action can include rehabilitation, a treatment or counseling program, suspension with or without pay, termination, refusal to hire, or other adverse

[195] ARIZ. REV. STAT. ANN. § 23-364(D).

[196] ARIZ. REV. STAT. ANN. §§ 23-493 to 23-493.12.

employment action. An employee discharged for refusing to submit to a drug or alcohol test or an employee who tests positive, is prohibited from receiving unemployment benefits because those actions constitute misconduct.

Written Policy. To implement a new drug testing policy, an employer should implement a written policy and distribute it to all employees. Applicants must also be advised about the company's drug and alcohol testing policy. A written policy must include a statement of the employer's policy regarding drug and alcohol use by employees, a description of those employees/applicants subject to testing, the circumstances under which testing may be required, and the substances for which the employer may require testing. The written policy must also include a description of the testing methods and collection procedures, the consequences of refusing to participate in testing, any adverse personnel action that may be taken based on the testing procedures or results, and the right of the employee, on request, to obtain the written test results. Finally, the written policy must include the right of an employee, on request, to explain in a confidential setting the reasons for a positive test result and a statement of the employer's policy regarding the confidentiality of test results. All compensated employees must be uniformly included in the testing policy, including officers, directors, and supervisors.

Confidentiality. The test records and results must be kept confidential under the law. An employee has a right to access the written test results of their own tests.

Method of Testing. The employer may choose the type of sample to be used for testing, including, most commonly, urine, hair, or breath. The employer may require certain procedures to ensure reliable testing including the presentation of identification from persons being tested.

The Drug Testing of Employees Act also requires testing to be done under conditions that must be reasonable and sanitary. The results must be reliable by labeling the samples and giving the person tested the opportunity to provide notification of any information that may be relevant to the test. Further, the collection, storage, and transportation of the sample must be reasonably designed to preclude the possibility of contamination, adulteration, or misidentification. The testing must be done with scientifically-accepted analytical methods and procedures performed in an approved or certified laboratory. There must be confirmation of a positive drug test by a more reliable procedure than the initial drug screen that incorporates a chromatographic technique (*e.g.*, gas chromatography-mass spectrometry).

Timing of Testing. Drug and alcohol testing normally must occur during, or immediately before or after, a regular work period. The testing is work time for the purposes of compensation for employees. The employer pays the costs for testing required of employees, as well as reasonable transportation costs if testing is conducted at a location other than the employee's normal worksite.

Employer Liability Protection. The law affords the employer several protections, but only if the employer establishes a policy and initiates testing in accordance with the law as noted above. Then, the employer is protected from liability against any legal actions taken in good faith based on the results of a positive test. The employer also is shielded from liability for any failure to test for drugs or alcohol impairment or a failure to test for a specific drug. There is no cause of action for a failure to test or detect any specific drug or other substance, any medical condition or any mental, emotional, or psychological disorder or condition. The employer also is protected from liability for suspending or terminating its testing program.

An employer can only be held liable for a false positive under certain specified conditions:

1. the employer takes adverse action;
2. the employer knew or clearly should have known the test was a false positive; and
3. the employer ignored this knowledge or exhibited a reckless or malicious disregard or a willful intent to deceive or be deceived.

However, if the employer's reliance on a false positive test result is reasonable and in good faith, the employer is not liable for monetary damages. No employer liability exists for any action taken related to a false negative drug or alcohol test.

Additionally, no cause of action is permitted for libel, slander, or defamation against an employer that established a testing program in accordance with the law, unless: (1) the results are disclosed to a person other than the employer, tested employee, or applicant, or other authorized person; (2) the information disclosed was a false positive test result; (3) there was a negligent disclosure of the false positive test result; and (4) all other legal elements for defamation are established.

Public Employers

Public-sector employers in Arizona may be limited in testing employees by the constitutional right to privacy and laws prohibiting unreasonable searches and seizures, including Fourth Amendment limitations on searches and seizures; Fifth Amendment due process requirements; Fourteenth Amendment guarantee of equal protection; First Amendment freedom of religion; and the implied right of privacy.

The Arizona Supreme Court has addressed the parameters of the right of Arizona public employers to implement drug testing. In *Petersen v. City of Mesa*, the court addressed whether a municipality could randomly test its firefighters for the presence of drugs and/or alcohol.[197] In *Petersen*, the City implemented a substance abuse program "to deter prohibited alcohol and controlled substance use and to detect prohibited use for the purpose of removing identified users from the safety-sensitive work force."[198] The City utilized a computer program to select employees to be tested within 30 minutes of notification with allowance for travel time. The conditions of the urine tests were private bathroom stalls and a confirmation was done with gas chromatography/mass spectrometry. A medical review officer reviewed positive tests and met with employees who tested positive on a confidential basis to allow them to explain the results. There was no release of information, but the positive-tested employees were evaluated by a substance abuse professional.

The plaintiff alleged random drug testing violates the Arizona and U.S. Constitutions. Although under the Fourth Amendment, searches generally must be based on individualized suspicion, a search may be performed when "special needs" exist by implementing a balancing test: privacy interests versus the important governmental interest. The City's stated interests for random testing was that firefighters have safety-sensitive positions and random testing removes abusers from the safety-sensitive workforce. No evidence existed of *any* drug use by firefighters or of *any* accidents, fatalities, injuries or property damage attributed to drug use by firefighters. No rumors existed that firefighters used or abused drugs or alcohol. As a result, the court found the random drug testing was not designed to respond to any defined risk, but the court also found the privacy interests of the firefighters were lowered because of the stated policy. Nonetheless, the court held the City's random testing "[fell] outside the 'closely guarded category of

[197] 83 P.3d 35 (Ariz. 2004).

[198] 83 P.3d at 37.

constitutionally permissible suspicionless searches'" and upheld the trial court's injunction enjoining the City from testing without suspicion.

3.2(c) *Marijuana Laws*

3.2(c)(i) *Federal Guidelines on Marijuana*

Under federal law, it is illegal to possess or use marijuana.[199]

3.2(c)(ii) *State Guidelines on Marijuana*

Arizona has both a medical and recreational marijuana law.

The Arizona Medical Marijuana Act (AMMA)[200] allows qualifying patients with certain debilitating medical conditions to apply to the Arizona Department of Health Services for an identification card that permits the patient to obtain, or in certain cases cultivate, a limited amount of marijuana. The law also prohibits discrimination by employers against registered cardholders.[201] Specifically, unless a failure to do so would cause an employer to lose a monetary or licensing-related benefit under federal law or regulations, an employer may not discriminate against a person in hiring, termination, or imposing any term or condition of employment or otherwise penalize a person based upon either:

1. the person's status as a cardholder; or
2. a registered qualifying patient's positive drug test for marijuana components or metabolites, unless the patient used, possessed, or was impaired by marijuana on the premises of the place of employment or during the hours of employment.[202]

Employers can prohibit the ingestion of marijuana in any workplace and may, also, prohibit an employee working while under the influence of marijuana. However, a registered qualifying patient cannot be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment. An employer can discipline an employee for ingesting marijuana in the workplace or working while under the influence of marijuana.[203]

The Arizona Drug Testing of Employees Act allows employers to refuse to place medical marijuana users in safety-sensitive jobs and to discipline individuals when there is a good faith belief that the employee was impaired by or improperly possessed marijuana while at work or during work hours.[204] The belief regarding a drug's effects may be based on information including results of a drug or alcohol test, warning labels or other printed materials that accompany instructions for use of the drug, statements by the

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[199] 21 U.S.C. §§ 811-12, 841 *et seq*.

[200] ARIZ. REV. STAT. ANN. §§ 36-2801 *et seq.*

[201] ARIZ. REV. STAT. ANN. § 36-2813(B)(1).

[202] ARIZ. REV. STAT. ANN. § 36-2813(B)(1), (2).

[203] ARIZ. REV. STAT. ANN. § 36-2814.

[204] ARIZ. REV. STAT. ANN. § 23-493.06. For additional information on the Arizona Drug Testing of Employees Act, see **3.2(b)(ii)**.

employee, information from a physician or pharmacist, information from reputable reference sources in print or on the internet or other information the employer in good faith believes to be reliable[205]

Employers should take maximum advantage of the safe harbor provisions of the Arizona drug testing laws by adopting written drug testing policies that clearly articulate when, how, and why employees are subject to drug testing, as well as setting out the employer's rules about possessing, using, or being affected by medical marijuana at work.

At least one federal district court judge has held that an implied private right of action exists for Arizona Medical Marijuana Act (AMMA) violations.[206] Because the employer did not provide evidence the employee used, possessed, or was impaired by marijuana at work – in this case drug screen results alone were insufficient – it did not have a good faith basis to believe the employee was impaired and therefore violated the AMMA by suspending and terminating the employee based on the drug screen results. However, the court also held that side effects from smoking medical marijuana did not constitute a disability under the Arizona Civil Rights Act (ACRA) because they were objectively transitory and minor, such that "a reasonable jury would not be convinced that smoking medical marijuana gave Plaintiff a physical or mental impairment with an actual or expected duration of more than six months, as required to meet the definition of 'disabled.'"

Recreational marijuana is legal in Arizona.[207] However, the law does not restrict employers' rights to maintain a drug and alcohol free workplace or affect their ability to have workplace policies restricting marijuana use by employees or applicants. Under the law, employers are not required to allow or accommodate marijuana use, consumption, possession, transfer, display, transportation, sale or cultivation in a place of employment. Employers can prohibit or regulate conduct otherwise allowed by the law when such conduct occurs on or in their properties, and the law does not restrict property owners' or occupiers' rights to prohibit or regulate conduct otherwise allowed by the law on or in such property. Additionally, the law does not require a person to violate federal law or to implement or fail to implement a restriction on the possession, consumption, display, transfer, processing, manufacturing, or cultivation of marijuana if by doing so the person will lose a monetary or licensing-related benefit under federal law.

3.2(d) *Data Security Breach*

3.2(d)(i) *Federal Data Security Breach Guidelines*

Federal law does not contain a data security breach notification statute. However, of interest to employers that provide identity theft protection services to individuals affected by a data security breach, whether voluntarily or as required by state law:

- An employer providing identity protection services to an employee whose personal information may have been compromised due to a data security breach is not required to include the value of the identity protection services in the employee's gross income and wages.

[205] ARIZ. REV. STAT. ANN. § 23-493.06.

[206] *Whitmire v. Wal-Mart Stores*, 359 F. Supp. 3d 761 (D. Ariz. 2019).

[207] ARIZ. REV. STAT. § 36-2851.

- An individual whose personal information may have been compromised in a data breach is not required to include in the individual's gross income the value of the identity protection services.
- The value of the provided identity theft protection services is not required to be reported on an information return (such as Form W-2 or Form 1099-MISC) filed with respect to affected employees.[208]

The tax relief provisions above do not apply to:

- cash provided in lieu of identity protection services;
- identity protection services provided for reasons other than as a result of a data breach, such as identity protection services received in connection with an employee's compensation benefit package; or
- proceeds received under an identity theft insurance policy.[209]

3.2(d)(ii) *State Data Security Breach Guidelines*

Arizona law requires that when a covered entity becomes aware of an unauthorized acquisition and access to unencrypted or unredacted computerized data that includes "personal information," the entity must conduct a reasonable investigation to determine if a breach has occurred. If a breach has occurred, notice is required. However, a covered entity is not required to disclose a breach of the security system if, after a reasonable investigation, it or a law enforcement agency determines that a breach has not occurred or is not likely to occur.[210]

Covered Entities. The data security breach law covers any person who conducts business in Arizona that owns or licenses unencrypted data that includes personal information. Exceptions include:

- any person subject to and complies with title V of the Gramm-Leach-Bliley Act; and
- entities covered under and in compliance with federal laws and regulations under the Health Insurance Portability and Accountability Act (HIPAA).[211]

Personal information is defined as an individual's username or email address in combination with a password or security question and answer or one's first name or first initial and last name in combination with any one of more of the following: (1) Social Security number; (2) driver's license number or a nonoperating identification license number; (3) a private key that is unique to the individual and is used to authenticate or sign electronic documents; (4) a financial account number or credit or debit card number in combination with any required security code, access code, or password that would permit access to the account; (5) health insurance identification number; (6) information about an individual's medical or mental health treatment or diagnosis by a health care professional; (7) passport number; (8) taxpayer identification number or an identity protection personal identification number issued by the U.S. IRS; or (9) unique biometric data generated from a measurement or analysis of human body

[208] I.R.S. Announcement 2015-22, *Federal Tax Treatment of Identity Protection Services Provided to Data Breach Victims* (Aug. 14, 2015), *available at* https://www.irs.gov/pub/irs-drop/a-15-22.pdf.

[209] I.R.S. Announcement 2015-22, *Federal Tax Treatment of Identity Protection Services Provided to Data Breach Victims* (Aug. 14, 2015).

[210] ARIZ. REV. STAT. ANN. § 18-551.

[211] ARIZ. REV. STAT. ANN. § 18-551.

characteristics to authenticate an individual when the individual accesses an online account. Exceptions to this definition include data that is encrypted, redacted, or secured by any other method so that the data is rendered unreadable or unusable and information that is lawfully available publicly.[212]

Content & Form of Notice. Notice may be in one of the following formats:

- written notice;
- electronic notice if the person's primary method of communication with the individual is by electronic means or is consistent with the federal e-sign act;
- telephonic notice; or
- substitute notice if the person demonstrates that:
  - the cost of providing notice would exceed $50,000;
  - the affected class of subject individuals to be notified exceeds 100,000 persons; or
  - the person does not have sufficient contact information.[213]

Substitute notice must consist of all of the following:

- electronic mail notice if the person has electronic mail addresses for the individuals subject to the notice;
- conspicuous posting of the notice for at least 45 days on the website of the covered entity if the covered entity maintains one; and
- notification to major statewide media.[214]

If the notification is occurring through substitute notice, the covered entity must also submit a written letter to the attorney general that demonstrates the facts necessary for substitute notice.

Notification must include the following:

- the approximate date of the breach;
- a brief description of the personal information included in the breach;
- the toll-free numbers and addresses for the three largest nationwide reporting agencies; and
- the toll-free number, address, and website for the Federal Trade Commission or any federal agency that assists consumers with identity theft matters.[215]

Exceptions. Exceptions in the law include:

- A covered entity that maintains and complies with a notification procedure as part of an information security policy for the treatment of personal information is compliant with the

[212] ARIZ. REV. STAT. ANN. § 18-551.

[213] ARIZ. REV. STAT. ANN. § 18-552.

[214] ARIZ. REV. STAT. ANN. § 18-552.

[215] ARIZ. REV. STAT. ANN. § 18-552.

statute. The policy must afford the same or greater protection to the affected individuals as the statute.

- Any person who complies with the notification requirements or security breach procedures of their primary or functional federal regulator is compliant with this statute.[216]

Timing of Notice. Notice must be given within 45 days. However, notification may be delayed if:

- a law enforcement agency indicates that notification will impede a criminal investigation;
- a covered entity needs time to determine the nature and scope of the breach;
- a covered entity needs time to identify the individuals affected; or
- a covered entity needs time to restore the reasonable integrity of the data system.[217]

Additional Provisions. If it is determined that the breach requires notification of more than 1,000 individuals, the entity must also notify the three largest nationwide consumer reporting agencies, the state attorney general, and the Director of the Arizona Department of Homeland Security (Director). The notification must be in writing on a form provided by the attorney general or Director or with a copy of the notice provided to the individuals.

The attorney general may enforce willful violations of this law and may impose a civil penalty for a violation of up to $10,000 per affected individual or the total amount of economic loss sustained by the affected individuals. Any penalty may not exceed $500,000 total.

3.3 Minimum Wage & Overtime

3.3(a) *Federal Guidelines on Minimum Wage & Overtime*

The primary source of federal wage and hour regulation is the Fair Labor Standards Act (FLSA). The FLSA establishes minimum wage, overtime, and child labor standards for covered employers. The FLSA applies to businesses that have: (1) annual gross revenue exceeding $500,000; and (2) employees engaged in commerce or in the production of goods for commerce, or employees that handle, sell, or otherwise work on goods or material that have been moved in or produced for commerce. For more information on this topic, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

As a general rule, federal wage and hour laws do not preempt state laws.[218] Thus, an employer must determine whether the FLSA or state law imposes a more stringent minimum wage, overtime, or child labor obligation and, if so, apply the more stringent of the two standards. If an employee is exempt from either federal or state law, but not both, then the employee must be paid for work in accordance with whichever law applies.

3.3(a)(i) *Federal Minimum Wage Obligations*

The current federal minimum wage is $7.25 per hour for most nonexempt employees.[219]

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[216] ARIZ. REV. STAT. ANN. § 18-552.

[217] ARIZ. REV. STAT. ANN. § 18-552.

[218] 29 U.S.C. § 218(a).

[219] 29 U.S.C. § 206.

Tipped employees are paid differently. If an employee earns sufficient tips, an employer may take a maximum tip credit of up to $5.12 per hour. Therefore, the minimum cash wage that a tipped employee must be paid is $2.13 per hour. Note that if an employee does not make $5.12 in tips per hour, an employer must make up the difference between the wage actually made and the federal minimum wage of $7.25 per hour. An employer bears the burden of proving that it is not taking a tip credit larger than the amount of tips actually received by the employee.[220]

An employer cannot keep tips received by employees for any purpose, including allowing managers or supervisors to keep a portion of employees' tips, regardless of whether the employer takes a tip credit.[221]

3.3(a)(ii) *Federal Overtime Obligations*

Nonexempt employees must be paid one-and-a-half times their regular rate of pay for all hours worked over 40 in a workweek.[222] For more information on exemptions to the federal minimum wage and/or overtime obligations, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

3.3(b) *State Guidelines on Minimum Wage Obligations*

When resolving any question about an employee's wages, Arizona employers must consider their obligations under state law in addition to an employer's minimum wage and overtime obligations under federal law. Arizona regulates these obligations under the state labor law and through wage orders issued by the Industrial Commission of Arizona (ICA).

3.3(b)(i) *State Minimum Wage*

Currently, the Arizona minimum wage is $14.35 per hour for most nonexempt employees.[223] Each January, the minimum wage is increased based on the increase in the cost of living, rounded to the nearest multiple of $ 0.05, *e.g.*, on January 1, 2025 it will increase to $14.70.

3.3(b)(ii) *Tipped Employees*

Tipped employees may be paid differently. An employer may consider tips as part of their wages, but the minimum cash wage an employer directly pays a tipped employee cannot be $3.00 per hour less than the minimum wage. If tipped employees do not receive at least the minimum wage when direct wages and tips are combined, an employer must pay the employee the difference.[224]

3.3(b)(iii) *Minimum Wage Exceptions & Rates Applicable to Specific Groups*

The Arizona minimum wage is applicable to all employers except *small businesses*, which are defined as businesses that generate less than $500,000 in gross sales and that are not involved in interstate commerce.[225] As a result, only the very smallest companies will be deemed exempt from the statutory

[220] 29 U.S.C. §§ 203, 206.

[221] 29 U.S.C. § 3(m)(2)(B).

[222] 29 U.S.C. § 207.

[223] ARIZ. REV. STAT ANN. § 23-363.

[224] ARIZ. REV. STAT ANN. § 23-363(C).

[225] ARIZ. REV. STAT ANN. § 23-362(C).

provisions. Further, the minimum wage provisions do not apply to individuals employed by a parent or a sibling, or those employed performing babysitting services in the employer's home on a casual basis.[226]

3.3(b)(iv) *Local Minimum Wage Ordinances*

The City of Flagstaff and City of Tucson have enacted minimum wage ordinances that establish a local minimum wage rate that may differ from the state's minimum wage rate. Local minimum wage ordinances often include their own notice, record-keeping, and wage statement requirements, so employers with operations in those localities must be aware of their overlapping state and local compliance obligations.

Under the City of Flagstaff's minimum wage ordinance, covered employees must receive a minimum wage of $17.40 per hour as of January 1, 2024.[227] If the federal minimum wage rises to a level above this rate, then the federal rate is used. Currently, for covered tipped employees, employers may apply a tip credit up to $1.50 per hour, and the minimum cash wage is $15.90 per hour. However, the maximum tip credit begins to decrease each subsequent January 1 until it is eliminated on January 1, 2026. Beginning January 1, 2023, and each subsequent January 1, the minimum wage will increase by the rate of inflation, rounded to the nearest multiple of 5 cents, *e.g.*, on January 1, 2025, the minimum wage increase to $17.85; for tipped employees, the maximum tip credit will decrease to $1.00, resulting in a minimum cash wage of $16.85.

In addition to a local minimum wage posting requirement at any workplace or job site, employers must also provide each employee at the time of hire written notice of: (1) the employer's business name, address, and telephone number; (2) the employee's right to earn the minimum wage and the current minimum wage rate; (3) the employee's right to be free from retaliation; (4) the employee's right to file a complaint; and (5) the contact information for the enforcement agency where questions about rights and responsibilities under the minimum wage ordinance can be answered.[228] Both the posting and notice must be provided in a language other than English if at least 5% of the employees at the workplace or jobsite speak the language as their primary language. There are additional record-keeping requirements.

Under the City of Tucson's minimum wage ordinance, covered employees and workers for hire must receive a minimum wage of $14.35 per hour beginning as of January 1, 2024.[229] The Tucson minimum wage will increase on January 1, 2025 to $15.00[230]. Beginning January 1, 2026, and each subsequent January 1, the minimum wage will increase by the rate of inflation, rounded to the nearest multiple of 5 cents. If the federal or state minimum wage rises to a level above these rates, then the higher rate becomes the local rate. For covered tipped employees, employers may apply a tip credit up to $3.00 per hour. Although the law does not expressly contain a recordkeeping requirement, if an employer or hiring entity does not maintain pay and time records, or allow the city reasonable access to records, or if records were not created contemporaneously, an employee or worker's account is presumed accurate.

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[226] ARIZ. REV. STAT ANN. § 23-362(A).

[227] FLAGSTAFF, ARIZ., CITY CODE §§ 15-01-001-0002 *et seq*.

[228] FLAGSTAFF, ARIZ., CITY CODE § 15-01-001-0004.

[229] TUCSON, ARIZ., CITY CODE §§ 17-81 *et seq*.

[230] In 2024, like in 2023, the preset minimum wage in the ordinance is less than the annually adjusted state minimum wage. When the state minimum wage exceeds the local minimum wage, the local rate becomes the higher state rate.

3.3(c) *State Guidelines on Overtime Obligations*

Arizona law does not have a separate overtime provision. Therefore, the payment of overtime in Arizona is regulated by the FLSA, which establishes a 40-hour overtime standard for covered employees.

Notably, Arizona Revised Statutes sections 23-391 and 23-392 set forth overtime pay requirements for certain law enforcement personnel employed by the state or any political subdivision, including universities and colleges, as well as certain public employees who work for the Department of Administration, Board of Regents, and some employees of community colleges and schools for the deaf and blind. Like the FLSA, the law calls for overtime to be paid at the rate of one and one-half times the hourly rate for work in excess of 40 hours in a workweek. The law, however, permits compensatory time off on the basis of one and one-half hours for each overtime hour worked, if overtime compensation is required by federal law.

3.4 Meal & Rest Period Requirements

3.4(a) *Federal Meal & Rest Period Guidelines*

3.4(a)(i) *Federal Meal & Rest Periods for Adults*

Federal law contains no generally applicable meal period requirements for adults. Under the FLSA, *bona fide* meal periods (which do not include coffee breaks or time for snacks and which ordinarily last 30 minutes or more) are not considered "hours worked" and can be unpaid.[231] Employees must be completely relieved from duty for the purpose of eating regular meals. Employees are *not* relieved if they are required to perform any duties—active or inactive—while eating. It is not necessary that employees be permitted to leave the premises if they are otherwise completely freed from duties during meal periods.

Federal law contains no generally applicable rest period requirements for adults. Under the FLSA, rest periods of short duration, running from five to 20 minutes, must be counted as "hours worked" and must be paid.[232]

3.4(a)(ii) *Federal Meal & Rest Periods for Minors*

The FLSA does not include any generally applicable meal and rest period requirements for minors. The principles described above as to what constitutes "hours worked" for meal and rest periods applies to minors as well as to adults.

3.4(a)(iii) *Lactation Accommodation Under Federal Law*

The Providing Urgent Maternal Protections for Nursing Mothers Act ("PUMP Act"), which expands the FLSA's lactation accommodation provisions, applies to most employers.[233] Under the FLSA, an employer must provide a reasonable break time for an employee to express breast milk for the employee's nursing child for one year after the child's birth, each time the employee needs to express milk. The employer is not required to compensate an employee receiving reasonable break time for any time spent during the workday for the purpose of expressing milk unless otherwise required by federal, state, or local law. Under the PUMP Act, break time for expressing milk is considered hours worked if the employee is not

[231] 29 C.F.R. § 785.19.

[232] 29 C.F.R. § 785.18.

[233] 29 U.S.C. § 218d.

completely relieved from duty during the entirety of the break.[234] An employer must also provide a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.[235] Exemptions apply for smaller employers and air carriers.[236]

The Pregnant Workers Fairness Act (PWFA), enacted in 2022, also impacts an employer's lactation accommodation obligations. The PWFA requires employers of 15 or more employees to make reasonable accommodations for a qualified employee's known limitations related to pregnancy, childbirth, or related medical conditions.[237] Lactation is considered a related medical condition.[238] Reasonable accommodation related to lactation includes, but is not limited to breaks, space for lactation, and accommodations related to pumping and nursing during work hours.[239] For more information on these topics, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

3.4(b) *State Meal & Rest Period Guidelines*

3.4(b)(i) *State Meal & Rest Periods for Adults*

Arizona law contains no generally applicable meal or rest period requirements for adults.

3.4(b)(ii) *State Meal & Rest Periods for Minors*

Arizona law contains no generally applicable meal or rest period requirements for minors.

3.4(b)(iii) *Lactation Accommodation Under State Law*

Under Arizona law, an individual has the right to breast feed in any area of a public place or a place of public accommodation.[240] Although the law does not specifically mention employers, it can be construed to include places of employment. Arizona does not otherwise require an employer to provide lactation accommodations to employees.

3.5 Working Hours & Compensable Activities

3.5(a) *Federal Guidelines on Working Hours & Compensable Activities*

In contrast to some state laws that provide for mandatory days of rest, the FLSA does not limit the hours or days an employee can work and requires only that an employee be compensated for "all hours" worked in a workweek. Ironically, the FLSA does not define what constitutes hours of work.[241] Therefore, courts and agency regulations have developed a body of law looking at whether an activity—such as on-call,

[234] 29 U.S.C. § 218d(b)(2).

[235] 29 U.S.C. § 218d(a).

[236] 29 U.S.C. § 218d(c), (d).

[237] 42 U.S.C. § 2000gg–1.

[238] 29 C.F.R. § 1636.3.

[239] 29 C.F.R. § 1636.3.

[240] ARIZ. REV. STAT. ANN. § 41-1443.

[241] The FLSA states only that to employ someone is to "suffer or permit" the individual to work. 29 U.S.C. § 203(g).

training, or travel time—is or is not "work." In addition, the Portal-to-Portal Act of 1947 excluded certain preliminary and postliminary activities from "work time."[242]

As a general rule, employee work time is compensable if expended for the employer's benefit, if controlled by the employer, or if allowed by the employer. All time spent in an employee's principal duties and all time spent in essential ancillary activities must be counted as work time. An employee's *principal duties* include an employee's productive tasks. However, the phrase is expansive enough to encompass not only those tasks an employee is employed to perform, but also tasks that are an "integral and indispensable" part of the principal activities. For more information on this topic, including information on whether time spent traveling, changing clothes, undergoing security screenings, training, waiting or on-call time, and sleep time will constitute hours worked under the FLSA, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

3.5(b) *State Guidelines on Working Hours & Compensable Activities*

Arizona does not limit the number of hours employees may work in the private sector. Employees generally can be required to work overtime except where limited by contract or law. For example, absent special circumstances, employees working in underground mines may not work more than eight hours in a 24-hour period.[243] Violations can result in conviction of a misdemeanor or a petty offense. Additionally, employees working in the laundry department of a laundry establishment may generally not work more than eight hours a day and in no case may they work more than 48 hours in a week.[244] Additionally, absent extenuating circumstances, drivers transporting agricultural commodities or farm supplies for agricultural purposes may not drive for any period after having been on duty 16 hours following eight consecutive hours off duty or for any period after having been on duty for 112 hours in any consecutive seven-day period.[245]

Arizona prohibits cities, towns, and counties from requiring that a private employer alter or adjust an employee's schedule, unless it is otherwise required by state or federal law.[246]

There are a number of issues considered when determining whether activities constitute work. This publication looks more closely at pay requirements for reporting time, on-call time, and travel time. Arizona follows federal law for determining whether an employee is entitled to compensation for being

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[242] *See, e.g.*, *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513, 519 (2014) (in determining whether certain preliminary and postliminary activities are compensable work hours, the question is not whether an employer requires an activity (or whether the activity benefits the employer), but rather whether the activity "is tied to the productive work that the employee is employed to perform").

[243] ARIZ. REV. STAT. ANN. § 23-282(B).

[244] ARIZ. REV. STAT. ANN. § 23-284(A). Employees in the laundry department of a laundry establishment may work more than eight hours in a single day when necessary to make repairs to prevent interruption of the ordinary running of the machinery or when a different apportionment of the hours of labor is made for the sole purpose of making a shorter day's work for one day of the week or if the employment is to make up for time lost on some previous day of the same week in consequence of a stoppage of the machinery upon which the person is employed or dependent upon for employment.

[245] ARIZ. REV. STAT. ANN. § 23-286.01(A).

[246] ARIZ. REV. STAT. ANN. § 23-205.

on call or for travel time.[247] There are no specific state provisions addressing reporting time pay or split shift premium pay.

3.6 Child Labor

3.6(a) *Federal Guidelines on Child Labor*

The FLSA limits the tasks minors, defined as persons under 18 years of age, can perform and the hours they can work. Occupational limits placed on minors vary depending on the age of the minor and whether the work is in an agricultural or nonagricultural occupation. There are exceptions to the list of prohibited activities for apprentices and student-learners, or if an individual is enrolled in and employed pursuant to approved school-supervised and school-administered work experience and career exploration programs.[248] Additional latitude is also granted where minors are employed by their parents.

Considerable penalties can be imposed for violation of the child labor requirements, and goods made in violation of the child labor provisions may be seized without compensation to the employer. Employers may protect themselves from unintentional violations of child labor provisions by maintaining an employment or age certificate indicating an acceptable age for the occupation and hours worked.[249] For more information on the FLSA's child labor restrictions, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

3.6(b) *State Guidelines on Child Labor*

Arizona supplements the federal child labor regulations with limits on the hours and types of jobs minors may perform. The general purpose of these statutes is to ensure that minors are not employed in an occupation or manner detrimental to their health, safety, or well-being.

3.6(b)(i) *State Restrictions on Types of Employment for Minors*

General Restrictions. Arizona restricts the employment of persons under the age of 18 by age and by the type of job. Table 9 summarizes the state restrictions on type of employment by age.

Table 9. State Restrictions on Type of Employment by Age

Age Range	Restrictions
Ages 16-17	*Children under the age of 18 are precluded from working in, about or in connection with:* • establishments manufacturing or storing explosives (except a retail establishment if the employment does not include any handling of explosives other than prepackaged small arms ammunition not exceeding .60 caliber in size, shotgun shells, or blasting caps); • motor vehicle driver or helper if the total driving time exceeds two hours a day or 25% of the workday or the mileage exceeds 50 miles per day; • mine or quarry operations;

[247] Industrial Comm'n of Ariz., *Substantive Policy Statement Regarding Interpretation of "Hours Worked" For Purposes of the Arizona Minimum Wage Act* (Aug. 16, 2007), *available at* https://www.azica.gov/labor-substantive-policy-hours-worked#:~:text=If%20sleeping%20period%20is%20of,lunch%20periods%20constitute%20hours%20worked.

[248] 29 C.F.R. §§ 570.36, 570.50.

[249] 29 C.F.R. § 570.6.

Table 9. State Restrictions on Type of Employment by Age	
Age Range	**Restrictions**
	• logging occupations; • occupations involving power-driven woodworking machines; • occupations involving exposure to radioactive substances; • occupations involving power-driven hoists (except operation of an automatic elevator incidental to employment); • occupations involving power-driven metalworking machines; • occupations involving meat packing or slaughtering or the operation of power-driven meat processing machines; • occupations involving power-driven equipment or machines such as bakery, paper products, and saws; • occupations involving the manufacture of clay construction products or silica refractory products; • occupations involving demolition and ship-breaking operations; • occupations involving roofing operations; and • occupations in excavation or tunnel operations (except manual excavation, backfilling, or working in trenches or other penetrations of the ground surface that do not exceed two feet in depth).[250]
Under Age 16	*In addition to the restrictions for minors aged 16 and17, children under the age of 16 are prohibited from engaging in any of the following activities unless a variance is granted:* • manufacturing; processing, laundering, or dry cleaning in a commercial laundry; • warehousing; • construction; • boiler, furnace, or engine rooms; • occupations involving work from a ladder, scaffold, windowsill, or similar structures or places more than five feet in height; • certain activities in retail food or gasoline service establishments; and • certain activities in agriculture (*e.g.*, operating a cotton picker, working in a pen occupied by a bull, picking or pruning from a ladder over eight feet in height, riding on a tractor as a helper).[251]

Restrictions on Selling or Serving Alcohol. Arizona law sets forth the following guidelines on minors selling or serving alcohol or working in an establishment that sells or serves alcohol:

- Persons under age 18 may not manufacture, sell, or dispose of spirituous liquors.
- Persons under age 18 may work for on-sale retailers in cleaning tables on the premises for reuse, removing dirty dishes, keeping a ready supply of needed items and helping clean up the premises, but may not handle spirituous liquors.

[250] ARIZ. REV. STAT. ANN. § 23-231.

[251] ARIZ. REV. STAT. ANN. § 23-232.

- Persons who are at least age 16 may work for an off-sale retailer in checking out, if supervised by a person on the premises who is at least age 18, packaging or carrying merchandise, including spirituous liquor, in unbroken packages, for the convenience of customers, if the employer sells primarily merchandise other than spirituous liquor.[252]

3.6(b)(ii) *State Limits on Hours of Work for Minors*

Arizona does not impose any limitation on the hours that may be worked by children over the age of 16. Generally, minors under the age of 16 are prohibited from working:

- more than 40 hours in any one week when the person is not enrolled in a session of school or school is not in session;
- more than 18 hours in any one week when the person is enrolled in a session of school when school is in session;
- more than eight hours a day when the person is not enrolled in a session of school or on a day when school is not is session;
- more than three hours a day when the person is enrolled in a session of school on a day school is in session; and
- between 9:30 P.M. and 6:00 A.M. on days preceding a school day and between 11:00 P.M. and 6:00 A.M. on days preceding a day when school is not in session.[253]

Employers are prohibited from employing individuals under the age of 16 in solicitation of sales or making deliveries on a door-to-door basis after 7:00 P.M. These provisions do not apply to persons delivering newspapers to consumers.[254]

3.6(b)(iii) *State Child Labor Exceptions*

Arizona's restrictions on youth employment do not apply if the children are employed by a grandparent, brother, sister, aunt, uncle, first cousin, stepparent, or parent, including a relative of the same degree through marriage or adoption, or person in *loco parentis* in occupations in which the grandparent, brother, sister, aunt, uncle, first cousin, stepparent, or parent or person in *loco parentis* owns at least 10% of the employing organization and such owner is actively engaged in the daily operation of the organization, if either: (1) the person is under the age of 18 years and not engaged in manufacturing or mining occupations; or (2) the person is between the ages of 16 and 18 years and is engaged in manufacturing or mining occupations.[255]

Other exceptions include children employed as stars or performers in motion picture, theatrical, radio, or television productions; involved in career education programs; involved in certain vocational or technical training school programs; employed as apprentices and registered by the bureau of apprenticeship; those who are married; those who have been emancipated, and those who have a high school diploma or its equivalent.[256]

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[252] ARIZ. REV. STAT. ANN. § 4-244.

[253] ARIZ. REV. STAT. ANN. § 23-233.

[254] ARIZ. REV. STAT. ANN. § 23-233(C).

[255] ARIZ. REV. STAT. ANN. § 23-235.

[256] ARIZ. REV. STAT. ANN. § 23-235.

3.6(b)(iv) *State Work Permit or Waiver Requirements*

Arizona employers may apply for a variance from the state child labor laws by submitting a written application to the state labor department.[257] Otherwise, minor employees are not required to obtain a work permit.

While minor employees are not required to obtain a work permit in Arizona, the state requires establishments that employ minors under the age of 16 to keep records of the following information for each of these minor employees:

- number of hours the minor employee is employed each week;
- number of hours the minor employee is employed each day;
- the dates the minor employee is enrolled in a session of school;
- the name of the school district in which the minor employee is enrolled; and
- the specific hours the employee works at the establishment.[258]

3.6(b)(v) *State Enforcement, Remedies & Penalties*

The Arizona Department of Labor enforces the state's child labor laws, and may investigate alleged violations, conduct hearings, and issue cease and desist orders and other injunctive relief.[259] Violation of the child labor laws is a Class 2 misdemeanor and also carries a civil penalty of not more than $1,000.[260]

3.7 Wage Payment Issues

3.7(a) *Federal Guidelines on Wage Payment*

There is no federal wage payment law. The FLSA covers minimum wage and overtime requirements, but would not generally be considered a "wage payment" law as the term is used in state law to define when and how wages must be paid.

3.7(a)(i) *Form of Payment Under Federal Law*

Authorized Instruments. Wages may be paid by cash, check, or facilities (*e.g.*, board or lodging).[261]

Direct Deposit. Neither the FLSA, nor its implementing regulations, address direct deposit of employee wages. The U.S. Department of Labor (DOL) has briefly considered the permissibility of direct deposit by stating:

> The payment of wages through direct deposit into an employee's bank account is an acceptable method of payment, provided employees have the option of receiving payment by cash or check directly from the employer. As an alternative, the employer may make arrangements for employees to cash a check drawn against the employer's

[257] ARIZ. REV. STAT. ANN. § 23-241.

[258] ARIZ. ADMIN. CODE § R20-5-903.

[259] ARIZ. REV. STAT. ANN. §§ 23-236 to 23-238.

[260] ARIZ. REV. STAT. ANN. §§ 23-236, 23-239.

[261] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf; *see also* 29 C.F.R. § 531.32 (description of "other facilities").

> payroll deposit account, if it is at a place convenient to their employment and without charge to them.[262]

According to the Consumer Financial Protection Bureau (CFPB), an employer may require direct deposit of wages by electronic means if the employee is allowed to choose the institution that will receive the direct deposit. Alternatively, an employer may give employees the choice of having their wages deposited at a particular institution (designated by the employer) or receiving their wages by another means, such as by check or cash.[263]

Payroll Debit Card. Employers may pay employees using payroll card accounts, so long as employees have the choice of receiving their wages by at least one other means.[264] The "prepaid rule" regulation defines a *payroll card account* as an account that is directly or indirectly established through an employer and to which electronic fund transfers of the consumer's wages, salary, or other employee compensation such as commissions are made on a recurring basis, whether the account is operated or managed by the employer, a third-party payroll processor, a depository institution, or any other person.[265]

Employers that use payroll card accounts must comply with several requirements set forth in the prepaid rule. Employers must give employees certain disclosures before the employees choose to be paid via a payroll card account, including a short-form disclosure, a long-form disclosure, and other information that must be disclosed in close proximity to the short-form disclosure. Employees must receive the short-form disclosure and either receive or have access to the long-form disclosure before the account is activated. All disclosures must be provided in writing. Importantly, within the short-form disclosure, employers must inform employees in writing and before the card is activated that they need not receive wages by payroll card. This disclosure must be very specific. It must provide a clear fee disclosure and include the following statement or an equivalent: "You do not have to accept this payroll card. Ask your employer about other ways to receive your wages." Alternatively, a financial institution or employer may provide a statement that the consumer has several options to receive wages or salary, followed by a list of the options available to the consumer, and directing the consumer to tell the employer which option the customer chooses using the following language or similar: "You have several options to receive your wages: [list of options]; or this payroll card. Tell your employer which option you choose." This statement must be located above the information about fees. A short-form disclosure covering a payroll card account also must contain a statement regarding state-required information or other fee discounts or waivers.[266] As part of the disclosures, employees must: (1) receive a statement of pay card fees; (2) have ready access to a statement of all fees and related information; and (3) receive periodic statements of recent account activity or free and easy access to this information online. Under the prepaid rule, employees have limited

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[262] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c00.

[263] Consumer Fin. Prot. Bureau, *CFPB Bulletin 2013-10: Payroll Card Accounts (Regulation E)* (Sept. 12, 2013), *available at* http://files.consumerfinance.gov/f/201309_cfpb_payroll-card-bulletin.pdf.

[264] 12 C.F.R. § 1005.18; *see also* Consumer Fin. Prot. Bureau, *CFPB Bulletin 2013-10: Payroll Card Accounts (Regulation E)* (Sept. 12, 2013) and Consumer Fin. Prot. Bureau, *Ask CFPB: Prepaid Cards, If my employer offers me a payroll card, do I have to accept it?* (Sept. 4, 2020), *available at* https://www.consumerfinance.gov/ask-cfpb/if-my-employer-offers-me-a-payroll-card-do-i-have-to-accept-it-en-407/.

[265] 12 C.F.R. § 1005.2(b)(3)(i)(A).

[266] 12 C.F.R. § 1005.18; *see also* Consumer Fin. Prot. Bureau, *Guide to the Short Form Disclosure* (Mar. 2018), *available at* https://files.consumerfinance.gov/f/documents/cfpb_prepaid_guide-to-short-form-disclosure.pdf; *Prepaid Disclosures* (Apr. 1, 2019), *available at* https://files.consumerfinance.gov/f/documents/102016_cfpb_PrepaidDisclosures.pdf.

responsibility for unauthorized charges or other unauthorized access, provided they have registered their payroll card accounts.[267]

The CFPB provides numerous online resources regarding prepaid cards, including Frequently Asked Questions. Employers that use or plan to use payroll card accounts should consult these resources, in addition to the prepaid card regulation, and seek knowledgeable counsel.[268]

3.7(a)(ii) *Frequency of Payment Under Federal Law*

Federal law does not specify the timing of wage payment and does not prohibit payment on a semi-monthly or monthly basis. However, all wages that are required by the FLSA are generally considered to be due on the payday for the pay period in which the wages were earned. FLSA regulations state that if an employer cannot calculate how much it owes an employee in overtime by payday, it must pay that employee overtime as soon as possible and no later than the next payday.[269]

3.7(a)(iii) *Final Payment Under Federal Law*

Federal law does not address when final wages must be paid to discharged employees or to employees who voluntarily quit. However, as noted in **3.7(a)(ii)**, wages that are required by the FLSA are generally considered to be due on the payday for the pay period in which the wages were earned.

3.7(a)(iv) *Notification of Wage Payments & Wage Records Under Federal Law*

Federal law does not generally require employers to provide employees wage statements when wages are paid. However, federal law does require employers to furnish pay stubs to certain unique classifications of employees, including migrant farm workers.

Federal law does not address whether electronic delivery of earnings statements is permissible.

3.7(a)(v) *Changing Regular Paydays or Pay Rate Under Federal Law*

There are no general notice requirements under federal law should an employer wish to change an employee's payday or wage rate. However, it is recommended that employees receive advance written notice before a change in regular paydays or pay rate occurs.

3.7(a)(vi) *Paying for Expenses Under Federal Law*

The FLSA does not have a general expense reimbursement obligation. Nonetheless, it prohibits employers from circumventing minimum wage and overtime laws by passing onto employees the cost of items that are primarily for the benefit or convenience of the employer, if doing so reduces an employee's wages below the highest applicable minimum wage rate or cuts into overtime premium pay.[270] Because the FLSA requires an employer to pay minimum wage and overtime premiums "free and clear," the employer must

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[267] 12 C.F.R. § 1005.18.

[268] *See* Consumer Fin. Prot. Bureau, *Prepaid Cards*, *available at* https://www.consumerfinance.gov/ask-cfpb/category-prepaid-cards/ and *Prepaid Rule Small Entity Compliance Guide* (Apr. 2019), *available at* https://files.consumerfinance.gov/f/documents/cfpb_prepaid_small-entity-compliance-guide.pdf.

[269] 29 C.F.R. § 778.106; *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30b04, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf.

[270] *See* 29 U.S.C. §§ 203(m), 206; 29 C.F.R. §§ 531.2, 531.32(a), and 531.36(a); U.S. Dep't of Labor, Wage & Hour Div., *Fact Sheet #16: Deductions From Wages for Uniforms and Other Facilities Under the Fair Labor Standards Act (FLSA)* (rev. July 2009).

reimburse employees for expenses that are primarily for the benefit of the employer if those expenses would reduce the applicable required minimum wage or overtime compensation.[271] Accordingly, among other items, an employer may be required to reimburse an employee for expenses related to work uniforms,[272] tools and equipment,[273] and business transportation and travel.[274] Additionally, if an employee is reimbursed for expenses normally incurred by an employee that primarily benefit the employer, the reimbursement cannot be included in the employee's regular rate.[275]

3.7(a)(vii) *Wage Deductions Under Federal Law*

Permissible Deductions. Under the FLSA, an employer can deduct:

- state and federal taxes, levies, and assessments (*e.g.*, income, Social Security, unemployment) from wages;[276]
- amounts ordered by a court to pay an employee's creditor, trustee, or other third party, under garnishment, wage attachment, trustee process, or bankruptcy proceedings (the employer or anyone acting on its behalf cannot profit from the transaction);[277]
- amounts as directed by an employee's voluntary assignment or order to pay an employee's creditor, donee, or other third party (the employer or agent cannot directly or indirectly profit or benefit from the transaction);[278]
- with an employee's authorization for:
  - the purchase of U.S. savings stamps or U.S. savings bonds;
  - union dues paid pursuant to a valid and lawful collective bargaining agreement;
  - payments to the employee's store accounts with merchants wholly independent of the employer;
  - insurance premiums, if paid to independent insurance companies where the employer is under no obligation to supply the insurance and derives, directly or indirectly, no benefit or profit from it; or
  - voluntary contributions to churches and charitable, fraternal, athletic, and social organizations, or societies from which the employer receives no profit or benefit, directly or indirectly;[279]

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[271] 29 C.F.R. §§ 531.35, 531.36, and 531.37.

[272] 29 U.S.C. § 203(m); 29 C.F.R. §§ 531.3, 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c12.

[273] 29 U.S.C. § 203(m); 29 C.F.R. §§ 531.3, 531.35; U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA 2001-7 (Feb. 16, 2001).

[274] 29 C.F.R. § 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c04.

[275] 29 C.F.R. § 778.217.

[276] 29 C.F.R. § 531.38.

[277] 29 C.F.R. § 531.39. The amount subject to withholding is governed by the federal Consumer Credit Protection Act. 15 U.S.C. §§ 1671 *et seq*.

[278] 29 C.F.R. § 531.40.

[279] 29 C.F.R. § 531.40.

- the reasonable cost of providing employees board, lodging, or other facilities by including this cost as wages, if the employer customarily furnishes these facilities to employees;[280] or
- amounts for premiums the employer paid while maintaining benefits coverage for an employee during a leave of absence under the Family and Medical Leave Act if the employee fails to return from leave after leave is exhausted or expires, if the deductions do not otherwise violate applicable federal or state wage payment or other laws.[281]

Additionally, while the FLSA contains no express provisions concerning deductions relating to overpayments made to an employee, loans and advances, or negative vacation balance, informal guidance from the DOL suggests such deductions may nonetheless be permissible. While this informal guidance may be interpreted to permit a deduction for loans to employees, employers should consult with counsel before deducting from an employee's wages. An employer can deduct the principal of a loan or wage advance, even if the deduction cuts into the minimum wage or overtime owed. However, deductions for interest or administrative costs on the loan or advance are illegal to the extent that they cut into the minimum wage or overtime pay. Loans or advances must be verified.[282]

An employer may also be able to deduct for wage overpayments even if the deduction cuts into the employee's FLSA minimum wage or overtime pay. The deduction can be made in the next pay period or several pay periods later. An employer cannot, however, charge an administrative fee or charge interest that brings the payment below the minimum wage.[283] Finally, if an employee is granted vacation pay before it accrues, with the understanding it constitutes an advance of pay, and the employee quits or is fired before the vacation is accrued, an employer can recoup the advanced vacation pay, even if this cuts into the minimum wage or overtime owed an employee.[284]

Deductions During Non-Overtime v. Overtime Workweeks. Whether an employee receives overtime during a given workweek affects an employer's ability to take deductions from the employee's wages. During non-overtime workweeks, an employer may make qualifying deductions (*i.e.*, the cost is reasonable and there is no employer profit) for "board, lodging, or other facilities" even if the deductions would reduce an employee's pay below the federal minimum wage. Deductions for articles that do not qualify as "board, lodging, or other facilities" (*e.g.*, tools, equipment, cash register shortages) can be made in non-overtime workweeks if, after the deduction, the employee is paid at least the federal minimum wage.[285]

During overtime workweeks, deductions can be made on the same basis in overtime weeks as in non-overtime weeks if the amount deducted does not exceed the amount which could be deducted if the employee had not worked overtime during the workweek. Deductions that exceed this amount for articles that are not "facilities" are prohibited. There is no limit on the amount that can be deducted for qualifying

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[280] 29 U.S.C. § 203. However, the cost cannot be treated as wages if prohibited under a collective bargaining agreement.

[281] 29 C.F.R. § 825.213.

[282] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf.

[283] U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA2004-19NA (Oct. 8, 2004); *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

[284] U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA2004-17NA (Oct. 6, 2004); *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

[285] 29 C.F.R. § 531.36.

deductions for "board, lodging, or other facilities." However, deductions made only in overtime weeks, or increases in prices charged for articles or services during overtime workweeks will be scrutinized to determine whether they are manipulations to evade FLSA overtime requirements.[286]

Prohibited Deductions. The FLSA prohibits an employer from making deductions for administrative or bookkeeping expenses incurred by an employer to the extent they cut into the minimum wage and overtime owed an employee.[287]

3.7(b) *State Guidelines on Wage Payment*

3.7(b)(i) *Form of Payment Under State Law*

Authorized Instruments. Wages must be paid in U.S. currency or by bank checks.[288] In Arizona, *wages* are defined as nondiscretionary compensation due to an employee in return for labor or services that the employee has a reasonable expectation to be paid whether determined by a time, task, piece, commission, or other method of calculation.[289]

Direct Deposit or Payroll Debit Card. In addition, Arizona expressly authorizes employers to pay all wages due to an employee on payday by direct deposit at a financial institution[290] of the employee's choice, provided that the employee voluntarily consents to such agreement.[291] Alternatively, if the employer has offered to pay the employee through direct deposit at a financial institution of the employee's choice, and the employee does not provide consent and does not designate a financial institution, the employer may pay the employee by direct deposit to the employee's credit to a payroll card account.[292] When an employee's wages are paid by direct deposit or to a payroll card account, the employer must provide the employee with a written or electronic statement of the employee's earnings and withholdings for that pay period.[293]

A direct deposit program must permit an employee to make one withdrawal without service charges for each deposit pay period. Similarly, a payroll debit card program must permit an employee to make one withdrawal without a service charge for each deposit per pay period. In addition, an employer must provide employees a list of all fees associated with the use of an employer-provided payroll card.

3.7(b)(ii) *Frequency of Payment Under State Law*

In Arizona, employers must pay employees on two or more days in each month, not more than 16 days apart, as fixed paydays for payment of wages to employees.[294] If the employer's headquarters and payroll offices are located outside of Arizona, once-a-month paydays can be utilized for executive, administrative,

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[286] 29 C.F.R. § 531.37.

[287] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

[288] ARIZ. REV. STAT. ANN. § 23-351(D).

[289] ARIZ. REV. STAT. ANN. § 23-350(6).

[290] Under Arizona's wage payment statute, the "financial institution" must be a member of the federal deposit insurance corporation or of any other comparable federal or state agency. *See* ARIZ. REV. STAT. ANN. § 23-351(D).

[291] ARIZ. REV. STAT. ANN. § 23-351(D)(4).

[292] ARIZ. REV. STAT. ANN. § 23-351(D)(5).

[293] ARIZ. REV. STAT. ANN. § 23-351(E), (F).

[294] ARIZ. REV. STAT. ANN. § 23-351(A).

and professional employees who are exempt from FLSA coverage, and supervisory personnel who are excluded from the National Labor Relations Act.[295]

Arizona law permits five days between the end of a pay period and the payment of wages earned during that pay period. However, overtime and exception pay must be paid no later than 16 days after the end of the most recent pay period. Payment may be made by personally delivering the wages within five days of the end of the pay period, or by depositing the wages into the mail within five days of the end of the pay period. Employers with payroll systems centralized outside of Arizona are afforded an extension and may personally deliver wages to employees no later than 10 days after the end of the pay period.[296]

3.7(b)(iii) *Final Payment Under State Law*

Employees who are discharged must be paid their final wages within seven business days or by the end of the next regular pay period, whichever is sooner.[297] Employees who quit are entitled to receive their wages no later than the regular pay day for the pay period when the employee terminated employment.[298] The only exceptions to the pay date requirements are those wages still undetermined at the time of termination, such as commissions or bonuses. If requested by the resigning employee, those wages may be mailed to the employee.[299]

3.7(b)(iv) *Notification of Wage Payments & Wage Records Under State Law*

As noted in **3.7(b)(i)**, employees paid by direct deposit or payroll debit card must be provided a written or electronic statement of their earnings and withholdings. Employers in Arizona must also furnish employees with an itemized statement of deductions made from wages within each pay period.[300]

Further, all Arizona employers, except those meeting the narrow definition of a "small business," are required to retain *payroll records.* These records must contain sufficient information to show hours worked daily by all employees, and the wages paid in compensation for these hours, for a period of four years.[301] With the exception of employees properly considered exempt from overtime requirements under the white collar exemptions of the FLSA,[302] *payroll records* include all timecards or sheets, tables of wage or rate schedules, and records of additions or deductions from wages (including supporting materials).[303] These records must be made available to the Industrial Commission of Arizona (ICA) or a requesting employee within 72 hours of the request.[304] Failure to maintain adequate payroll records may result in the imposition of fines and lead a court to impose a presumption that the records would have demonstrated the existence of a violation of the Arizona Minimum Wage Act (AMWA).[305]

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[295] ARIZ. REV. STAT. ANN. § 23-351(B).

[296] ARIZ. REV. STAT. ANN. § 23-351(C).

[297] ARIZ. REV. STAT. ANN. § 23-353(A).

[298] ARIZ. REV. STAT. ANN. § 23-353(B).

[299] ARIZ. REV. STAT. ANN. § 23-353(B).

[300] ARIZ. REV. STAT. ANN. § 23-351(E), (F).

[301] ARIZ. REV. STAT. ANN. § 23-364(D).

[302] 29 C.F.R. § 541.

[303] ARIZ. ADMIN. CODE § R20-5-1210(A) & (C).

[304] ARIZ. ADMIN. CODE § R20-5-1209.

[305] ARIZ. REV. STAT. ANN. § 23-364(D),(F), & (G).

3.7(b)(v) *Wage Transparency*

Arizona law does not address whether an employer may prohibit employees from disclosing their wages or from discussing and inquiring about the wages of other employees.

3.7(b)(vi) *Changing Regular Paydays or Pay Rate Under State Law*

There are no general notice requirements under Arizona law regarding making a change to regular paydays or an employee's rate of pay. Employers, however, should consider providing employees with advance written notice before a change occurs.

3.7(b)(vii) *Paying for Expenses Under State Law*

Arizona's wage and hour statutes do not include provisions on expense reimbursement. However, according to the ICA, unless covered by a collective bargaining agreement, an employer may not credit towards the minimum wage the cost of any uniforms or any other garment an employee wears as a condition of employment. This includes the cost of cleaning and maintaining uniforms.[306]

3.7(b)(viii) *Wage Deductions Under State Law*

Requirements for Deductions. In Arizona, an employer cannot deduct from employee wages unless one of the following applies:

- The employer is required or empowered to do so by state or federal law.
- The employer has the employee's prior written authorization. An employer cannot withhold wages under such an agreement past the date specified by the employee in a written revocation of the authorization, unless the withholding is to resolve a debt or obligation to the employer, or a court orders otherwise. However, note that a federal district court has held that the Arizona statute making paycheck deductions revocable at the will of the employee is preempted by the Taft-Hartley Act, which allows unions to bargain for deductions for union dues that are irrevocable for a period of not more than one year. The court issued a permanent injunction as to that portion of the statute.[307]
- There is a reasonable good faith dispute as to the amount of wages due, including the amount of any counterclaim or any claim of debt, reimbursement, recoupment, or set-off asserted by the employer against the employee.[308]

Deductions for Political Purposes. Arizona enacted a statute related to deductions for political purposes.[309] An Arizona federal court, however, concluded that the statute was unconstitutional and issued a permanent injunction against its enforcement in 2013.[310]

3.7(b)(ix) *Wage Assignments & Wage Garnishments*

Garnishment for Amounts Owed to Creditors. Similar to the federal wage garnishment law, under Arizona law, disposable earnings include the amount remaining from the gross earnings for a pay period after the

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[306] Industrial Comm'n of Ariz., *Frequently Asked Questions*, *available at* https://www.azica.gov/labor-frequently-asked-questions-english.

[307] *See UFCW Local 99 v. Bennett*, 934 F. Supp. 2d 1167, 1191-92, 1218 (D. Ariz. 2013).

[308] ARIZ. REV. STAT. ANN. § 23-352.

[309] ARIZ. REV. STAT. ANN. § 23-361.02.

[310] *See UFCW Local 99 v. Bennett*, 934 F. Supp. 2d 1167 (D. Ariz. 2013).

deductions required by state and federal laws.[311] *Earnings* means compensation, whether this compensation is called wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension, retirement, or savings program.[312] Exempt earnings are those earnings that, pursuant to state or federal laws, are not subject to judicial process, including garnishment.[313]

Earnings that are not applicable to garnishments include:

- indebtedness owed to a judgment debtor by a garnishee for amounts which are not earnings as defined by the law;
- monies held by an employer (garnishee) on behalf of a judgment debtor;
- personal property of a judgment debtor that is in the possession of an employer (garnishee); and
- shares or securities of a corporation or a proprietary interest in the corporation belonging to a judgment debtor, if the employer (garnishee) is a corporation.[314]

Child Support. Arizona's child support provisions are set forth at Arizona Revised Statutes sections 25-500 through 25-685. Generally referred to as an "order of assignment" as opposed to a "garnishment," an employer's obligation is only for child support, spousal maintenance, spousal maintenance arrearages, interest on arrearages, and handling fees. The order of assignment will set forth: (1) the total amount the employer must withhold; and (2) specify the monthly amount of current support and any other payment ordered for support.[315]

The statute sets forth the procedure for the deduction from wages pursuant to an order of assignment. Once the order of assignment is served on the employer, there are several things the employer must do. First, the employee is notified of the order of assignment and is given 14 calendar days from the date of notice to allow the employee the opportunity to contest the order of assignment.[316] Second, after the 14-day period, deductions are made.[317] Third, the deductions can be no more than one-half of the employee's disposable earnings for any pay period.[318] Disposable earnings include the remaining portion of wages, salary, or compensation for personal services, which includes bonuses, commissions, and payments pursuant to a pension or retirement program or a deferred compensation plan (savings plan) after deducting from such earnings the amounts required by law to be withheld.[319]

Under Arizona law, an employer may not refuse to hire, may not discharge, or otherwise discipline an employee as a result of the order of assignment.[320] If wrongfully refused employment, disciplined, or

311 ARIZ. REV. STAT. ANN. § 12-1598(3).

312 ARIZ. REV. STAT. ANN. § 12-1598(4).

313 ARIZ. REV. STAT. ANN. § 12-1598(6).

314 ARIZ. REV. STAT. ANN. § 12-1598.01.

315 ARIZ. REV. STAT. ANN. § 25-506(A).

316 ARIZ. REV. STAT. ANN. § 25-504(C).

317 ARIZ. REV. STAT. ANN. § 25-504(C).

318 ARIZ. REV. STAT. ANN. § 33-1131(C).

319 ARIZ. REV. STAT. ANN. § 25-504(C).

320 ARIZ. REV. STAT. ANN. § 25-504(Q).

discharged, the employee may recover damages, including reinstatement, reasonable attorneys' fees, and costs.[321]

The employer may deduct $1.00 from the employee's pay for each pay period, but not more than $4.00 per month as a service fee or cost for complying with the order of assignment.[322] The employer is also required to deduct a monthly amount for the support payment handling fee.[323]

3.7(b)(x) *State Enforcement, Remedies & Penalties*

Where there is a dispute over the amount of wages an employee is owed, the employer must pay all wages that are not in dispute.[324] The employer may withhold only those wages as allowed under Arizona Revised Statutes section 23-352. Instead of filing a civil action against an employer for unpaid wages, an employee may file a complaint with the ICA if the unpaid wages do not exceed $5,000 and within one year of the accrual of the claim.[325] The ICA will investigate the claim to determine if wages are due.[326] Either party may seek review of the ICA's determination.[327] The ICA's decision becomes final 35 days after the decision is served upon the parties.[328] The employer has 10 days after the order becomes final to pay the employee the wages due; otherwise the employer becomes liable for the treble damages noted below.[329]

Employers that fail to timely pay wages without a good-faith basis could be liable to the employee in a civil suit for treble the amount of the unpaid wages.[330] The lawsuit must be brought within one year of the date the payment was due.[331] The treble damage provision is directed against employers that delay paying wages without reasonable justification or that try to defraud employees of rightfully earned wages.[332] A treble damages award, however, is discretionary and not mandatory.[333]

Failure to pay minimum wage can also result in significant penalties. An employee can submit a complaint to the ICA within one year of the last instance of improper payment of minimum wage, or has the right to file a private civil lawsuit within two years (three years if the violation was willful) of the last violation, and "may encompass all violations that occurred as part of a continuing course of employer conduct regardless of their date."[334] A prevailing employee is entitled to actual back pay (the balance of wages owed to the employee) with interest, and an amount equal to twice the actual back wages (often referred to as treble

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[321] ARIZ. REV. STAT. ANN. § 25-504(Q).

[322] ARIZ. REV. STAT. ANN. § 25-504(C).

[323] ARIZ. REV. STAT. ANN. § 25-510.

[324] *Abrams v. Horizon Corp.*, 669 P.2d 51 (Ariz. 1983); *Sanborn v. Brooker & Wake Prop. Mgmt., Inc.*, 874 P.2d 982 (Ariz. Ct. App. 1994).

[325] ARIZ. REV. STAT. ANN. § 23-356(A).

[326] ARIZ. REV. STAT. ANN. § 23-357(A).

[327] ARIZ. REV. STAT. ANN. § 23-358(A).

[328] ARIZ. REV. STAT. ANN. §§ 12-904, 23-359.

[329] ARIZ. REV. STAT. ANN. § 23-360.

[330] ARIZ. REV. STAT. ANN. § 23-355.

[331] ARIZ. REV. STAT. ANN. § 12-541(3).

[332] *Patton v. County of Mohave*, 741 P.2d 301 (Ariz. Ct. App. 1987).

[333] *Crum v. Maricopa County*, 950 P.2d 171 (Ariz. Ct. App. 1997).

[334] ARIZ. REV. STAT. ANN. § 23-364(C), (E), and (H).

damages), and reasonable attorneys' fees and costs.[335] If an employer retaliates against an employee for raising a complaint pertaining to the AMWA, that employer can be liable for compensatory and punitive damages of no less than $150 per day of retaliation.[336] The ICA also retains the right to levy fines or civil money penalties against noncomplying employers.[337]

An employer can also be liable for: failure to maintain or make available proper "payroll records;" failure to display postings regarding the rights and obligations arising under the AMWA promulgated by the ICA; hindering an ICA investigation; or failure to provide a proper address to employees.[338] The ICA or a court has the discretion to impose remedies not specified in the AMWA or the ICA's interpretive regulations, if warranted.[339]

3.8 Other Benefits

3.8(a) *Vacation Pay & Similar Paid Time Off*

3.8(a)(i) *Federal Guidelines on Vacation Pay & Similar Paid Time Off*

To the extent an "employee welfare benefit plan" is established or maintained for the purpose of providing vacation benefits for participants or their beneficiaries, it may be governed under the federal Employee Retirement Income Security Act (ERISA).[340] However, an employer program of compensating employees for vacation benefits out of the employer's general assets is not considered a covered welfare benefit plan.[341] Further, the U.S. Supreme Court, in *Massachusetts v. Morash*, noted that extensive state regulation of vesting, funding, and participation rights of vacation benefits may provide greater protections for employees than ERISA and, as a result, the court was reluctant to have ERISA preempt state law in situations where it was not clearly indicated.[342]

3.8(a)(ii) *State Guidelines on Vacation Pay & Similar Paid Time Off*

There is no requirement under Arizona law that an employer must offer employees other benefit compensation such as vacation pay, holiday pay, personal time off, bonuses, severance pay, or pensions. However, once an employer does establish a policy and promises vacation pay and other types of additional compensation, the employer may not arbitrarily withhold or withdraw these fringe benefits retroactively. Therefore, employers should draft clear, precise, and complete policies and procedures

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[335] ARIZ. REV. STAT. ANN. § 23-364(G).

[336] ARIZ. REV. STAT. ANN. § 23-364(B), (G) (any adverse employment action taken within 90 days after an employee files a complaint under the AMWA is presumed to be in retaliation of that complaint unless the employer can show by clear and convincing evidence that it had a permissible reason for taking the adverse employment action).

[337] ARIZ. REV. STAT. ANN. § 23-364(G).

[338] ARIZ. REV. STAT. ANN. § 23-364(F), (G); ARIZ. ADMIN. CODE § R20-5-1212.

[339] ARIZ. ADMIN. CODE § R20-5-1217.

[340] 29 U.S.C. § 1002.

[341] 29 C.F.R. § 2510.3-1; *see also* U.S. Dep't of Labor, *Advisory Opinion 2004-10A* (Dec. 30, 2004), *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2004-10a; U.S. Dep't of Labor, *Advisory Opinion 2004-08A* (July 2, 2004), *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2004-08a; U.S. Dep't of Labor, *Advisory Opinion 2004-03A* (Apr. 30, 2004), *available at* https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/2004-03a.

[342] 490 U.S. 107, 119 (1989).

regarding these benefits, as they can become contractual obligations and subject the employer to liability if withheld or reduced without notice.

In Arizona, vacation pay is considered a matter of contract or employment policy.[343] However, when vacation is earned pursuant to such a policy or contract, it constitutes wages.[344] Employers may place conditions on the right to vacation pay, for example, conditioning the earning of vacation days on reaching a certain number of days of employment. Because vacation pay is a matter of contract, "use it or lose it" policies, policies that cap accrual and forfeiture of accrued vacation time upon termination of employment is likely permissible so long as employees are provided notice of the policy.

3.8(b) *Holidays & Days of Rest*

3.8(b)(i) *Federal Guidelines on Holidays & Days of Rest*

There is no federal law requiring that employees be provided a day of rest each week, or be compensated at a premium rate for work performed on the seventh consecutive day of work or on holidays.

3.8(b)(ii) *State Guidelines on Holidays & Days of Rest*

Arizona does not require employers to provide employees with a day of rest each week, or compensate employees at a premium rate for work performed on the seventh consecutive day of work or on holidays.

3.8(c) *Recognition of Domestic Partnerships & Civil Unions*

3.8(c)(i) *Federal Guidelines on Domestic Partnerships & Civil Unions*

Federal law does not regulate or define domestic partnerships and civil unions. States and municipalities are free to provide for domestic partnership and civil unions within their jurisdictions. Thus, whether a couple may register as domestic partners or enter into a civil union depends on their place of residence. States may also pass laws to regulate whether employee benefit plans must provide coverage for an employee's domestic partner or civil union partner.

Whether such state laws apply to an employer's benefit plans depends on whether the benefits are subject to ERISA. Most state and local laws that relate to an employer's provision of health benefit plans for employees are preempted by ERISA. Self-insured plans, for example, are preempted by ERISA. If the plan is preempted by ERISA, employers may not be required to comply with the states' directives on requiring coverage for domestic partners or parties to a civil union.[345] ERISA does not preempt state laws that regulate insurance, so employer health benefit plans that provide benefits pursuant to an insurance contract are subject to state laws requiring coverage for domestic partners or civil union partners.

The federal Comprehensive Omnibus Budget Reconciliation Act (COBRA) requires group health plans to provide continuation coverage under the plan for a specified period of time to each qualified beneficiary who would lose coverage under the plan as a result of a qualifying event (*e.g.*, the employee's death or termination from employment).[346] However, under COBRA, only an employee and the employee's spouse and dependent children are considered "qualified beneficiaries."[347] Here again, states may choose to

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[343] *See, e.g.*, *In re First Magnus Fin. Corp*., 2009 WL 1074261 (Bankr. D. Ariz. Mar. 11, 2009).

[344] ARIZ. REV. STAT. ANN. § 23-350.

[345] 29 U.S.C. § 1144.

[346] 29 U.S.C. § 1161.

[347] 29 U.S.C. § 1167(3).

extend continuation coverage requirements to domestic partners and civil union partners under state mini-COBRA statutes.

3.8(c)(ii) *State Guidelines on Domestic Partnerships & Civil Unions*

Couples may register as domestic partners in the cities of Phoenix, Tucson, Scottsdale, Flagstaff, and Tempe. However, state law does not address the issue of whether an employee's domestic partner would be considered an eligible dependent for purposes of employee benefits.

3.9 Leaves of Absence

3.9(a) *Family & Medical Leave*

3.9(a)(i) *Federal Guidelines on Family & Medical Leave*

The federal Family and Medical Leave Act (FMLA) requires covered employers to provide eligible employees up to 12 weeks of unpaid leave in any 12-month period:

- for the birth or placement of a child for adoption or foster care;[348]
- to care for an immediate family member (spouse, child, or parent) with a serious health condition;[349]
- to take medical leave when the employee is unable to work because of a serious health condition;[350]
- for a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is on covered active duty or called to covered active duty status as a member of the National Guard, armed forces, or armed forces reserves (see **3.9(k)(i)** for information on "qualifying exigency leave" under the FMLA); and
- to care for a next of kin service member with a serious injury or illness (see **3.9(k)(i)** for information on the 26 weeks available for "military caregiver leave" under the FMLA).

A *covered employer* is engaged in commerce or in any industry or activity affecting commerce and has at least 50 employees in 20 or more workweeks in the current or preceding calendar year.[351] A *covered employee* has completed at least 12 months of employment and has worked at least 1,250 hours in the last 12 months at a location where 50 or more employees work within 75 miles of each other.[352] For information on the FMLA, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

[348] 29 C.F.R. §§ 825.102, 825.112, 825.113, 825.120, and 826.121.

[349] 29 C.F.R. §§ 825.102, 825.112, and 825.113; *see also* U.S. Dep't of Labor, Wage & Hour Div., *Administrator's Interpretation No. 2010-3* (June 22, 2010), *available at* https://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.pdf (guidance on who may take time off to care for a sick, newly-born, or adopted child when the employee has no legal or biological attachment to the child).

[350] 29 C.F.R. §§ 825.112, 825.113.

[351] 29 U.S.C. § 2611(4); 29 C.F.R. §§ 825.104 to 825.109.

[352] 29 U.S.C. § 2611(2); 29 C.F.R. §§ 825.110 to 825.111.

3.9(a)(ii) *State Guidelines on Family & Medical Leave*

Arizona law does not address family and medical leave for private-sector employees. See **3.9(b)(ii)**, however, for information on using state paid sick leave.

3.9(b) *Paid Sick Leave*

3.9(b)(i) *Federal Guidelines on Paid Sick Leave*

Federal law does not require private employers (that are not government contractors) to provide employees paid sick leave. Executive Order No. 13706 requires certain federal contractors and subcontractors to provide employees with a minimum of 56 hours of paid sick leave annually, to be accrued at a rate of at least one hour of paid sick leave for every 30 hours worked.[353] The paid sick leave requirement applies to certain contracts solicited—or renewed, extended, or amended—on or after January 1, 2017, including all contracts and subcontracts of any tier thereunder. For more information on this topic, see LITTLER ON GOVERNMENT CONTRACTORS & EQUAL EMPLOYMENT OPPORTUNITY OBLIGATIONS.

3.9(b)(ii) *State Guidelines on Paid Sick Leave*

Coverage & Eligibility. The Arizona Fair Wages and Healthy Families Act requires employers to allow employees to accrue up to 40 hours of annual earned paid sick time.[354] The paid sick time provisions apply to all employers regardless of size, with exclusions only for the State of Arizona and the U.S. federal government.[355] An employer may require a newly-hired employee to wait until the 90th calendar day after beginning employment before using accrued paid sick time.[356]

Permitted Uses, Notice & Documentation. An employee may use paid sick time for the following reasons:

- an employee's own mental or physical illness, injury, or health condition, or the employee's need to seek medical diagnosis, treatment, or preventive care;
- a family member's mental or physical illness, injury, or health condition, or the family member's need to seek medical diagnosis, treatment, or preventive care;
- closure of the employee's workplace due to a public health emergency, or an employee's need to care for a child whose school or place of care has been closed due to a public health emergency;
- when an employee or employee's family member's "presence in the community may jeopardize the health of others" due to exposure or suspected exposure to a communicable disease; and
- absences due to domestic violence, sexual violence, abuse, or stalking of an employee or employee's family member, as these terms are defined in the statute, if the leave is to address the psychological, physical, or legal effects on the employee or the employee's family member.[357]

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[353] 80 Fed. Reg. 54,697-54,700 (Sept. 10, 2015).

[354] ARIZ. REV. STAT. §§ 23-371 *et seq.*

[355] ARIZ. REV. STAT. § 23-371(G) (definition of *employer*).

[356] ARIZ. REV. STAT. § 23-372(D).

[357] ARIZ. REV. STAT. § 23-373(A).

Family member is defined broadly as a spouse or legally registered domestic partner in any state or political subdivision; a grandparent, grandchild, or sibling of the employee or the employee's spouse or domestic partner; a biological, adopted, or foster child, stepchild, or legal ward, a child of a domestic partner or an individual to whom the employee stands or stood *in loco parentis*; or a biological, foster, stepparent, adoptive parent, or legal guardian of an employee or an employee's spouse or domestic partner (including a person who stood in *in loco parentis* when the employee or employee's spouse or domestic partner was a minor child); or any other individual related by blood or affinity whose close relationship is the equivalent of a family relationship.[358]

An employee's request for paid sick time "may be made orally, in writing, by electronic means or by any other means acceptable to the employer."[359] If possible, an employee's leave request must include the expected duration of the leave. If an employee's need to use leave is "foreseeable," employees must make a "good faith effort" to give their employers advance notice and schedule their absences in a way that lessens the impact on the employers' businesses.[360] For "unforeseeable leave," employers may require that employees give notice of the leave *if* the notice requirements are clearly set forth in writing and that written description is disseminated to the employee.[361]

The law permits an employer to request "reasonable documentation" that earned paid sick time is used for a proper purpose *only* where an employer seeks to use three or more consecutive workdays of paid sick time. *Reasonable documentation* is defined as "[d]ocumentation signed by a health care professional indicating that the earned paid sick time is necessary."[362] Where three or more consecutive paid sick time days are used in cases of domestic violence, sexual violence, abuse, or stalking, the statute provides alternative forms of reasonable documentation that may be requested, such as a police report, a protective order, or a signed statement from the employee or other individual affirming that the employee was a victim of such acts.[363] Employers may never require, however, that an employee divulge details about the nature of a health condition or domestic violence, sexual violence, abuse, or stalking situation to justify a paid sick time request.[364]

Further, an employee may not be required to find "coverage," or a replacement worker, for the employee's use of paid sick time.[365]

Accrual, Caps, Carry-Over, Cash Value, Cash-Out & Negative Balances. An employer with a paid leave policy, paid time off, who makes available an amount of paid leave sufficient to meet the law's accrual requirements that may be used for the same purposes and under the same conditions as earned paid sick time under the law is not required to provide additional paid sick time. Otherwise, paid sick time accrues at a rate of no less than one hour for every 30 hours actually worked. For employees who are exempt from overtime and minimum wage requirements of the federal Fair Labor Standards Act, it is assumed for purposes of paid sick time accrual that the employee works 40 hours per week. If an exempt employee's

[358] ARIZ. REV. STAT. § 23-371(H).

[359] ARIZ. REV. STAT. § 23-373(B).

[360] ARIZ. REV. STAT. § 23-373(C).

[361] ARIZ. REV. STAT. § 23-373(D).

[362] ARIZ. REV. STAT. § 23-373(G).

[363] ARIZ. REV. STAT. § 23-373(G).

[364] ARIZ. REV. STAT. § 23-377.

[365] ARIZ. REV. STAT. § 23-373.

normal workweek is less than 40 hours, the employee's paid sick time accrues based on the actual number of hours worked in that normal workweek.[366]

The cap on accrual depends on the size of the employer. For employers of 15 or more employees, accrual is capped at 40 hours of paid sick time per year. For employers of fewer than 15 employees, accrual is capped at 24 hours per year. Employers have the discretion to set a higher cap.[367]

An employee must be permitted to carry over unused, accrued paid sick time to the next year, but cannot use this carried-over amount to increase their maximum use cap for that year. However, carry-over is not required if an employer front-loads the required amount of leave at the beginning of each year (23 hours or 40 hours, depending on the employer's size) or at year-end cashes out the employee's accrued but unused leave hours and at the beginning of the subsequent year front-loads the required amount.[368] Employers are not required to pay unused, accrued paid sick time to employees whose employment terminates for *any* reason, including involuntary termination, voluntary resignation, retirement, or other separation from employment. However, if an employer rehires a separated employee within nine months, all paid sick time that the employee had accrued at the time of the employee's separation must be reinstated. Employers are allowed the option to pay out unused, accrued paid sick time to employees at the end of the year.[369]

The statute permits an employer, in its discretion, to allow an employee to borrow paid sick time from a subsequent year before it is earned;[370] however, there is no provision in the statute speaking to an employer's ability to recover borrowed paid sick time if the employee in question separates from employment before the employee actually accrues the borrowed paid sick time.

Posting & Record Keeping. Employers must provide notice of the Arizona Fair Wages and Healthy Families Act by the date of hire. The notice must be in English and Spanish and any other language deemed appropriate by the state. Model notices will be made available.[371] The notice must inform employees of the following:

- employees' entitlement to earn paid sick time and the rate at which it will accrue;
- the terms of use of paid sick time as provided by law;
- that retaliation against employees requesting or using paid sick time is prohibited;
- employees' right to file a complaint if paid sick time use is unlawfully denied or retaliated against; and
- the contact information for where questions about paid sick time rights and responsibilities can be answered.

366 ARIZ. REV. STAT. § 23-372(D).

367 ARIZ. REV. STAT. § 23-372(A), (B).

368 ARIZ. ADMIN. CODE § 20-5-1206(G)-(H) and ARIZ. REV. STAT. § 23-372(D)(4).

369 ARIZ. REV. STAT. § 23-372(D).

370 ARIZ. REV. STAT. § 23-372(D).

371 ARIZ. REV. STAT. § 23-375.

The amount of earned paid sick time available to the employee, the amount of earned paid sick time taken by the employee to date in the year and the amount of pay the employee has received as earned paid sick time must be recorded in, or on an attachment to, the employee's regular paycheck.[372]

Employers must keep records of an employee's paid sick time use and accrual for four years. There is a rebuttable presumption that an employer that fails to maintain such records did not pay statutorily earned paid sick time.[373]

Arizona's earned paid sick time law also requires employers to permit an employee or the employee's designated representative to inspect and copy payroll records pertaining to that employee.[374]

Antiretaliation Provisions. It is "unlawful for an employer or any other person to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right protected" by the paid sick time law.[375] There is a presumption that any adverse employment action taken within 90 days of an employee's exercise of paid sick time rights is retaliatory, unless there is "clear and convincing" evidence that the action was taken for other lawful reasons.[376] Any paid sick time day counts as a protected absence and cannot be used or counted toward disciplinary action.

State Enforcement, Remedies & Penalties. An individual or organization can file an administrative complaint with the Industrial Commission of Arizona (ICA) to enforce the paid sick leave law within one year from the date wages, leave, or PTO were due, or within one year from the date an alleged retaliation, discrimination, conditioning leave on disclosure, or confidentiality violation occurred or when the employee knew or should have known of the alleged violation.[377] An injured party can also file a civil action no later than two years after a violation last occurred (or three years for willful violations).[378] Claims may encompass all violations that occurred as part of a continuing course of employer conduct, regardless of their date. The statute of limitations is tolled during an ICA (or law enforcement) investigation of an employer. An investigation, however, does not bar a person from filing suit.[379]

Employers that fail to pay required sick time will be required to pay the employee the balance of sick time owed, including interest, and an additional amount equal twice the underpaid sick time. Additionally, the labor department and the courts can order payment of unpaid wages and/or sick time, other amounts, and civil penalties, and may order any other additional legal or equitable relief for violations. A prevailing plaintiff is entitled to reasonable attorneys' fees and costs.[380]

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[372] ARIZ. REV. STAT. § 23-375(C).

[373] ARIZ. REV. STAT. ANN. § 23-364(D).

[374] ARIZ. REV. STAT. ANN. § 23-364(D).

[375] ARIZ. REV. STAT. ANN. § 23-374(A).

[376] ARIZ. REV. STAT. ANN. § 23-364(B).

[377] ARIZ. REV. STAT. ANN. § 23-364(C) and ARIZ. ADMIN. CODE § 20-5-1211.

[378] *But see Vega v. All My Sons Bus. Dev. L.L.C.*, 583 F. Supp. 3d 1244 (D. Ariz. 2022) (granting defendant's motion for judgment on the pleadings, no private right of action to seek civil penalties for violations), and *Arrison v. Walmart Inc.*, 2023 WL 4421425 (D. Ariz. July 10, 2023) (granting defendant's motion for summary judgment, no private right of action to obtain civil penalties for recordkeeping violations).

[379] ARIZ. REV. STAT. ANN. § 23-364(H).

[380] ARIZ. REV. STAT. ANN. § 23-364(G).

If an employer commits unlawful retaliation, it will be required to pay the employee and amount set by the ICA or court that is sufficient to compensate the employee and deter future violations that is not less than $150 for each day the violation continued or until legal judgment is final.[381] Additionally, if the state labor department determines that a retaliation, discrimination, confidentiality, or nondisclosure violation has occurred, it must direct the employer or other person to cease and desist from the violation and may take action necessary to remedy the violation, including: 1) Rehiring or reinstatement; 2) Reimbursement of lost wages and interest; 3) Payment of penalty to employees or affected employees; and 4) Posting of notices to employees.[382]

An employer that violates the record keeping, posting, or other requirements that the ICA may establish is subject to a civil penalty of at least $250 dollars for a first violation, and at least $1,000 dollars for each subsequent or willful violation. The commission or court may also determine that an employer be subject to special monitoring and inspections.[383]

3.9(c) *Pregnancy Leave*

3.9(c)(i) *Federal Guidelines on Pregnancy Leave*

Three federal statutes are generally implicated when handling leave related to pregnancy: the Pregnancy Discrimination Act, which amended Title VII of the Civil Rights Act of 1964 ("Title VII") in 1978; the Family and Medical Leave Act; and the Americans with Disabilities Act. For additional information, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

Pregnancy Discrimination Act (PDA). Under the PDA, which as part of Title VII applies to employers with 15 or more employees, disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions must be treated the same as disabilities caused or contributed to by other medical conditions under an employer's health or disability insurance or sick leave plan.[384] Policies and practices involving such matters as the commencement and duration of leave, the availability of extensions, reinstatement, and payment under any health or disability insurance or sick leave plan must be applied to disability due to pregnancy, childbirth, or related medical conditions on the same terms as they are applied to other disabilities.

An employer must allow individuals with physical limitations resulting from pregnancy to take leave on the same terms and conditions as others who are similar in their ability or inability to work. However, an employer may not compel an employee to take leave because she is pregnant, as long as she is able to perform her job. Moreover, an employer may not prohibit employees from returning to work for a set length of time after childbirth. Thus, employers must hold open a job for a pregnancy-related absence for the same length of time as jobs are held open for employees on sick or disability leave.

Family and Medical Leave Act (FMLA). A pregnant employee may take FMLA leave intermittently for prenatal examinations or for her own serious health condition, such as severe morning sickness.[385] FMLA

[381] ARIZ. REV. STAT. ANN. § 23-364(G).

[382] ARIZ. ADMIN. CODE § 20-5-1213(C).

[383] ARIZ. REV. STAT. ANN. § 23-364(F).

[384] 42 U.S.C. § 2000e(k); *see also* 29 C.F.R. § 1604.10.

[385] 29 C.F.R. § 825.202.

leave may also be used for the birth or placement of a child; however, the use of intermittent leave (as opposed to leave taken on an intermittent or reduced schedule) is subject to the employer's approval.

Americans with Disabilities Act (ADA). Pregnancy-related impairments may constitute disabilities for purposes of the ADA. The federal Equal Employment Opportunity Commission (EEOC) takes the position that leave is a reasonable accommodation for pregnancy-related impairments, and may be granted in addition to what an employer would normally provide under a sick leave policy for reasons related to the impairment.[386] An employee may also be allowed to take leave beyond the maximum FMLA leave if the additional leave would be considered a reasonable accommodation.

Several states provide greater protections for employees with respect to pregnancy. For example, states may have specific laws prohibiting discrimination based on pregnancy or providing separate protections for pregnant individuals, including the requirement that employers provide reasonable accommodations to pregnant employees to enable them to continue working during their pregnancies, provided that no undue hardship on the employer's business operations would result. These protections are discussed in **3.11(c)**. To the extent that a state law focuses primarily on providing job-protected leave for employees with disabling pregnancy-related health conditions, that state law is discussed below.

3.9(c)(ii) *State Guidelines on Pregnancy Leave*

Arizona law does not expressly require pregnancy-related leave for private-sector employees. However, employers with 15 or more employees are prohibited from discriminating against an employee on the basis of pregnancy or childbirth-related medical conditions. Individuals who are affected by pregnancy or childbirth-related medical conditions must be treated the same as other persons not so affected but similar in their ability or inability to work, for all employment-related purposes including receipt of benefits under fringe benefit programs.[387]

3.9(d) *Adoptive Parents Leave*

3.9(d)(i) *Federal Guidelines on Adoptive Parents Leave*

An eligible employee may take time off to care for a newly-adopted child as part of the employee's leave entitlement under the FMLA. For information on the FMLA, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

3.9(d)(ii) *State Guidelines on Adoptive Parents Leave*

Arizona law does not address adoptive parents leave for private-sector employees.

3.9(e) *School Activities Leave*

3.9(e)(i) *Federal Guidelines on School Activities Leave*

Federal law does not address school activities leave for private-sector employees.

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[386] EEOC, Notice 915.003, *EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues* (June 25, 2015), *available at* https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm; *see also* EEOC, *Facts About Pregnancy Discrimination* (Sept. 8, 2008), *available at* https://www.eeoc.gov//facts/fs-preg.html.

[387] ARIZ. REV. STAT. ANN. §§ 41-1461, 41-1463.

3.9(e)(ii) *State Guidelines on School Activities Leave*

Arizona law does not address school activities leave for private-sector employees.

3.9(f) *Blood, Organ, or Bone Marrow Donation Leave*

3.9(f)(i) *Federal Guidelines on Blood, Organ, or Bone Marrow Donation*

Federal law does not address blood, organ, or bone marrow donation leave for private-sector employees.

3.9(f)(ii) *State Guidelines on Blood, Organ, or Bone Marrow Donation*

Arizona law does not address blood, organ, or bone marrow donation leave for private-sector employees.

3.9(g) *Voting Time*

3.9(g)(i) *Federal Voting Time Guidelines*

There is no federal law concerning time off to vote.

3.9(g)(ii) *State Voting Time Guidelines*

Arizona law provides all employees time off from work to vote.

Entitlement. An employee is entitled to an amount of time off such that, when added to the time difference between their regular workshift hours and the opening or closing of the polls, a period equal to or greater than three hours exists.[388] In other words, if the polls are open from 7:00 A.M. to 7:00 P.M., and the employee's regular workshift hours are from 8:00 A.M. to 5:00 P.M., the employee is entitled to a one-hour absence at the beginning or end of the regular work shift.

The employer, however, designates the hours during which an employee may be absent from work.[389] Thus, an employer decides whether an employee is entitled to time off at the beginning or end of the employee's shift.[390]

Prerequisites. An employee is entitled to an absence for voting on statewide primary and general election days only.[391] Statewide general election days take place on the first Tuesday after the first Monday in November of every even-numbered year.[392] Statewide primary election days are scheduled for the tenth Tuesday before each statewide general election. Primary elections are scheduled for the first Tuesday in August in the year the general or special election is held.[393]

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[388] ARIZ. REV. STAT. ANN. § 16-402(A).

[389] ARIZ. REV. STAT. ANN. § 16-402(A).

[390] Although Arizona Revised Statutes section 16-402 does not explicitly provide for releasing an employee for three consecutive hours during the middle of the employee's regular workshift, it appears that such an absence would satisfy the statute's purpose and policy.

[391] ARIZ. REV. STAT. ANN. § 16-402(A).

[392] ARIZ. REV. STAT. ANN. § 16-211.

[393] ARIZ. REV. STAT. ANN. § 16-201.

To be entitled to time off, an employee must be entitled to vote. Thus, an employee must be at least 18 years of age on or before the date of the election and properly be registered to vote.[394] The law also requires an employee to request time off prior to the election day on which the absence is necessary.[395]

State Enforcement, Remedies & Penalties. An employer is forbidden by law from penalizing employees, or otherwise deducting from an employee's usual salary or wages, for taking time off to vote.[396] A person who directly or indirectly violates the law by either refusing an employee the right to time off or penalizing an employee for being absent can be charged with a Class 2 misdemeanor.[397]

What constitutes a "penalty" or "deduction" may be confusing for employers and misinterpreted by employees. For instance, it is not a penalty for an employer to require an employee to begin their regular shift earlier (so the employee works the same number of hours) in order to provide the employee with the mandated three-hour period, despite an employee's protestations that arriving for work at a different time than usual is inconvenient.

Regardless of the circumstances, however, employers with benefits systems that accrue vacation or sick time on the number of hours actually worked should be wary of failing to properly credit employees who take time off to vote because such failures, even if done unintentionally, could be classified as a penalty or deduction under the statute.

3.9(h) *Leave to Participate in Political Activities*

3.9(h)(i) *Federal Guidelines on Leave to Participate in Political Activities*

Federal law does not address leave for private-sector employees to participate in political activities.

3.9(h)(ii) *State Guidelines on Leave to Participate in Political Activities*

Arizona law does not address leave for private-sector employees to participate in political activities.

3.9(i) *Leave to Participate in Judicial Proceedings*

3.9(i)(i) *Federal Guidelines on Leave to Participate in Judicial Proceedings*

The Jury System Improvements Act prohibits employers from terminating or disciplining "permanent" employees due to their jury service in federal court.[398] Employers are under no federal statutory obligation to pay employees while serving on a jury.

Employers may verify that an employee's request for civic duty is legally obligated by requiring the employee to produce a copy of the summons, subpoena, or other documentation. Also, an employer can set reasonable advance notice requirements for jury duty leave. Upon completion of jury duty, an employee is entitled to reinstatement.

An employer also may be required to grant leave to employees who are summoned to testify, to assist, or to participate in hearings conducted by federal administrative agencies, as required by a variety of

394 ARIZ. REV. STAT. ANN. §§ 16-120 *et seq*.

395 ARIZ. REV. STAT. ANN. § 16-402(A).

396 ARIZ. REV. STAT. ANN. § 16-402(A).

397 ARIZ. REV. STAT. ANN. § 16-402(B).

398 28 U.S.C. § 1875.

additional federal statutes.[399] For more information, see LITTLER ON LEAVES OF ABSENCE: MILITARY & CIVIC DUTY LEAVES.

3.9(i)(ii) *State Guidelines on Leave to Participate in Judicial Proceedings*

Leave to Serve on a Jury. Arizona gives employees the right to take time off from work to serve on a state or local jury. Thus, an employer may not refuse to permit an employee to serve as a juror.[400] Nor may an employer penalize an employee due to service on a jury. An employee may not lose seniority or precedence while serving on a jury. Upon return, the employee must be reinstated to the employee's previous position or to a higher position commensurate with the employee's ability and experience and in accordance with seniority or precedence.

An employer is not required to compensate an employee who is absent due to jury service. Nor may an employer require or request that an employee use annual, vacation, or sick leave for time spent responding to a jury duty summons, participating in jury selection, or serving on a jury. Absences from employment for jury service are not to affect any vacation rights to which an employee may be entitled.

A court must postpone the service of a summoned juror who is one of five or fewer full-time employees (or their equivalent) if another employee is summoned to appear during the same period.

3.9(j) *Leave for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

3.9(j)(i) *Federal Guidelines on Leaves for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

Federal law does not address leave for private-sector employees who are victims of crime or domestic violence.

3.9(j)(ii) *State Guidelines on Leaves for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

Eligibility for Leave. Arizona law provides that an eligible employee who is a victim of a crime may take time off from work to be present at criminal proceedings, or to obtain or attempt to obtain an order of protection, an injunction against harassment, or any other injunctive relief to help ensure the health, safety, or welfare of the victim or the victim's child.[401] An employer may not refuse to hire, discharge, or otherwise discriminate against an employee who exercises their right to leave work provided by the statute.[402]

An employee who is the accused or is in custody for a crime is not eligible for time off under these provisions.[403]

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[399] *See, e.g.*, 29 U.S.C. § 660(c) (Occupational Safety and Health Act); 29 U.S.C. § 215(a)(3) (Fair Labor Standards Act); 42 U.S.C. § 2000e 3(a) (Title VII); 29 U.S.C. § 623(d) (Age Discrimination in Employment Act).

[400] ARIZ. REV. STAT. ANN. § 21-236.

[401] ARIZ. REV. STAT. ANN. §§ 13-4439 (victims of crimes in general), 8-420 (victims of juvenile offenses).

[402] ARIZ. REV. STAT. ANN. § 13-4439.

[403] ARIZ. REV. STAT. ANN. §§ 13-4401(19), 8-382.

Eligibility for Victims of Crimes in General. An employee is eligible for time off to attend criminal proceedings if:

- the employee works for an employer with 50 or more employees for each day during 20 or more calendar weeks in the current or preceding year; and
- either:
  - the employee is a victim of the crime at issue in the proceedings; or
  - the employee is the spouse, parent, child, sibling, grandparent, second-degree relative, or other lawful representative of a victim that was killed or incapacitated.[404]

Eligibility for Victims of Domestic Abuse, Sexual Assault & Related Crimes. An employee is eligible for time off from work to obtain or attempt to obtain an order of protection, an injunction against harassment or any other injunctive relief to help ensure the health, safety, or welfare of the victim or the victim's child if:

- the employee works for an employer with 50 or more employees for each day during 20 or more calendar weeks in the current or preceding year; and
- either:
  - the employee is a victim of the crime at issue; or
  - the employee is the parent of the victim.[405]

Prerequisites for Taking Leave. Before an employee may leave work, the employee is required to:

1. provide the employer with a copy of the form provided to the employee by the law enforcement agency, or a court order the employee is subject to or any other proper documentation; and
2. if applicable, give the employer a copy of the notice of each scheduled proceeding that is provided to the victim by the agency responsible for providing notice to the victim.[406]

Compensation During Leave. An employer is not required to compensate an employee for absences taken pursuant to the statute. The employee may elect to use, or an employer may require the employee to use, the employee's accrued paid vacation, personal leave, or sick leave.[407] Employers are required to keep confidential records regarding the employee's leave.[408]

Undue Hardship Exception. An employer may limit an employee's leave if it creates an undue hardship to the employer's business. Undue hardship means a significant difficulty and expense to the business and includes the consideration of the size of the employer's business and the employer's critical need of the employee.[409]

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[404] ARIZ. REV. STAT. ANN. §§ 13-4401(19), 8-382.

[405] ARIZ. REV. STAT. ANN. §§ 13-4439, 13-4401(19).

[406] ARIZ. REV. STAT. ANN. §§ 13-4439, 8-420.

[407] ARIZ. REV. STAT. ANN. § 13-4439.

[408] ARIZ. REV. STAT. ANN. § 13-4439.

[409] ARIZ. REV. STAT. ANN. § 13-4439.

3.9(k) *Military-Related Leave*

3.9(k)(i) *Federal Guidelines on Military-Related Leave*

Two federal statutes primarily govern military-related leave: the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Family and Medical Leave Act (FMLA). For more detailed information on these statutes, including notice and other requirements, see **LITTLER ON LEAVES OF ABSENCE: MILITARY & CIVIC DUTY LEAVES**.

USERRA. USERRA imposes obligations on all public and private employers to provide employees with leave to "serve" in the "uniformed services." USERRA also requires employers to reinstate employees returning from military leave who meet certain defined qualifications. An employer also may have an obligation to train or otherwise qualify those employees returning from military leave. USERRA guarantees employees a continuation of health benefits for the 24 months of military leave (at the employee's expense) and protects an employee's pension benefits upon return from leave. Finally, USERRA requires that employers not discriminate against an employee because of past, present, or future military obligations, among other things.

Some states provide greater protections for employees with respect to military leave. USERRA, however, establishes a "floor" with respect to the rights and benefits an employer is required to provide to an employee to take leave, return from leave, and be free from discrimination. Any state law that seeks to supersede, nullify, or diminish these rights is void under USERRA.[410]

FMLA. Under the FMLA, eligible employees may take leave for: (1) any "qualifying exigency" arising from the foreign deployment of the employee's spouse, son, daughter, or parent with the armed forces; or (2) to care for a next of kin servicemember with a serious injury or illness (referred to as "military caregiver leave").

1. **Qualifying Exigency Leave.** An eligible employee may take up to 12 weeks of unpaid leave in a single 12-month period if the employee's spouse, child, or parent is an active duty member of one of the U.S. armed forces' reserve components or National Guard, or is a reservist or member of the National Guard who faces recall to active duty if a qualifying exigency exists.[411] An eligible employee may also take leave for a qualifying exigency if a covered family member is a member of the regular armed forces and is on duty, or called to active duty, in a foreign country.[412] Notably, leave is only available for covered relatives of military members called to active *federal* service by the president and is not available for those in the armed forces recalled to state service by the governor of the member's respective state.

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[410] USERRA provides that: (1) nothing within USERRA is intended to supersede, nullify, or diminish a right or benefit provided to an employee that is greater than the rights USERRA provides (38 U.S.C. § 4302(a)); and (2) USERRA supersedes any state law that would reduce, limit, or eliminate any right or benefit USERRA provides (38 U.S.C. § 4302(b)).

[411] 29 C.F.R. § 825.126(a).

[412] Deployment of the member with the armed forces to a foreign country means deployment to areas outside of the United States, the District of Columbia, or any Territory or possession of the United States, including international waters. 29 C.F.R. § 825.126(a)(3).

2. **Military Caregiver Leave.** An eligible employee may take up to 26 weeks of unpaid leave in a single 12-month period to care for a "covered servicemember" with a serious injury or illness if the employee is the servicemember's spouse, child, parent, or next of kin.

3.9(k)(ii) *State Guidelines on Military-Related Leave*

Military Service Leave. Employers may not refuse to hire or otherwise discriminate against an employee who is a member of the National Guard of Arizona or of any other state or the U.S. Armed Forces Reserves because of their membership or absence from employment because of military orders. Arizona law also prohibits employers from attempting to dissuade an employee from enlisting in the state or U.S. military services.[413]

An employer must permit employees who are members of the U.S. Armed Forces Reserves or the National Guard of Arizona or of any other state to take leaves of absence when ordered to active duty by the state or the United States or to attend camps, maneuvers, formations, or armory drills. When ordered by the governor to perform training or duty, members of the National Guard are entitled to the protections USERRA provides persons on federal active duty.[414]

A military leave of absence shall not affect vacation rights that employees otherwise have. In determining eligibility for vacation and the amount of vacation pay owed a guard member or reservist, an employer need not consider the leave as a period of work.[415]

National Guard members and reservists do not lose seniority or precedence while on leave, and upon return must be reinstated to their previous jobs or to higher positions commensurate with their skills and experience as seniority or precedence would otherwise entitle them.[416]

Other Military-Related Protections: Spousal Unemployment. Although not a specific leave requirement, a spouse voluntarily leaving work to accompany the other spouse who is a member of the armed services and who is transferred to another locality as a result of official orders will not be disqualified from receiving unemployment benefits.[417]

3.9(l) *Other Leaves*

3.9(l)(i) *Federal Guidelines on Other Leaves*

There are no federal statutory requirements for other categories of leave for private-sector employees.

3.9(l)(ii) *State Guidelines on Other Leaves*

There are no statutory requirements for other categories of leave for private-sector employees in Arizona.

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[413] ARIZ. REV. STAT. ANN. § 26-167.

[414] ARIZ. REV. STAT. ANN. § 26-168(D).

[415] ARIZ. REV. STAT. ANN. § 26-168(A).

[416] ARIZ. REV. STAT. ANN. § 26-168(B).

[417] ARIZ. REV. STAT. ANN. § 23-775(1).

3.10 Workplace Safety

3.10(a) *Occupational Safety and Health*

3.10(a)(i) *Fed-OSH Act Guidelines*

The federal Occupational Safety and Health Act ("Fed-OSH Act") requires every employer to keep their places of employment safe and free from recognized hazards likely to cause death or serious harm to employees.[418] Employers are also required to comply with all applicable occupational safety and health standards.[419] To enforce these standards, the federal Occupational Safety and Health Administration ("Fed-OSHA") is authorized to carry out workplace inspections and investigations and to issue citations and assess penalties. The Fed-OSH Act also requires employers to adopt reporting and record-keeping requirements related to workplace accidents. For more information on this topic, see LITTLER ON WORKPLACE SAFETY.

Note that the Fed-OSH Act encourages states to enact their own state safety and health plans. Among the criteria for state plan approval is the requirement that the state plan provide for the development and enforcement of state standards that are at least as effective in providing workplace protection as are comparable standards under the federal law.[420] Some state plans, however, are more comprehensive than the federal program or otherwise differ from the Fed-OSH Act.

3.10(a)(ii) *State-OSH Act Guidelines*

Arizona, under agreement with Fed-OSHA, operates its own state occupational safety and health program in accordance with section 18 of the Fed-OSH Act.[421] Thus, Arizona is a so-called "state plan" jurisdiction, with its own detailed rules for occupational safety and health that parallel, but are separate from, Fed-OSHA standards.

Like the Fed-OSH Act, the Arizona Occupational Safety and Health Act (AOSHA)[422] imposes various obligations upon covered employers, most importantly that "each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees"[423] The Arizona Division of Occupational Safety and Health (ADOSH) of the Industrial Commission of Arizona (ICA) enforces AOSHA by establishing regulations,[424] effectively enforcing such regulations, educating and training employees, and establishing reporting procedures for job-related accidents and illnesses.

AOSHA is very broad in its scope and coverage. It covers virtually every employee and every employer in the state. AOSHA defines the term *employer* as "any individual or type of organization…which has in its employ one or more individuals..." The term also includes the State of Arizona, and its subdivisions, school

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[418] 29 U.S.C. § 654(a)(1). An *employer* is defined as "a person engaged in a business affecting commerce that has employees." 29 U.S.C. § 652(5). The definition of employer does not include federal or state agencies (except for the U.S. House of Representatives and Senate). Under some state plans, however, state agencies may be subject to the state safety and health plan.

[419] 29 U.S.C. § 654(a)(2).

[420] 29 U.S.C. § 667(c)(2).

[421] 29 U.S.C. § 667.

[422] ARIZ. REV. STAT. ANN. §§ 23-401 *et seq*.

[423] ARIZ. REV. STAT. ANN. § 23-403(A).

[424] ARIZ. ADMIN. CODE §§ 20-5-601 *et seq.*

districts, and public or quasi-public corporations.[425] *Employee* is defined as "any person performing services for an employer…"[426] The provisions of AOSHA are applicable to places of employment within the state. AOSHA even includes self-employed persons who have employees, but excludes household domestic service.[427] AOSHA also does not cover employment under the Atomic Energy Act[428] or under the jurisdiction of the State Mine Inspector.[429] It also does not cover motor vehicles on public highways, federal employees, employees on Indian lands, and places of employment regulated by the Federal Mine Safety and Health Act or the Federal Railway Safety Act.

Safety & Health Standards. AOSHA grants the ADOSH wide authority to promulgate occupational safety and health standards for employers and places of employment in Arizona. ADOSH and the ICA incorporate a variety of resources for guidance on standards and rule promulgating. In practice, however, the majority of standards regulating places of employment in Arizona are federal standards adopted under the Fed-OSH Act.

ADOSH has adopted three major groups of federal standards for employers in Arizona. First, Arizona employers must comply with:

1. the general industry standards contained in Code of Federal Regulations part 1910, subparts B through Z;[430]
2. the construction standards in Code of Federal Regulations part 1926;[431] and
3. the agricultural standards contained in Code of Federal Regulations part 1928.[432]

Arizona also has a statute protecting employees who complain about safety or health issues from retaliation.[433]

General Duty Clause. As mentioned above, both the Fed-OSH Act and AOSHA generally require the employer to maintain a hazard-free workplace.[434] This section in both acts is commonly referred to as the "General Duty Clause." The General Duty Clause is one of the most frequently litigated provisions of the AOSHA. The elements of a General Duty Clause violation are:

1. the employer failed to make its workplace free of hazards;
2. the condition is a hazard recognized by the employer or the employer's industry;

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[425] ARIZ. ADMIN. CODE § 23-401(7).

[426] ARIZ. ADMIN. CODE § 23-401(6).

[427] ARIZ. REV. STAT. ANN. § 23-401(7).

[428] 42 U.S.C. §§ 2011 *et seq.*

[429] ARIZ. REV. STAT. ANN. §§ 23-402 and 27-301 *et seq.*

[430] 29 C.F.R. pt. 1910; ARIZ. ADMIN. CODE § 20-5-602.

[431] 29 C.F.R. pt. 1926; ARIZ. ADMIN. CODE § 20-5-601.

[432] 29 C.F.R. pt. 1928; ARIZ. ADMIN. CODE § 20-5-603.

[433] ARIZ. REV. STAT. ANN. § 23-425.

[434] Both U.S. Code Title 29, section 654(a)(1)and Arizona Revised Statutes § 23-403(A) require employers to furnish "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

3. the hazard is causing or likely to cause death or serious physical harm to employees; and
4. the hazard could have been materially reduced or eliminated by a feasible means of abatement.[435]

The state attorney general opined that the ICA cannot create a recognized hazard other than in the adjudication of a particular case or by promulgating a rule.[436] Indeed, under subsection C of the General Duty Clause, "a condition or practice which is common within an industry is not deemed a recognized hazard unless a standard or regulation concerning the condition or practice has been developed pursuant to section 23-410 or section 23-414." If no standard applies, ADOSH can cite an employer for violating the General Duty Clause, but the employer has a defense if the citation arises from a condition or practice common in the industry. Federal case law holds that if a specific standard is applicable to a hazardous condition, a citation based solely on the General Duty Clause is improper.[437]

Record Keeping. AOSHA requires employers to compile, maintain, and report certain data to the ICA's Research and Statistics Section.[438] Arizona exclusively follows the federal standard,[439] thus, it requires annual reporting of workplace injury statistics and reporting of serious workplace accidents.

Enforcement. ADOSH has full authority to carry out and enforce the AOSHA and any standards and rules adopted. ADOSH's main tool to assure compliance is the power to conduct investigations. Arizona statutes, regulations, and the Fed-OSHA Field Manual govern inspections of the workplace.[440] ADOSH has authority to inspect places of employment in the state during regular working hours or at other reasonable times. An ADOSH investigator may enter, without delay, any place of employment upon presenting appropriate credentials to any employer.

The law permits ADOSH to investigate all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials. ADOSH also has the right to question employees privately. The law prohibits ADOSH from giving the employer advance notice of a random or customary regulatory inspection.[441] Although the statutory language is very broad and appears to permit almost unlimited inspections, an inspection must conform with the dictates of the Fourth Amendment to the U.S. Constitution. In *Marshall v. Barlow's, Inc.*, the U.S. Supreme Court held that a business, like the occupant of a residence, has a constitutional right to be free from unreasonable official entries upon its commercial property.[442] Thus, to meet constitutional requirements, ADOSH's decision to select a site for inspection must be based on either: (1) specific evidence that the worksite contains an existing violation; or (2) the worksite was chosen as a result of an unbiased implementation of a systematic plan for selecting inspection targets.

There are two basic types of inspections under the AOSHA:

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[435] *National Realty & Constr. Co. v. Occupational Safety & Health Review Comm'n*, 489 F.2d 1257 (D.C. Cir. 1973); *Inland Steel Co.*, 12 O.S.H.C. 1968 (Rev. Comm'n 1986).

[436] Op. Ariz. Att'y Gen. No. I83-036 (April 12, 1983).

[437] *Secretary of Labor v. Odyssey Printing Co*., 14 O.S.H.C.1849 (1990).

[438] ARIZ. REV. STAT. ANN. § 23-427.

[439] 29 C.F.R. § 1904.

[440] ARIZ. REV. STAT. ANN. § 23-408; ARIZ. ADMIN. CODE § 20-5-610 through 619.

[441] ARIZ. REV. STAT. ANN. § 23-408(C).

[442] *Marshall v. Barlow's, Inc*., 436 U.S. 307 (1978).

1. programmed; and
2. unprogrammed.

These two categories of inspections correspond with the two constitutionally permissible types of searches. An *unprogrammed inspection* is generally based on a complaint, referral, reportable accident, or fatality. Accordingly, this type of inspection is normally limited in scope to specific working conditions or practices and covers limited areas of a particular place of employment. In this sense, an unprogrammed inspection is a partial inspection of the place of employment. In contrast, a *programmed inspection* is usually comprehensive in that it encompasses the entire place of employment. A programmed inspection is based on objective and neutral criteria, such as the number of employees, type of employment, and the severity and number of hazards in the industry.

Upon arrival at the place of employment, the inspector (also called a *compliance officer*) conducts an opening conference with the employer and, if the employees are represented, an employee representative. During the opening conference the purpose, scope, and nature of the inspection is explained. If the inspection is the result of a complaint or a referral, the employer is provided with a copy of the complaint or referral, but if the complaint comes from an employee, that name will be withheld at the employee's request.[443] The employer is also informed that it can deny the inspector entry to the place of employment. However, in the event entry is denied, a search warrant from the superior court likely will be sought to gain entry and complete the inspection. Such warrants usually are issued, so the employer should cooperate with the inspector and permit the inspection.

Employees or their representatives have the right to accompany the investigator on the inspection.[444] Employer representatives also may accompany the inspector. A different employer and employee representative may accompany the compliance officer during each different phase of an inspection if this will not interfere with the conduct of the inspection.[445] However, the inspection should be conducted in a manner that does not disrupt the employer's operations.[446] During the inspection, the compliance officer may take photographs and/or videotapes of the workplace. The employer representative should carry a camera and take identical photos/videos. The investigator will also check to ensure the mandatory notices provided by the ICA are posted.

Citations. If ADOSH determines that an employer has violated any provision of the AOSHA or any standard, rule, or order, ADOSH will issue a citation. The citation must be issued with reasonable promptness, but not later than six months after the occurrence of the violation.[447] If the employer fails to correct the violation addressed in the citation, it may be assessed an administrative fine of not more than the maximum civil penalty for abatement violations adopted by Fed-OSHA for each day during which the violation continues.[448]

There are three basic types of citations that may be issued for a violation of the AOSHA:

[443] ARIZ. ADMIN. CODE § 20-5-618(A).

[444] ARIZ. REV. STAT. ANN. § 23-408; ARIZ. ADMIN. CODE § 20-5-615.

[445] ARIZ. ADMIN. CODE § 20-5-615(A).

[446] ARIZ. ADMIN. CODE. § 20-5-614.

[447] ARIZ. REV. STAT. ANN. § 23-415(D).

[448] ARIZ. REV. STAT. ANN. § 23-418(D).

1. willful;
2. serious; and
3. other than serious.

A citation may consist of one or many separate items, each classified as separate violations. The AOSHA does not specifically define a *willful violation*, but an Arizona Court of Appeals's decision defines *willful* as an act done with either an intentional disregard of, or plain indifference to, the governing safety regulations.[449] A willful violation may be punished by a fine of not more than the maximum civil penalty nor less than the minimum civil penalty for such violations adopted by Fed-OSHA.[450] Additionally, there is an Arizona statute that assesses an additional penalty of $25,000 against an employer committing a willful or repeat violation that causes permanent disability or death. The $25,000 is paid directly to the injured employee or the employee's survivors.[451]

AOSHA defines a *serious violation* as the existence of a condition that has a substantial probability to cause death or serious physical harm unless the employer did not and could not, with the exercise of reasonable due diligence, know of the presence of the violation.[452] Employers are subject to fines of not more than the maximum penalty for serious violations adopted by Fed-OSHA for a serious and other than serious violation.[453] In assessing administrative fines, the ICA is required to give due consideration to the appropriateness of the penalty with respect to the size of the employer, the gravity of the violation, the employer's good faith, and the employer's history of previous violations.[454]

Arizona law permits the same employer defenses as provided for under the Fed–OSH Act and for further discussion as to those defenses, see **LITTLER ON WORKPLACE SAFETY**. Arizona cases have addressed the defenses of isolated employee misconduct,[455] lack of employer actual knowledge in a willful violation citation,[456] incorrect standard listed in the citation,[457] and lack of employer knowledge in a serious violation citation.[458] To prove the defense of isolated employee misconduct, an employer must establish:

1. the employee must be experienced or otherwise aware of the job hazards through training;
2. the employer must have an adequate safety program, including training and instruction;
3. the employer must have safety equipment and provide instruction for proper use; and
4. the employer must enforce its safety policies and procedures through employee discipline.[459]

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[449] *Division of Occupational Safety & Health of the I.C.A v. Ball, Ball & Brosamer, Inc.*, 837 P.2d 174 (Ariz. Ct. App. 1992).

[450] ARIZ. REV. STAT. ANN. § 23-418(A).

[451] ARIZ. REV. STAT. ANN. § 23-418.01.

[452] ARIZ. REV. STAT. ANN. § 23-401(12).

[453] ARIZ. REV. STAT. ANN. § 23-418(B).

[454] ARIZ. REV. STAT. ANN. § 23-418(I); ARIZ. ADMIN. CODE § 20-5-622.

[455] *Arizona Div. of Occupational Safety & Health v. Superior Court*, 863 P.2d 276, 281 (Ariz. Ct. App. 1993).

[456] *Arizona Div. of Occupational Safety & Health v. Ball, Ball & Brosamer*, 837 P.2d 174 (Ariz. Ct. App. 1992).

[457] *Markwood Enters. v. Division of Occupational Safety & Health*, 730 P.2d 878 (Ariz. Ct. App. 1986).

[458] *McAfee-Guthrie, Inc. v. Division of Occupational Safety & Health*, 627 P.2d 239 (Ariz. Ct. App. 1981).

[459] *Arizona Div. of Occupational Safety & Health v. Superior Court*, 863 P.2d 276, 281 (Ariz. Ct. App. 1993).

To ensure this defense, it is recommended that a comprehensive training and disciplinary program be instituted at every worksite.

Administrative Hearings. An employer has the right to protest a citation under AOSHA. Protests of a citation are adjudicated by the ICA Administrative Law Judges (ALJs) and their orders may be appealed to the Occupational Safety and Health Review Board ("Review Board"). The Review Board is an independent body consisting of five members and one alternate appointed by the governor. One member is a representative of management, one is a representative of labor, and three members are representatives of the general public. The Review Board can only conduct business if the member from management, the member from labor, and at least one of the three general public members are present.

The employer may contest the citation by serving written notice of its intent to contest within 15 working days of its receipt of the citation.[460] If the employer fails to contest the citation within the time period specified, the citation is deemed to be final and is not subject to review by any court or agency. The Arizona Court of Appeals has held that the 15-day requirement does not violate due process.[461]

An employer may also request an informal conference to discuss a citation within 15 days of receiving the citation. However, the request for an informal conference does not toll the period for serving the notice of contest. If the employer desires to attempt to settle the disputed citation, it should also contest the citation to preserve its right to litigate if settlement is not achieved.

If an employer has filed a notice of contest, the ICA Legal Department represents the ADOSH by filing a complaint in formal proceedings before the ALJ in a public hearing. The ALJs are not bound by common law, the rules of evidence, or jurisdictional rules, but rather conduct hearings to achieve a "substantial justice."[462] The employer must file an answer to the complaint within 15 days. In formulating an answer, the employer should consider the applicability of any of the numerous affirmative defenses recognized in Fed-OSH Act cases including: improper citation of the General Duty Clause; improper inspection; multiemployer worksite; unpreventable employee misconduct; lack of employment relationship; infeasibility of compliance; and the greater hazard defense.

Discovery in proceedings before the ALJ is limited, but the ALJ does have subpoena power to command depositions. Aggrieved parties have 15 days to file an appeal from the ALJ order with the Review Board. The Arizona Administrative Code also governs their procedures. From there, the aggrieved party has 10 days to appeal to the Arizona Court of Appeals by special action.[463]

3.10(b) *Cell Phone & Texting While Driving Prohibitions*

3.10(b)(i) *Federal Guidelines on Cell Phone & Texting While Driving*

Federal law does not address cell phone use or texting while driving.

3.10(b)(ii) *State Guidelines on Cell Phone & Texting While Driving*

Arizona prohibits the use of portable wireless communication devices while driving, except in hands-free mode. Under the law, a driver may not operate a motor vehicle while physically holding, or supporting

[460] ARIZ. REV. STAT. ANN. § 23-417(A).

[461] *Highway Prods. v. Occupational Safety & Review Bd.*, 648 P.2d 1060 (Ariz. Ct. App. 1982).

[462] ARIZ. REV. STAT. ANN. § 23-420(F).

[463] ARIZ. REV. STAT. ANN. § 23-423(I); *McAfee-Guthrie*, 627 P.2d at 241.

with any part of their body, a portable wireless communication device or stand-alone electronic device. Drivers also may not write, send or read any text-based communication, including text messages, instant messages, emails or internet data while operating a motor vehicle. However, there are exceptions for operating a device in a hands-free manner for navigation, use of a global positioning system, or obtaining motor vehicle information or information related to driving a motor vehicle.

Under the law, *portable wireless communication device* means a cellular telephone, a portable telephone, a text messaging device, a personal digital assistant, a stand-alone computer, a global positioning system receiver or a substantially similar portable wireless device that is used to initiate or receive communication, information or data. The term does not include a radio, citizens band radio, citizens band radio hybrid, commercial two-way radio communication device or its functional equivalent, subscription-based emergency communication device, prescribed medical device, amateur or ham radio device or in-vehicle security, navigation or remote diagnostics system. *Stand-alone electronic device* means a portable device other than a portable wireless communication device that stores audio or video data files to be retrieved on demand by a user.

The law does not apply to devices that are accessible through an interface that is embedded in a motor vehicle that allows communication without the use of the driver's hands, except to activate or deactivate device functions. It also provides exceptions for emergency and law enforcement, as well as operators licensed by the Federal Communications Commission operating a radio frequency device, other than a portable wireless communication device. The law also exempts operators using two-way radio or private land mobile radio systems, within the meaning of 47 C.F.R. § 90, while in the performance of work-related duties and who is operating a fleet vehicle or operators who possess a commercial driver license. There are further exemptions for operators reporting illegal activity or summoning emergency help, or if the device relays information, in the course of occupational duties, between the operator and a dispatcher or a digital network or software application service.

Arizona law prohibits viewing a television image or visual image from an image display device, but provides an exception for static images or imagery in support of mapping services or applications. The law also prohibits watching a video or movie on a portable wireless communication device or stand-alone electronic device other than watching data related to the navigation of the motor vehicle, vehicle information, or information related to driving the motor vehicle. Additionally, the law prohibits recording or broadcasting while driving, except for the sole purpose of continuously recording or broadcasting video within or outside of the motor vehicle.[464]

3.10(c) *Firearms in the Workplace*

3.10(c)(i) *Federal Guidelines on Firearms on Employer Property*

Federal law does not address firearms in the workplace.

3.10(c)(ii) *State Guidelines on Firearms on Employer Property*

Firearms in the Workplace. In 2010, Arizona became the third state to allow people to carry concealed weapons without a permit. U.S. citizens 21 and older can forego background checks and classes previously required. The law, however, does not trump employers' policies that typically restrict guns or other

[464] ARIZ. REV. STAT. ANN. §§ 28-914; 28-963.

weapons at worksites. Employers still can ban firearms from the workplace despite the legislature's elimination of concealed-carry weapons permit requirements.

Firearms in Company Parking Lots. In 2009, Arizona passed a law severely limiting employers from implementing and maintaining policies that prohibit employees from lawfully storing firearms in their locked vehicles while parked in their employer's parking lot.[465] The law prohibits property owners, tenants, and public or private employers or business entities from maintaining or enforcing any policy or rule that would forbid employees, as well as other individuals (such as visitors and customers), from lawfully transporting or lawfully storing any firearm that is both:

- in the employee's locked and privately owned vehicle or in a locked compartment on the employee's privately owned motorcycle; and
- not visible from outside of the vehicle or motorcycle.

The 2009 law, however, is not without restrictions. Specifically, employers may prohibit an employee from carrying a firearm in their vehicle while parked on company property if any federal or state law prohibits the employee from possessing the firearm or if complying with the law would result in the employer violating other federal or state laws or regulations. Further, the law does not apply if the parking lot, parking garage, or other area designated for parking vehicles or motorcycles is located on an owner- or tenant-occupied, single-family detached residence.

Moreover, employers may prohibit employees from carrying or storing firearms in any vehicles owned or leased by the employer when the employees are using the vehicle for their employment. Of course, an employee may transport or store a firearm in an employer-owned or leased vehicle if the employer provides consent to do so or the employee is required to do so as part of the employee's official duties. The law also does not apply if the employer is a current U.S. Department of Defense contractor and the parking lot is located in whole or in part on a U.S. military base or military installation.

An employer also may prohibit employees from leaving firearms in their vehicles parked in the primary parking lot if the employer provides alternative parking in a location reasonably close to the primary parking area and does not charge an extra fee for such parking. Similarly, some employers provide parking lots or parking garages secured by a fence or other physical barrier and limit access to the area by a guard or other security measure. In these situations, the employer may prohibit employees from storing their firearms in their vehicles or motorcycles in the secured parking areas if the employer provides employees with temporary and secure storage for their firearms while the vehicles are parked in the secure area. However, the employer must monitor the storage, make it readily accessible to employees when entering and leaving the premises, and provide for immediate retrieval of the firearm when the employees leave the premises.[466]

3.10(d) *Smoking in the Workplace*

3.10(d)(i) *Federal Guidelines on Smoking in the Workplace*

Federal law does not address smoking in the workplace.

[465] ARIZ. REV. STAT. ANN. § 12-781.

[466] ARIZ. REV. STAT. ANN. § 12-781.

3.10(d)(ii) *State Guidelines on Smoking in the Workplace*

The Smoke-Free Arizona Act prohibits smoking within any enclosed area in public places and places of employment.[467] In addition, this law prohibits smoking within a reasonable distance from any entrances, windows, and ventilations systems to ensure persons entering or leaving the building or facility are not subjected to breathing smoke and that smoke does not enter the building.

In addition to prohibiting smoking in or reasonably near any enclosed area, employers must: (1) communicate with employees and applicants to educate them about the law;[468] (2) clearly and conspicuously post "no smoking" signs at every entrance; and (3) remove all ashtrays from any area where smoking is prohibited.[469]

Under the Smoke-Free Arizona Act, vehicles can be considered *places of employment* when they are "owned and operated by the employer during work hours when the vehicle is occupied by more than one person."[470] Thus, a "no-smoking" sign must be posted in all company-owned vehicles and smoking is not permitted in a company-owned vehicle when it is being used for business purposes and more than one person occupies it.

Antiretaliation Provisions. Employers may not discharge or retaliate against any employee for engaging in a protected activity under the Smoke-Free Arizona Act, including complaining about a violation of the Act.[471]

State Enforcement, Remedies & Penalties. Penalties for violating the Smoke-Free Arizona Act start at $100 for each violation, and can increase to $5,000 per violation if a pattern of violations is noted. Each day that a violation occurs constitutes a separate violation.[472]

3.10(e) *Suitable Seating for Employees*

3.10(e)(i) *Federal Guidelines on Suitable Seating for Employees*

Federal law does not address suitable seating requirements for employees.

3.10(e)(ii) *State Guidelines on Suitable Seating for Employees*

Arizona law does not address suitable seating requirements for employees.

3.10(f) *Workplace Violence Protection Orders*

3.10(f)(i) *Federal Guidelines on Workplace Violence Protection Orders*

Federal law does not address employer workplace violence protection orders. That is, there is no federal statute addressing whether or how employers might obtain a legal order (such as a temporary restraining

[467] ARIZ. REV. STAT. ANN. § 36-601.01; ARIZ. ADMIN. CODE §§ 9-2-101 *et seq*.

[468] ARIZ. REV. STAT. ANN. § 36-601.01(C).

[469] ARIZ. REV. STAT. ANN. § 36-601.01(E).

[470] ARIZ. REV. STAT. ANN. § 36-601.01(A)(7).

[471] ARIZ. REV. STAT. ANN. § 36-601.01(F).

[472] ARIZ. REV. STAT. ANN. § 36-601.01(G).

order) on their own behalf, or on behalf of their employees or visitors, to protect against workplace violence, threats, or harassment.

3.10(f)(ii) *State Guidelines on Workplace Violence Protection Orders*

Individual Injunction. Arizona has enacted procedures for individuals and employers to obtain injunctions against harassment in the workplace. An individual can seek an injunction against harassment if the individual is the target of harassment.[473] For purposes of this type of injunction, *harassment* is defined as a series of acts over any period of time directed at a specific person that would cause a reasonable person to be seriously alarmed, annoyed, or harassed, and, in fact, the misconduct seriously alarms, annoys, or harasses that person and serves no legitimate purpose. *Harassment* also includes one or more acts of sexual violence as defined by the state paid sick time law. The court may enjoin the defendant from committing a violation of one or more acts of harassment or restrain the defendant from contacting the plaintiff or other specifically designated persons from going near the residence, place of employment, or school of the plaintiff or other specifically designated locations or persons.[474]

A person may file a petition for an injunction in any justice court, city court, or superior court.[475] Notwithstanding the location or residence of the plaintiff or the defendant, any court in Arizona may issue or enforce an injunction against harassment or workplace harassment. A court filing fee is not charged for filing a petition under these laws.[476]

Employer Injunction. Alternatively, an employer can seek an injunction against workplace harassment under Arizona Revised Statutes section 12-1810. *Harassment* is defined under this statute as a single threat or act of physical harm or damage or a series of acts over any period of time that would cause a reasonable person to be seriously alarmed or annoyed.[477] If harassment occurs, the employer or an agent of the employer may file a written petition for an injunction prohibiting workplace harassment with a magistrate, justice of the peace, or superior court judge.[478]

The injunction can restrain the defendant from going near the employer's property or place of business and restrain the defendant from contacting the employer, or other person, while that person is on or at the employer's property or place of business or is performing official work duties.[479] An employer is immune from civil liability for seeking or failing to seek an injunction under this section unless the employer is seeking an injunction primarily to accomplish a purpose for which the injunction was not designed.[480] Any action or statement by an employer under this section is not deemed an admission of any fact by the employer.[481]

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[473] ARIZ. REV. STAT. ANN. § 12-1809.

[474] ARIZ. REV. STAT. ANN. §§ 12-1809(F), 13-719.

[475] ARIZ. REV. STAT. ANN. § 12-1809(A).

[476] ARIZ. REV. STAT. ANN. § 12-1809(D).

[477] ARIZ. REV. STAT. ANN. § 12-1810(S)(2).

[478] ARIZ. REV. STAT. ANN. § 12-1810.

[479] ARIZ. REV. STAT. ANN. § 12-1810(F)(1).

[480] ARIZ. REV. STAT. ANN. § 12-1810(Q).

[481] ARIZ. REV. STAT. ANN. § 12-1810(Q).

3.11 Discrimination, Retaliation & Harassment

3.11(a) *Protected Classes & Other Fair Employment Practices Protections*

3.11(a)(i) *Federal FEP Protections*

The federal equal employment opportunity laws that apply to most employers include: (1) Title VII of the Civil Rights Act of 1964 ("Title VII");[482] (2) the Americans with Disabilities Act (ADA);[483] (3) the Age Discrimination in Employment Act (ADEA);[484] (4) the Equal Pay Act;[485] (5) the Genetic Information Nondiscrimination Act of 2009 (GINA);[486] (6) the Civil Rights Acts of 1866 and 1871;[487] and (7) the Civil Rights Act of 1991. As a result of these laws, federal law prohibits discrimination in employment on the basis of:

- race;
- color;
- national origin (includes ancestry);
- religion;
- sex (includes pregnancy, childbirth, or related medical conditions, and pursuant to the U.S. Supreme Court's decision in *Bostock v. Clayton County, Georgia*, includes sexual orientation and gender identity);[488]
- disability (includes having a "record of" an impairment or being "regarded as" having an impairment);
- age (40); or
- genetic information.

The Equal Employment Opportunity Commission (EEOC) is the agency charged with handling claims under the antidiscrimination statutes.[489] Employees must first exhaust their administrative remedies by filing a complaint within 180 days—unless a charge is covered by state or local antidiscrimination law, in which case the time is extended to 300 days.[490]

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[482] 42 U.S.C. §§ 2000e *et seq.* Title VII applies to employers with 15 or more employees. 42 U.S.C. § 2000e(b).

[483] 42 U.S.C. §§ 12101 *et seq.* The ADA applies to employers with 15 or more employees. 42 U.S.C. § 12111(5).

[484] 29 U.S.C. §§ 621 *et seq*. The ADEA applies to employers with 20 or more employees. 29 U.S.C. § 630.

[485] 29 U.S.C. § 206(d). Since the Equal Pay Act is part of the FLSA, the Equal Pay Act applies to employers covered by the FLSA. *See* 29 U.S.C. § 203.

[486] 42 U.S.C. §§ 2000ff *et seq*. GINA applies to employers with 15 or more employees. 42 U.S.C. § 2000ff (refers to 42 U.S.C. § 2000e(f)).

[487] 42 U.S.C. §§ 1981, 1983.

[488] 140 S. Ct. 1731 (2020). For a discussion of this case, see LITTLER ON DISCRIMINATION IN THE WORKPLACE: RACE, NATIONAL ORIGIN, SEX, AGE & GENETIC INFORMATION.

[489] The EEOC's website is available at http://www.eeoc.gov/.

[490] 29 C.F.R. § 1601.13. Note that for ADEA charges, only state laws extend the filing limit to 300 days. 29 C.F.R. § 1626.7.

3.11(a)(ii) *State FEP Protections*

The Arizona Civil Rights Act (ACRA) makes it an unlawful employment practice for an employer to fail or refuse to hire, to discharge, or otherwise discriminate against its employees on the basis of:

- genetic test results;[491]
- race;
- color;
- religion;
- sex;
- age;
- disability; or
- national origin.[492]

"Because of sex" and "on the basis of sex" include discrimination on the basis of pregnancy, childbirth, or related medical conditions.[493]

Covered Employers. Under the ACRA, an *employer* means a person who has 15 or more employees for each working day in each of the 20 or more calendar weeks in the current or preceding calendar year or, in the case of sexual harassment, a person who has one or more employees.[494] For purposes of sexual harassment, an employer not only includes a person who has one or more employees, but any agent of that person to the extent the person is alleged to have committed any act of sexual harassment or discriminated against anyone for opposing sexual harassment or making a charge, testifying, assisting or participating in any manner in an investigation, proceeding or hearing arising from sexual harassment.[495] It does not include the United States, any department or agency of the United States, a corporation owned by the United States, Indian tribes, or *bona fide* private membership clubs, other than labor organizations, exempt from taxation under section 501(c) of the Internal Revenue Code.

Personal Liability for Supervisors. The Arizona Supreme Court has not directly addressed the question of whether supervisors or managers can be held personally liable as *employers* under the ACRA. Federal courts in Arizona have held that supervisors cannot be held liable under either Title VII or the ACRA, relying upon implicit conclusions of the Ninth Circuit Court of Appeals.[496] It is possible that when faced squarely

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[491] In addition to the prohibition against discrimination based upon the results of a genetic test under the ACRA, Arizona also prohibits genetic testing of any individual without that individual's specific written and informed consent. The results of a genetic test are considered privileged and confidential and cannot be released without the express consent of the individual tested. ARIZ. REV. STAT. ANN. § 20-448.02.

[492] ARIZ. REV. STAT. ANN. § 41-1463(B)(1)-(3).

[493] ARIZ. REV. STAT. ANN. § 41-1461.

[494] ARIZ. REV. STAT. ANN. § 41-1461(6)(a); *Cronin v. Sheldon*, 991 P.2d 231 (Ariz. 1999) (employers need only one employee to be liable under ACRA for sexual harassment claims); *Taylor v. Graham County Chamber of Commerce*, 33 P.3d 518 (Ariz. Ct. App. 2001) (former employee could not bring tort claim for age or gender discrimination where former employer employed fewer than 15 people).

[495] ARIZ. REV. STAT. ANN. § 41-1461(7)(a).

[496] *See Ransom v. State of Ariz*., *Bd. of Regents*, 983 F. Supp. 895 (D. Ariz. 1997) (state employee could not proceed against individual supervisors under the ACRA).

with the question, Arizona courts will also conclude that a manager or supervisor cannot be held individually liable for discrimination or harassment under the ACRA. This does not, however, prevent an employee from attempting to hold an individual supervisor liable for retaliation or torts ancillary to a claim of discrimination, such as infliction of emotional distress, tortious interference with contract, or similar claims.

3.11(a)(iii) *State Enforcement Agency & Civil Enforcement Procedures*

The Arizona Civil Rights Division (ACRD or "Division") of the Office of the Attorney General administers and enforces the ACRA.[497] The ACRD investigates complaints of employment discrimination filed in either its Tucson or Phoenix office.[498] The ACRD has a work sharing agreement with the federal EEOC for charges filed with the ACRD and filed under federal discrimination laws. After the charge is filed, it is assigned to an investigator who requests information from the employer and investigates information from other sources. Upon concluding its investigation, the ACRD will issue a final determination of "cause to believe that discrimination has occurred" or "no cause." Before this conclusion, the charging party and the employer may resolve the matter through a "no fault settlement" either through the investigator or by an ACRD mediator. If a "cause" determination is issued, the ACRD provides another opportunity to conciliate.

A charge may be filed by an individual or on behalf of an individual or group of individuals by any person, agency, or organization (including labor unions). The charge must be in writing, sworn before a notary public (or member of the Division), and signed by the individual bringing the charge. A charge filed on an individual's behalf need not identify the subject by name. A charge of discrimination could even be filed by the chief counsel of the ACRD, or any member of the ACRD approved to file a charge.[499] Ultimately, however, the charge must contain sufficient information to identify the parties and describe the discriminatory acts.

A charge must be filed within 180 days from the date of the alleged discriminatory act. If the discriminatory act alleged is a "continuing violation," the charge must be filed after the commencement of the discriminatory acts or practice, but prior to 180 days from the date the acts or practice ceased. The charge may be amended to cure technical defects or omissions or even to clarify existing allegations. All amendments relate back to the original filing date. Any allegations regarding acts or practices occurring after the filing of the charge must be addressed in a separate charge, rather than in an amendment.[500]

The charge must be served upon the employer within 10 days of the charge filing. The ACRD will then request a statement of position from the employer.[501]

An investigator may also seek information through subpoenas and interrogatories. The investigator interviews the charging party and may also interview witnesses. Subpoenas are sent directly to the witnesses, unless the person to be interviewed is a current employee of a company represented by counsel. Discovery requests are similarly sent to the company's counsel.[502] Answers must be verified by

[497] ARIZ. REV. STAT. ANN. §§ 41-1401 *et seq.*

[498] ARIZ. ADMIN. CODE §§ 10-3-100 *et seq.*

[499] ARIZ. REV. STAT. ANN. § 41-1481(A).

[500] ARIZ. ADMIN. CODE § 10-3-203(B).

[501] ARIZ. ADMIN. CODE §§ 10-3-205, 10-3-206.

[502] ARIZ. ADMIN. CODE § 10-3-206.

the employer, rather than by counsel, and objections must be filed within five days.[503] The employer's counsel generally may be present during the interviews with current or former management employees. All other witnesses may have counsel present during the taking of their testimony.[504] If counsel is not a member of the Arizona Bar, the ACRD will urge the attorney to associate with local counsel or it could constitute the unauthorized practice of law in Arizona in contravention to the Arizona Supreme Court Rules.

The information submitted to the ACRD during the investigation is confidential. However, disclosure may be made to further the investigation or to facilitate settlement. The contents of the file are only subject to discovery if the charge becomes the subject of a lawsuit, with the exception of the documents related to the investigator's or the ACRD's decision making. Such documents are protected by the executive privilege. Executive privilege covers all notes, memoranda, or other materials relating to agency decision making or the deliberative process of any ACRD staff members. However, the rest of the ACRD file can be reviewed prior to pursuing litigation. The investigative file also may be obtained from the ACRD once litigation is commenced by serving a subpoena and/or attaching the complaint.

At the conclusion of the investigation, the ACRD issues a final determination. Parties are notified of the determination by letter.[505] If a "cause" determination is made, the agency prepares findings of fact and delivers that document to the parties.[506] If a cause determination is made, the parties are invited to participate in conciliation. Parties must give their answer within five days of the receipt of the invitation to conciliate. Nothing said or done during the course of conciliation may be used in any subsequent litigation without written consent of the parties.[507]

A right to sue letter is issued after the ACRD concludes its investigation and issues a determination. A right to sue letter also may be requested after the investigation has been open 90 days, and may be issued regardless of whether the ACRD has completed its investigation. A right to sue letter is a prerequisite to an ACRA lawsuit. A party may appeal the ACRD's determination within 15 days from the final decision. The ACRD may administratively close an investigation if the charging party fails to cooperate in the investigation, or if it loses contact with the charging party. The ACRD must complete its investigation within one year from the date of the charge of discrimination or as soon as practicable. Moreover, a lawsuit under the ACRA must be filed within one year of the filing of the charge.[508]

3.11(a)(iv) *Additional Discrimination Protections*

Communicable Diseases. Under Arizona law, an employer cannot demand the disclosure of an applicant or employee's confidential communicable disease information, including HIV and AIDS information.[509] Specifically, the statute provides that it is a Class 3 misdemeanor to knowingly disclose or compel another person to disclose or procure confidential communicable disease information.[510]

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[503] ARIZ. ADMIN. CODE §§ 10-3-206, 10-3-206(G)(2).

[504] ARIZ. ADMIN. CODE § 10-3-206(G)(2)(b).

[505] ARIZ. ADMIN. CODE § 10-3-206(M).

[506] ARIZ. REV. STAT. ANN. § 41-1481(B).

[507] ARIZ. ADMIN. CODE § 10-3-207.

[508] ARIZ. REV. STAT. ANN. § 41-1481(D).

[509] ARIZ. REV. STAT. ANN. §§ 36-661 *et seq.*

[510] ARIZ. REV. STAT. ANN. § 36-666.

There are, however, certain limited circumstances wherein an individual may compel the disclosure of confidential communicable disease information.[511] In the employment context, an employer may request an order from a court or administrative body for the disclosure of confidential communicable disease information if the employer can show:

1. a clear and imminent danger to a person whose life or health may unknowingly be at significant risk as a result of contact with the person to whom the information pertains;
2. a clear and imminent danger to public health; or
3. a compelling need requiring the disclosure of the information.[512]

Preference for Veterans. Arizona law allows a preference to be applied in hiring, promotion, and retention decisions for veterans.[513] An employer that elects to implement a veterans' preference policy must do so in writing and apply the policy uniformly to such employment decisions. A *veteran* is a person who served on active duty in the U.S. armed forces and who was discharged or released from military service under honorable conditions.

3.11(a)(v) *Local FEP Protections*

In addition to the federal and state laws, employers with operations in various cities are subject to local fair employment practices ordinances.

- **Flagstaff.** Employers with 15 or more employees in the City of Flagstaff for each working day in each of 20 or more calendar weeks in the current or preceding calendar year and any agent of such person must extend antidiscrimination protections on the basis of: race; color; religion; sex; age; disability; veteran's status; national origin; sexual orientation; and gender identity or expression. Any person claiming to be aggrieved by an alleged violation may file with the City Manager's Office a verified charge, in writing, within one hundred 180 calendar days after the alleged violation occurred.
- **Glendale.** Employers with five or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year must extend antidiscrimination protections on the basis of: race; color; ethnicity; national origin; age; disability; religion; sex; sexual orientation; gender; gender identity; veteran status; military status; and familial status.[514]
- **Mesa.** Employers with five or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year must extend antidiscrimination protections on the basis of: race; color; religion; ethnicity; sex (including pregnancy, childbirth, or related medical conditions); gender; age; disability; national origin; sexual orientation; gender identity; familial status; veteran status; and genetic information.[515]
- **Phoenix.** Employers with one or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year must extend antidiscrimination

[511] ARIZ. REV. STAT. ANN. § 36-665.

[512] ARIZ. REV. STAT. ANN. § 36-665(B).

[513] ARIZ. REV. STAT. ANN. §§ 23-495, 23-495.1.

[514] GLENDALE, ARIZ. CODE ch. 34.

[515] MESA, ARIZ. CITY CODE § 6-14-1.

protections on the basis of: race; color; religion; sex (including gender, pregnancy, childbirth, or related medical conditions); national origin; age (40 or older); genetic information; marital status; sexual orientation; gender identity or expression; and disability.[516] Any person alleging a violation of the ordinance may file a complaint with the City of Phoenix Equal Opportunity Department within 180 days after the occurrence of the alleged unlawful discriminatory practice.[517]

- **Scottsdale**. Protected classifications include: race, color, religion, sex (including pregnancy, childbirth, or related medical conditions), age, disability, national origin, sexual orientation, gender identity, and military status.[518] *Employer* means any person employing one or more employees in the city of Scottsdale in each of 20 or more calendar weeks in the current or preceding year.[519]
- **Tempe.** Protected classifications include: race (including protective hairstyles historically associated with an individual's race); color; gender; gender identity; sexual orientation; religion; national origin; familial status; age; disability; and U.S. military veteran status.[520] Employers doing business with the city that have one or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year are covered.[521] A person alleging a violation of the ordinance may file a written change with the Tempe City Manager within 45 calendar days of the alleged violation occurring.[522]
- **Tucson.** Employers with one or more employees, but not to exceed 100 employees,[523] for each working day in each of 20 or more calendar weeks in the current or preceding calendar year are subject to the following antidiscrimination protections: race (including hair texture, hair type, or a protective hairstyle that is commonly or historically associated with race); color; religion; ancestry; sex (including pregnancy, childbirth, or related medical conditions); age (at least 18 years of age, except where state law provides for a greater minimum or maximum legal age);[524] disability; national origin; sexual orientation; gender identity; familial status; and

[516] PHOENIX, ARIZ., CITY CODE §§ 18-3 (a *bona fide* private membership club, other than a labor organization, which is exempt from taxation under the Internal Revenue Code ("Code") is excluded from coverage), 18-4 (includes religious and *bona fide* occupational qualification exemptions).

[517] PHOENIX, ARIZ., CITY CODE § 18-5.

[518] SCOTTSDALE, ARIZ., REV. CODE §§ 15-14 - 15-21.

[519] SCOTTSDALE, ARIZ., REV. CODE §§ 15-14.

[520] TEMPE, ARIZ., CODE §§ 2-603(2), 2-604 (exclusions including religious organizations, social clubs, expressive organizations, and *bona fide* membership club).

[521] TEMPE, ARIZ., CODE § 2-600 (exceptions including religious organizations, expressive associations whose employment of a person would significantly burden the associations' rights of expressive association, and *bona fide* membership club, other than a labor organization, which is exempt from taxation under the Code).

[522] TEMPE, ARIZ., CODE § 2-606.

[523] The jurisdictional maximum limit of 100 employees does not apply to protected classes that do not have remedies available under either the Arizona Civil Rights Act or Title VII.

[524] However, one of the ordinance's provisions, which prohibits refusing to hire or employ, discharging, or discriminating against any such person, protects only individuals who are at least 40 years of age. *See* TUCSON, ARIZ., CODE OF ORDINANCES § 17-12(b).

marital status.[525] An employer must post a workplace poster covering these protections.[526] A person alleging a violation of the ordinance may file a charge with the Office of Equal Opportunity Programs of the Tucson City Manager's Office within 90 calendar days after the alleged violation occurred.[527]

3.11(b) *Equal Pay Protections*

3.11(b)(i) *Federal Guidelines on Equal Pay Protections*

The Equal Pay Act requires employers to pay male and female employees equal wages for substantially equal jobs. Specifically, the law prohibits employers covered under the federal Fair Labor Standards Act (FLSA) from discriminating between employees within the same establishment on the basis of sex by paying wages to employees at a rate less than the rate at which the employer pays wages to employees of the opposite sex for equal work on jobs— "the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[528] The prohibition does not apply to payments made under: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a differential based on a factor other than sex.

An employee alleging a violation of the Equal Pay Act must first exhaust administrative remedies by filing a complaint with the EEOC within 180 days of the alleged unlawful employment practice. Under the federal Lilly Ledbetter Fair Pay Act of 2009, for purposes of the statute of limitations for a claim arising under the Equal Pay Act, an unlawful employment practice occurs with respect to discrimination in compensation when: (1) a discriminatory compensation decision or other practice is adopted; (2) an individual becomes subject to such a decision or practice; or (3) an individual is affected by application of such decision or practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.[529]

3.11(b)(ii) *State Guidelines on Equal Pay Protections*

Arizona law provides that an employer is prohibited from paying any person at wage rates less than the rates paid to employees of the opposite sex in the same establishment for the same quantity and quality of the same classification of work, unless the wage rates are in good faith based upon factors other than sex.[530] Specifically, the law does not prohibit a variation in rates of pay for male and female employees engaged in the same classification of work based upon a difference in seniority, length of service, ability, skill, difference in duties or services performed, whether regularly or occasionally, difference in the shift or time of day worked, hours of work, or restrictions or prohibitions on lifting or moving objects in excess of specified weight, or other reasonable differentiation, factor, or factors other than sex, when exercised in good faith.

An employee alleging a violation may file a civil action within six months of the alleged violation.[531]

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[525] TUCSON, ARIZ., CODE OF ORDINANCES §§ 17-11, 17-12, and 17-13 (exclusions including *bona fide* private membership clubs and religious organizations).

[526] TUCSON, ARIZ., CODE OF ORDINANCES § 17-16.

[527] TUCSON, ARIZ., CODE OF ORDINANCES § 17-15.

[528] 29 U.S.C. § 206(d)(1).

[529] 42 U.S.C. § 2000e-5.

[530] ARIZ. REV. STAT. ANN. § 23-341.

[531] ARIZ. REV. STAT. ANN. § 23-341.

3.11(c) *Pregnancy Accommodation*

3.11(c)(i) *Federal Guidelines on Pregnancy Accommodation*

As discussed in **3.9(c)(i)**, the federal Pregnancy Discrimination Act (PDA), which amended Title VII, the Family and Medical Leave Act (FMLA), and the Americans with Disabilities Act (ADA) may be implicated in determining the extent to which an employer is required to accommodate an employee's pregnancy, childbirth, or related medical conditions.

Additionally, the Pregnant Workers Fairness Act (PWFA) makes it an unlawful employment practice for an employer of 15 or more employees to:

- fail or refuse to make reasonable accommodations for the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on its business operations;
- require a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process;
- deny employment opportunities to a qualified employee, if the denial is based on the employer's need to make reasonable accommodations for the qualified employee;
- require a qualified employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided; or
- take adverse action related to the terms, conditions, or privileges of employment against a qualified employee because the employee requested or used a reasonable accommodation.[532]

A *reasonable accommodation* is any change or adjustment to a job, work environment, or the way things are usually done that would allow an individual with a disability to apply for a job, perform job functions, or enjoy equal access to benefits available to other employees. Reasonable accommodation includes:

- modifications to the job application process that allow a qualified applicant with a known limitation under the PWFA to be considered for the position;
- modifications to the work environment, or to the circumstances under which the position is customarily performed;
- modifications that enable an employee to enjoy equal benefits and privileges of employment as are enjoyed by other similarly situated employees without known limitations; or
- temporary suspension of an employee's essential job function(s).[533]

The PWFA also provides for reasonable accommodations related to lactation, as described in **3.4(a)(iii)**.

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[532] 42 U.S.C. § 2000gg-1. The regulations provide definitions of *pregnancy*, *childbirth*, and *related medical conditions*. 29 C.F.R. § 1636.3.

[533] 29 C.F.R. § 1636.3.

An employee seeking a reasonable accommodation must request an accommodation.[534] To request a reasonable accommodation, the employee or the employee's representative need only communicate to the employer that the employee needs an adjustment or change at work due to their limitation resulting from a physical or mental condition related to pregnancy, childbirth, or related medical conditions. The employee must also participate in a timely, good faith interactive process with the employer to determine an effective reasonable accommodation.[535] An employee is not required to accept an accommodation. However, if the employee rejects a reasonable accommodation, and, as a result of that rejection, cannot perform (or apply to perform) an essential function of the position, the employee will not be considered "qualified."[536]

An employer is not required to seek documentation from an employee to support the employee's request for accommodation but may do so when it is reasonable under the circumstances for the employer to determine whether the employee has a limitation within the meaning of the PWFA and needs an adjustment or change at work due to the limitation.

Reasonable accommodation is not required if providing the accommodation would impose an undue hardship on the employer's business operations. An *undue hardship* is an action that fundamentally alters the nature or operation of the business or is unduly costly, extensive, substantial, or disruptive. When determining whether an accommodation would impose an undue hardship, the following factors are considered:

- the nature and net cost of the accommodation;
- the overall financial resources of the employer;
- the number of employees employed by the employer;
- the number, type, and location of the employer's facilities; and
- the employer's operations, including:
    - the composition, structure, and functions of the workforce; and
    - the geographic separateness and administrative or fiscal relationship of the facility where the accommodation will be provided.[537]

The following modifications do not impose an undue hardship under the PWFA when they are requested as workplace accommodations by a pregnant employee:

- allowing an employee to carry or keep water near and drink, as needed;
- allowing an employee to take additional restroom breaks, as needed;
- allowing an employee whose work requires standing to sit and whose work requires sitting to stand, as needed; and

[534] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1636.3.

[535] 29 C.F.R. § 1636.3.

[536] 29 C.F.R. § 1636.4.

[537] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1630.2(p).

- allowing an employee to take breaks to eat and drink, as needed.[538]

The PWFA expressly states that it does not limit or preempt the effectiveness of state-level pregnancy accommodation laws. State pregnancy accommodation laws are often specific in terms of outlining an employer's obligations and listing reasonable accommodations that an employer should consider if they do not cause an undue hardship on the employer's business.

Where a state law focuses primarily on providing job-protected leave for pregnancy or childbirth—as opposed to a pregnancy accommodation—it is discussed in **3.9(c)(ii)**. For more information on these topics, see **LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES**.

3.11(c)(ii) *State Guidelines on Pregnancy Accommodation*

Arizona law does not address pregnancy accommodations for private-sector employees.

3.11(d) *Harassment Prevention Training & Education Requirements*

3.11(d)(i) *Federal Guidelines on Antiharassment Training*

While not expressly mandated by federal statute or regulation, training on equal employment opportunity topics—*i.e.*, discrimination, harassment, and retaliation—has become *de facto* mandatory for employers.[539] Multiple decisions of the U.S. Supreme Court[540] and subsequent lower court decisions have made clear that an employer that does not conduct effective training: (1) will be unable to assert the affirmative defense that it exercised reasonable care to prevent and correct harassment; and (2) will subject itself to the risk of punitive damages. EEOC guidance on employer liability reinforces the important role that training plays in establishing a legal defense to harassment and discrimination claims.[541] Training for all employees, not just managerial and supervisory employees, also demonstrates an employer's "good faith efforts" to prevent harassment. For more information on harassment claims and employee training, see **LITTLER ON HARASSMENT IN THE WORKPLACE** and **LITTLER ON EMPLOYEE TRAINING**.

3.11(d)(ii) *State Guidelines on Antiharassment Training*

There are no antiharassment training and education requirements mandated for private employers in Arizona.

3.12 Miscellaneous Provisions

3.12(a) *Whistleblower Claims*

3.12(a)(i) *Federal Guidelines on Whistleblowing*

Protections for whistleblowers can be found in dozens of federal statutes. The federal Occupational Safety and Health Administration ("Fed-OSHA") administers over 20 whistleblower laws, many of which have

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[538] 29 C.F.R. § 1636.3.

[539] Note that the Notification and Federal Employee Anti-Discrimination and Retaliation ("No FEAR") Act mandates training of federal agency employees.

[540] *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *see also Kolstad v. American Dental Assoc.*, 527 U.S. 526 (1999).

[541] EEOC, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, June 18, 1999, *available at* http://www.eeoc.gov/policy/docs/harassment.html; *see also* EEOC, *Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (June 2016), *available at* https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.

little or nothing to do with safety or health. Although the framework for many of the Fed-OSHA-administered statutes is similar (*e.g.*, several of them follow the regulations promulgated under the Wendell H. Ford Aviation Investment and Reform Act (AIR21)), each statute has its own idiosyncrasies, including who is covered, timeliness of the complaint, standard of proof regarding nexus of protected activity, appeal or objection rights, and remedies available. For more information on whistleblowing protections, see LITTLER ON WHISTLEBLOWING & RETALIATION.

3.12(a)(ii) *State Guidelines on Whistleblowing*

The Arizona Employment Protection Act (EPA) prohibits employers from terminating employees in retaliation for an employee reporting to a representative of the employer, or to an employee or agency of a public body or political subdivision of Arizona, any information or reasonable belief that the employer or an employee of the employer has violated, is violating, or will violate the Constitution of Arizona or Arizona statutes.[542] An employee who is terminated for whistleblowing activities protected by the EPA may bring a civil lawsuit in state court against the employer for damages.

The EPA also addresses the at-will nature of the employment relationship, noting that for the employment relationship to lose its at-will status, the employee and employer must have signed a written contract restricting the right of either party to terminate the relationship.[543]

Arizona law similarly prohibits a public employee who has control over personnel actions from taking reprisal against an employee for disclosing information to a public body regarding violation of any law, or mismanagement, waste of funds, or abuse of authority.[544]

Among other antiretaliation provisions, the Arizona Occupational Safety and Health Act also prohibits an employer from discriminating against an employee who files a complaint, institutes a proceeding, or testifies regarding a violation of health or safety statutes.[545]

3.12(b) *Labor Laws*

3.12(b)(i) *Federal Labor Laws*

Labor law refers to the body of law governing employer relations with unions. The National Labor Relations Act (NLRA)[546] and the Railway Labor Act (RLA)[547] are the two main federal laws governing employer relations with unions in the private sector. The NLRA regulates labor relations for virtually all private-sector employers and employees, other than rail and air carriers and certain enterprises owned or controlled by such carriers, which are covered by the RLA. The NLRA's main purpose is to: (1) protect employees' right to engage in or refrain from *concerted activity* (*i.e.*, group activities attempting to improve working conditions) through representation by labor unions; and (2) regulate the collective bargaining process by which employers and unions negotiate the terms and conditions of union members' employment. The National Labor Relations Board (NLRB or "Board") enforces the NLRA and is responsible for conducting union elections and enforcing the NLRA's prohibitions against "unfair" conduct by

[542] ARIZ. REV. STAT. ANN. § 23-1501(3)(c)(ii).

[543] ARIZ. REV. STAT. ANN. § 23-1501.

[544] ARIZ. REV. STAT. ANN. §§ 38-531 to 38-534.

[545] ARIZ. REV. STAT. ANN. §§ 23-425, 23-418.

[546] 29 U.S.C. §§ 151 to 169.

[547] 45 U.S.C. §§ 151 *et seq*.

employers and unions (referred to as *unfair labor practices*). For more information on union organizing and collective bargaining rights under the NLRA, see LITTLER ON UNION ORGANIZING and LITTLER ON COLLECTIVE BARGAINING.

Labor policy in the United States is determined, to a large degree, at the federal level because the NLRA preempts many state laws. Yet, significant state-level initiatives remain. For example, *right-to-work laws* are state laws that grant workers the freedom to join or refrain from joining labor unions and prohibit mandatory union dues and fees as a condition of employment.

3.12(b)(ii) *Notable State Labor Laws*

Arizona is a right-to-work state, which means that no employee can be denied the opportunity to obtain employment because of nonmembership in a labor organization.[548] Any individual who causes the discharge or denial of employment to any person because of nonmembership in a labor organization shall be liable to the person injured and subject to civil liability.[549]

In addition, Arizona voters approved a measure amending the Arizona Constitution to guarantee the right of individuals to vote by secret ballot "where local, state or federal law permits or requires elections, designations or authorizations for employee representation."[550] Essentially, the Arizona Constitution provides a right to vote by secret ballot in union elections.

4. END OF EMPLOYMENT

4.1 Plant Closings & Mass Layoffs

4.1(a) *Federal WARN Act*

The federal Worker Adjustment and Retraining Notification (WARN) Act requires a covered employer to give 60 days' notice prior to: (1) a *plant closing* involving the termination of 50 or more employees at a single site of employment due to the closure of the site or one or more operating units within the site; or (2) a *mass layoff* involving either 50 or more employees, provided those affected constitute 33% of those working at the single site of employment, or at least 500 employees (regardless of the percentage of the workforce they constitute).[551] The notice must be provided to affected nonunion employees, the representatives of affected unionized employees, the state's dislocated worker unit, and the local government where the closing or layoff is to occur.[552] There are exceptions that either reduce or eliminate notice requirements. For more information on the WARN Act, see LITTLER ON REDUCTIONS IN FORCE.

4.1(b) *State Mini-WARN Act*

Arizona does not have a mini-WARN law requiring advance notice to employees of a plant closing.

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[548] ARIZ. REV. STAT. § 23-1302.

[549] ARIZ. REV. STAT. § 23-1306.

[550] ARIZ. CONST. art. II, § 37.

[551] 29 U.S.C. § 2101(1)-(3). Business enterprises employing: (1) 100 or more full-time employees; or (2) 100 or more employees, including part-time employees, who in aggregate work at least 4,000 hours per week (exclusive of overtime) are covered by the WARN Act. 20 C.F.R. § 639.3.

[552] 20 C.F.R. §§ 639.4, 639.6.

4.1(c) *State Mass Layoff Notification Requirements*

Arizona does not require that an employer notify the state unemployment insurance department or another department in the event of a mass layoff.

4.2 Documentation to Provide when Employment Ends

4.2(a) *Federal Guidelines on Documentation at End of Employment*

Table 10 lists the documents that must be provided when employment ends under federal law.

Table 10. Federal Documents to Provide at End of Employment

Category	Notes
Health Benefits: Consolidated Omnibus Budget Reconciliation Act (COBRA)	Under COBRA, the administrator of a covered group health plan must provide written notice to each covered employee and spouse of the covered employee (if any) of the right to continuation coverage provided under the plan.[553] The notice must be provided not later than the earlier of: • the date that is 90 days after the date on which the individual's coverage under the plan commences or, if later, the date that is 90 days after the date on which the plan first becomes subject to the continuation coverage requirements; or • the first date on which the administrator is required to furnish the covered employee, spouse, or dependent child of such employee notice of a qualified beneficiary's right to elect continuation coverage.
Retirement Benefits	The Internal Revenue Service requires the administrator of a retirement plan to provide notice to terminating employees within certain time frames that describe their retirement benefits and the procedures necessary to obtain them.[554]

4.2(b) *State Guidelines on Documentation at End of Employment*

Table 11 lists the documents that must be provided when employment ends under state law.

Table 11. State Documents to Provide at End of Employment

Category	Notes
Health Benefits: Mini-COBRA, etc.	Any health benefits plan issued or renewed after December 31, 2018 must allow an enrollee or any qualified dependent to continue coverage after a qualifying event. All small employers with an average of at least

[553] 29 C.F.R. § 2590.606-1. Model notices and general information about COBRA is available from the U.S. Department of Labor's Employee Benefits Security Administration at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra.

[554] See the section "Notice given to participants when they leave a company" at https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-notices.

Table 11. State Documents to Provide at End of Employment	
Category	**Notes**
	one, but fewer than twenty employees, must notify an enrollee in writing of the right of the enrollee and any qualified dependents to continue coverage under the employer's health benefits plan within thirty days of an enrollee's qualifying event. A written communication or a notice postmarked within forty-five days after a qualifying event mailed by the employer to the enrollee's last known address satisfies this notice requirement. Notice to the enrollee constitutes notice to any qualified dependent, unless the employer knows there is a qualified dependent who does not live at the same address and knows the dependent's address, in which case a separate notice must be sent to the qualified dependent.[555]
Unemployment Notice	**Generally.** Employers are required to post printed statements dealing with claims for unemployment benefits in places readily accessible to employees and must make available to each individual, at the time the individual becomes unemployed, a printed statement dealing with claims for benefits.[556] **Multistate Workers.** For multistate employers, whenever an individual covered by election is separated from employment, an employer must again notify the individual as to the state under whose unemployment compensation law the individual's services have been covered. If, at the time of termination, the individual is not located in the elected state, an employer must notify the individual as to the procedure for filing interstate benefit claims. In addition to the above notice requirement, employers must comply with the covered jurisdiction's general notice requirement, if applicable.[557]

4.3 Providing References for Former Employees

4.3(a) *Federal Guidelines on References*

Federal law does not specifically address providing former employees with references.

[555] ARIZ. REV. STAT. ANN. § 20-2330. A sample notice of coverage continuation that may be used to meet the notification requirement is available from the Arizona Department of Insurance at https://insurance.az.gov/sites/default/files/documents/files/Sample%20Notice%20of%20Continuiation%20Coverage%20Mini-COBRA%2020190123.docx (updated January 23, 2019).

[556] ARIZ. REV. STAT. ANN. § 23-772(C).

[557] ARIZ. ADMIN. CODE § 6-3-1406.

4.3(b) *State Guidelines on References*

Arizona's blacklisting statute deals with employer-provided references.[558] It creates a safe harbor provision for employers to discuss personnel matters with prospective employers. An employer is immune from civil liability for the disclosure or the consequences of providing information in good faith when the information is requested by a prospective employer about a current or former employee's job performance, professional conduct, evaluation, or about the reason for termination of a former employee. A *presumption of good faith* exists if either: (1) the employer employs less than 100 employees and provides only the information authorized by the statute; or (2) the employer employs at least 100 employees and has a regular practice in Arizona of providing information requested by a prospective employer about the reason for termination of a former employee or about the job performance, professional conduct, or evaluation of a current or former employee. The presumption of good faith is rebuttable by showing that the employer disclosed the information with actual malice or with intent to mislead. *Actual malice* means knowledge that the information was false or was provided with reckless disregard of its truth or falsity. However, this statute, by its own terms, does not alter any defenses or privileges that exist under common law, such as consent or giving truthful information.

The statute specifically allows an employer to communicate to a requesting employer information regarding an individual's "education, training, experience, qualifications and job performance."[559] Although the communication need not be in writing, if it is in writing, a copy of the communication must be sent to the employee at the employee's last known address.

Despite the limited immunity afforded by the statute, an employer may still be liable to an employee or former employee unless discretion is used. The statute allows for a civil action and a litigant is entitled to damages and attorneys' fees, if successful. In addition to a defamation action under the standards discussed above, potential liability exists under a theory of intentional interference with a contractual relationship, including both existing and potential contractual relations.

There are special rules relating to school districts,[560] banks, savings, and loans, and credit unions.[561]

[558] ARIZ. REV. STAT. ANN. §§ 23-1361 *et seq.*

[559] ARIZ. REV. STAT. ANN. § 23-1361(B).

[560] ARIZ. REV. STAT. ANN. §§ 23-1361(B), 15-512(F); Op. Ariz. Att'y Gen. No. I90-088 (Sept. 25, 1990).

[561] ARIZ. REV. STAT. ANN. § 23-1361(G), (H).