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STATE

Littler on

Arkansas 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 Arkansas 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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TABLE OF CONTENTS

1. PRE-HIRE

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); IRS, 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*, 331 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 Arkansas, as elsewhere, an individual who provides services to another for payment generally is considered either an independent contractor or an employee.

The Arkansas Empower Independent Contractors Act of 2019 (Empower Act), establishes a statutory test for determining employment status for wage and hour, unemployment, and workers' compensation issues. This test adopts the Internal Revenue Service (IRS) 20-factor test, under which employers or agencies charged with enforcement consider the following factors:

1. a person for whom a service is performed has the right to require compliance with instructions, including without limitation when, where, and how a worker is to work;
2. a worker is required to receive training, including without limitation through:
    a. working with an experienced employee;
    b. corresponding with the person for whom a service is performed;
    c. attending meetings; or
    d. other training methods;
3. a worker's services are integrated into the business operation of the person for whom a service is performed and are provided in a way that shows the worker's services are subject to the direction and control of the person for whom a service is performed;
4. a worker's services are required to be performed personally, indicating an interest in the methods used and the results;
5. a person for whom a service is performed hires, supervises, or pays assistants;
6. a continuing relationship exists between a worker performing services and a person for whom a service is performed;
7. a worker performing a service has hours set by the person for whom a service is performed;

[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*, 15 F.3d 103, 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.3d 338, 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.

8. a worker is required to devote substantially full time to the business of the person for whom a service is performed, indicating the person for whom a service is performed has control over the amount of time the worker spends working and by implication restricts the worker from obtaining other gainful work;

    a. The work is performed on the premises of the person for whom a service is performed, or the person for whom a service is performed has control over where the work takes place.

    a. A person for whom a service is performed has control over where the work takes place if the person has the right to: (1) compel the worker to travel a designated route; (2) compel the worker to canvass a territory within a certain time; or (3) require that the work be done at a specific place, especially if the work could be performed elsewhere;

9. a worker is required to perform services in the order or sequence set by the person for whom a service is performed or the person for whom a service is performed retains the right to set the order or sequence;
10. a worker is required to submit regular oral or written reports to the person for whom a service is performed;
11. a worker is paid by the hour, week, or month except when he or she is paid by the hour, week, or month only as a convenient way of paying a lump sum agreed upon as the cost of a job;
12. a person for whom a service is performed pays the worker's business or traveling expenses;
13. a person for whom a service is performed provides significant tools and materials to the worker performing services;
14. a worker invests in the facilities used in performing the services;
15. a worker realizes a profit or suffers a loss as a result of the services performed that is in addition to the profit or loss ordinarily realized by an employee;
16. a worker performs more than de minimis services for more than one person or firm at the same time, unless the persons or firms are part of the same service arrangement;
17. a worker makes their services available to the general public on a regular and consistent basis;
18. a person for whom a service is performed retains the right to discharge the worker; and
19. a worker has the right to terminate the relationship with the person for whom a service is performed at any time he or she wishes without incurring liability.[5]

The Arkansas Department of Labor, Labor Standards Division has entered into a partnership with the U.S. Department of Labor (DOL), Wage and Hour Division to work cooperatively through information sharing, joint enforcement efforts, and coordinated outreach and education efforts in order to reduce instances of misclassification of employees as independent contractors.[6]

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[5] ARK. CODE ANN. §§ 11-1-201 through -204. The IRS 20-factor test is generally covered in the following resources: Treas. Reg. § 31.3121(d)-(1)(c); IRS, 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.

[6] More information about the DOL Misclassification Initiative is available at https://www.dol.gov/whd/workers/misclassification/#stateDetails. The Memorandum of Understanding with the Arkansas Department of Labor is available at https://www.dol.gov/whd/workers/MOU/ar.pdf.

Arkansas law clarifies that direct sellers are not considered employees. For purposes of the law, direct seller has the same definition as that under the federal Internal Revenue Code.[7]

Table 1. State Tests for Classifying Workers

Purpose of Determining Employee Status	State Agency	Test to Apply
Fair Employment Practices Laws	Not applicable	There are no relevant statutory definitions or case law identifying a test for independent contractor status in this context.
Income Taxes	Arkansas Department of Finance & Administration	There are no relevant statutory definitions or case law identifying a test for independent contractor status in this context.
Unemployment Insurance	Arkansas Department of Workforce Services	The IRS 20-factor test, as set forth in the Empower Act, applies.[8]
Wage & Hour Laws	Arkansas Department of Labor, Minimum Wage & Overtime Division	The IRS 20-factor test, as set forth in the Empower Act, applies.[9] For purposes of state wage and hour law, direct sellers are not employees, but independent contractors.[10]
Workers' Compensation	Arkansas Workers' Compensation Commission	The IRS 20-factor test, as set forth in the Empower Act, applies.[11] For purposes of state workers' compensation law, direct sellers are not employees, but independent contractors.[12]
Workplace Safety	Not applicable	There are no relevant statutory definitions or case law identifying a test for independent contractor status. Arkansas does not have an approved state plan under the federal Occupational Safety and Health Act.

[7] ARK. CODE ANN. §§ 11-4-203; 11-9-102; 11-10-210.

[8] ARK. CODE ANN. §§ 11-10-210(a)(1)(C) and 11-10-210(e).

[9] ARK. CODE ANN. §§ 11-4-103 and 11-4-607.

[10] ARK. CODE ANN. § 11-4-203.

[11] ARK. CODE ANN. §§ 11-9-102(9)(A)-(B) and 11-9-103.

[12] ARK. CODE ANN. § 11-9-102.

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.[13]

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.[14] 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.[15]

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

[13] 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.

[14] *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).

[15] *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*

Arkansas does not have a generally applicable employment eligibility or verification statute applicable to private employers. Therefore, private-sector employers in Arkansas should follow federal law requirements regarding employment eligibility and verification.

1.2(b)(ii) *State Contractors*

Generally, a state agency may not enter into or renew a public contract for services with a contractor if it knows that the contractor or subcontractor employs or contracts with an illegal immigrant to perform work under the contract.[16] For purposes of the statute, *illegal immigrant* is defined as any person not a citizen of the United States who has entered the United States in violation of federal law, legally entered the United States but without the right to be employed here, or legally entered the United States subject to a time limit that has expired.[17]

Before executing a public contract, each prospective contractor must certify that, at the time of the certification, it does not employ or contract with an illegal immigrant.[18] A *contractor* is defined as a person who has a public contract with a state agency for professional services, technical and general services, or any category of construction in which the total dollar value of the contract is at least $25,000.[19] Moreover, if the contractor uses a subcontractor, the subcontractor must certify that at the time of certification, it does not employ or contract with an illegal immigrant. The subcontractor must submit the certification within 30 days after the execution of the subcontract, and the contractor must maintain this certification on file for the duration of the contract.[20]

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

The state may terminate a public contractor for breach if a contractor fails to remedy a violation of the employment eligibility and certification provisions within 60 days. The contractor will be liable to the state for actual damages if a contract is terminated.[21] However, if a contractor learns that a subcontractor is violating the immigration provisions, the contractor may terminate the contract with the subcontractor and will not be in breach of the contract with the contractor and subcontractor.[22]

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

[16] ARK. CODE ANN. § 19-11-105(b).

[17] ARK. CODE ANN. § 19-11-105(a)(3).

[18] ARK. CODE ANN. § 19-11-105(c).

[19] ARK. CODE ANN. § 19-11-105(a)(1).

[20] ARK. CODE ANN. § 19-11-105(a)-(c), (e).

[21] ARK. CODE ANN. § 19-11-105(d).

[22] ARK. CODE ANN. § 19-11-105(e)(1)(B)(3).

guidance pursuant to its authority under Title VII of the Civil Rights Act of 1964 ("Title VII").[23] 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.

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*

Under the Arkansas State Criminal Records Act, employers may obtain *arrest records* or *arrest information*, which means felony arrest information in which a conviction or disposition has not been entered into the central repository.[24] However, there is an unresolved inconsistency in the law regarding the release of arrest records because another statutory provision prohibits the release of all "nonconviction information" for noncriminal justice use.[25] *Nonconviction information* means a felony arrest information without disposition if at least five years have elapsed from the date of the arrest, any misdemeanor arrest for which a disposition has not been entered, all acquittals, and all dismissals.[26]

An employer that has received background check information about an applicant or employee must provide a copy of the information to that individual upon request.[27]

Ban-the-Box Law. Arkansas has not implemented a state "ban-the-box" law covering private employers.

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[23] 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.

[24] ARK. CODE ANN. § 12-12-1503(2)(A).

[25] ARK. CODE ANN. § 12-12-1009.

[26] ARK. CODE ANN. § 12-12-1001(17).

[27] ARK. CODE ANN. § 11-3-206.

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

The Arkansas State Criminal Records Act allows employers to obtain all conviction information held by the Arkansas Crime Information Center on an applicant or employee.[28] *Conviction information* "means criminal history information disclosing that a person has pleaded guilty or nolo contendere to or was found guilty of a criminal offense in a court of law, together with sentencing information."[29]

As noted in **1.3(a)(ii)**, employers need to provide an applicant or employee, upon request, with a copy of any background check information received.[30]

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

An Arkansas employer is prohibited from requiring an applicant to disclose any information contained in a sealed record in any application, interview, or in any other way. Upon entry of a uniform order sealing a record, the person's underlying conduct is deemed as a matter of law never to have occurred, and the person may state that the underlying conduct did not occur and that no records exist.[31] Moreover, for purposes of the statute permitting release of felony arrest records and conviction information to an employer, the definition of *conviction record* does not include a sealed or expunged record.[32]

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[33] governs an employer's acquisition and use of virtually any type of information gathered by a "consumer reporting agency"[34] 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

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[28] ARK. CODE ANN. § 12-12-1504.

[29] ARK. CODE ANN. § 12-12-1503(5)(A).

[30] ARK. CODE ANN. § 11-3-206.

[31] ARK. CODE ANN. § 16-90-1417(b)(1).

[32] ARK. CODE ANN. § 12-12-1503(5)(B).

[33] 15 U.S.C. §§ 1681 *et seq*.

[34] 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).

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]."[35]

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

Arkansas does not have a mini-FCRA law, and there are no additional state provisions specifically restricting a private employer's use of credit information and history. However, an employer that has received background check information about an applicant or employee must provide a copy of the information to that individual upon request.[36]

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.

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

[36] ARK. CODE ANN. § 11-3-206.

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

Arkansas law prohibits an employer from requiring, requesting, suggesting, or causing a current or prospective employee to:

- disclose their social media account username and password; or,
- change their social media account's privacy settings.[37]

Further, an employer is prohibited from requiring that a current or prospective employee add another employee, supervisor, or administrator to their social media contacts.[38]

An employer also cannot take action against, threaten to discharge, discipline, fail or refuse to hire, or otherwise penalize an individual for exercising their rights under the social media law.[39]

Social media account means a personal account with an electronic medium or service where users may create, share, or view user-generated content, including but not limited to: (1) videos; (2) photographs; (3) blogs; (4) podcasts; (5) messages; (6) emails; or (7) website profiles or locations. Such accounts include Facebook, Twitter, LinkedIn, Myspace, and Instagram.[40]

Exceptions. The law does not preclude an employer from complying with federal, state, or local laws, rules, or regulations, or the rules or regulations of a self-regulatory organization.[41] Moreover, an employer may view information about an applicant or employee that is publicly available on the internet.[42]

Additionally, by regulation the state labor department has clarified the following:

- Issuing an invitation to add a current or prospective employee through a social media account, in itself, is not prohibited.
- The law does not prohibit employees, supervisors, and administrators from adding one another as social media contacts if the interaction is voluntary and no stated or implied coercion is present. *Stated or implied coercion* includes, but is not limited to, a threat to discharge, discipline, or otherwise penalize a current employee, or a stated or implied threat to refuse to hire a prospective employee.
- The law does not prohibit an employer from using social media to advertise to the general public or recruit prospective employees, if there is no stated or implied threat to refuse to hire an applicant who exercises rights under the law.
- The law does not prohibit an employer from requiring an employee to monitor communications from the employer by means of email or a company website.
- Any employer requirements, requests, suggestions, or actions that occurred before the law took effect are not considered a violation of the law even though the social media relationship

[37] ARK. CODE ANN. § 11-2-124(b)(1).

[38] ARK. CODE ANN. § 11-2-124(b)(2).

[39] ARK. CODE ANN. § 11-2-124(c).

[40] ARK. CODE ANN. § 11-2-124.

[41] ARK. CODE ANN. § 11-2-124(e)(1).

[42] ARK. CODE ANN. § 11-2-124(d).

continues after the law's effective date. However, if an employee or applicant ends the social media relationship or contact, any employer action or requirements after the law's effective date to renew or reinstate social media contact is subject to the law.[43]

Further, an employer can request that an employee disclose the employee's username and password so that the employer can access the employee's social media account if the employee's account activity is reasonably believed to be relevant to an employer's formal investigation or related proceeding concerning allegations the employee violated federal, state, or local laws or regulations, or the employer's written policies. However, an employee's username and password can only be used for the purpose of the formal investigation or a related proceeding.[44]

Rules for Employer-Provided Devices & Online Accounts. The statutory definition of *social media account* excludes any account: (1) opened by an employee at an employer's request; (2) provided to an employee by an employer (*e.g.*, company email account or other software program owned or operated exclusively by the employer); (3) setup by an employee on employer's behalf; or, (4) setup by an employee to impersonate an employer by using employer's name, logos, or trademarks.[45] Additionally, the law provides protection for an employer that inadvertently receives an employee's username, password, or other login information to the employee's social media account through the use of a company electronic monitoring device or program. Under such circumstances, the employer is not liable for having the information, but still may not use the information to gain access to an employee's social media account.[46]

1.3(c)(iii) *State Enforcement, Remedies & Penalties*

If the Arkansas Department of Labor determines a violation of Arkansas's social media law occurred, it can assess a civil money penalty or seek injunctive relief.[47]

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.[48] 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

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[43] 010-14-500 ARK. CODE R. §§ B, C.

[44] ARK. CODE ANN. § 11-2-124(e)(2).

[45] ARK. CODE ANN. § 11-2-124.

[46] ARK. CODE ANN. § 11-2-124(b)(2).

[47] 010-14-500 ARK. CODE R. § D.

[48] 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.

- 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*

Arkansas 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.[49] The Drug-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.[50] 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.

[49] 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 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.

[50] 41 U.S.C. §§ 8101 *et seq*.; *see also* 48 C.F.R. §§ 23.500 *et seq*.

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

Generally speaking, Arkansas law generally permits preemployment examinations—physical, medical, or drug—so long as: (1) there is no cost for the testing to the candidate or employee; and (2) the individual receives, upon request, a true and correct copy of the examiner's report, free of charge.[51]

In addition, an employer can establish and implement a substance abuse or drug-free workplace policy that may include a drug testing program that complies with state or federal law, and as a result of testing, may take action against an applicant or employee.[52] The support for testing arises out of a law protecting an employer's right to prohibit the use of marijuana in the workplace. See **3.2(c)(ii)** for detailed information on this new law.

Moreover, private employers in Arkansas may voluntarily choose to implement and maintain drug-free workplaces under Arkansas's voluntary testing law in order to qualify for workers' compensation premium reductions.[53] The drug testing program does not authorize an employer to test any applicant or employee for alcohol or drugs in any manner inconsistent with federal requirements.[54] All testing must be performed in compliance with U.S. Department of Transportation drug testing procedures.[55] If an employer requires testing for employment or continued employment, even if testing is mandated by federal or state law, the employer must cover all the costs of testing.[56]

Illegal drugs are defined as any controlled substances that are unlawful for particular applicants or employees to possess or use, including prescription drugs for which applicants or employees have no current or valid prescription. Alcohol is considered an illegal substance under the drug and alcohol testing provisions if, at the time of the test, employers have a written policy that: (1) prohibits alcohol use under the circumstances at issue; (2) establishes alcohol testing procedures, and, (3) specifies the concentration of alcohol that would qualify as a positive test.[57]

Participating employers are required to perform the following testing, to the extent permitted by law: (1) job applicant drug and alcohol testing; (2) reasonable suspicion testing; (3) routine fitness for duty drug testing; (4) follow-up drug testing; and (5) post-accident testing.[58] Drug testing may only occur after a conditional job offer has been made. Refusal to submit to a drug test or a positive confirmed drug test may be used as a basis for refusal to hire an applicant or termination. Additionally, an employer may test job applicants for alcohol, but is not required to, after a conditional offer of employment.[59]

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[51] ARK. CODE ANN. § 11-3-203. Preemployment examinations must also comply with the federal Americans with Disabilities Act.

[52] ARK. CONST., amend. 98, § 3.

[53] ARK. CODE ANN. §§ 11-14-101 *et seq.*; *see also* ARK. CODE ANN. § 11-3-203 (medical examinations), 010-14.1-008 ARK. CODE R. §§ A-E (medical examinations and drug tests).

[54] ARK. CODE ANN. §§ 11-14-103(c), 11-14-104(c).

[55] ARK. CODE ANN. § 11-14-107.

[56] ARK. CODE ANN. §§ 11-3-203, 11-14-107.

[57] 010-14.1-008 ARK. CODE R. § C.

[58] ARK. CODE ANN. § 11-14-106.

[59] ARK. CODE ANN. § 11-14-106.

Notice & Policy Requirements. One time only, prior to testing, a covered employer must give all employees and applicants a written policy that complies with the detailed statutory requirements.[60] In addition, a covered employer must notify all employees that it is a condition of employment for an employee to refrain from reporting to work or working while under the influence of drugs or alcohol, and that if an injured employee refuses to submit to drug or alcohol testing, the employee may be prevented from receiving workers' compensation benefits.[61] Any job advertisements for positions for which drug or alcohol testing is required must give notice to the applicant that they will be tested for drugs before being allowed to work. The employer must also post notice of the testing policy in an appropriate and conspicuous location on its premises, and must make copies available for inspection.[62]

Upon written request, an employer must provide an applicant or employee with a copy of any drug testing results at no cost. An employee has the opportunity to contest positive confirmed test result within five days of receiving the positive result.[63]

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, 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[64] and a cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act[65] if the employee purchases a qualified health plan through the exchange; and

[60] ARK. CODE ANN. § 11-14-105. The statute sets forth numerous elements that must be included in any policy. ARK. CODE ANN. § 11-14-105(a).

[61] ARK. CODE ANN. § 11-14-101(b).

[62] ARK. CODE ANN. § 11-14-105.

[63] ARK. CODE ANN. § 11-3-203; 010-14.1-008 ARK. CODE R. § B.

[64] 26 U.S.C. § 36B.

[65] 42 U.S.C. § 18071.

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	• 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.[66] 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.[67]
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.[68] 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.[69]
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.[70] In either case, distribution may be accomplished electronically. Employers may use a format other than the FMLA poster as a model notice, if the

[66] 29 U.S.C. § 218b.

[67] 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.

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

[69] 29 C.F.R. § 2590.606-1.

[70] 29 C.F.R. § 825.300(a).

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	information provided includes, at a minimum, all of the information contained in that poster.[71] 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.[72]
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.[73] 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) relating to their marital status and the number of withholding exemptions they claim.[74]
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.[75]

[71] 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.

[72] 29 C.F.R. § 825.300(a).

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

[74] 26 C.F.R. § 31.3402(f)(2)-1. The IRS provides this form at https://www.irs.gov/pub/irs-pdf/fw4.pdf.

[75] 38 U.S.C. § 4334. This notice is available at https://www.dol.gov/sites/dolgov/files/VETS/legacy/files/USERRA_Private.pdf.

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
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.[76]

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	No notice requirement located.
Drug-Free Workplace Policy Documents	Employers that implement a voluntary drug-free workplace program must inform all employees and applicants of their written policy, one time, prior to any testing.[77] The statute sets forth numerous elements that must be included in any policy.[78] Notice also must be included in any job vacancy announcements for positions subject to testing.[79] For more information on such programs, see **1.3(e)(ii)**.
Fair Employment Practices Documents	No notice requirement located.
Tax Documents	All employees must complete a withholding exemption certificate.[80]
Wage & Hour Documents	No notice requirement located.

[76] 29 C.F.R. § 531.59.

[77] ARK. CODE ANN. §§ 11-14-101 *et seq*. Notice must be provided at least 60 days prior to initial implementation of a program. ARK. CODE ANN. § 11-14-105(b).

[78] ARK. CODE ANN. § 11-14-105(a).

[79] ARK. CODE ANN. § 11-14-105(c).

[80] ARK. CODE ANN. § 26-51-914. The state form (Form AR4EC) is available at https://dws.arkansas.gov/wp-content/uploads/AR4EC.pdf. The statute provides that the federal Form W-4 is also sufficient. ARK. CODE ANN. § 26-51-914(c).

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.[81] 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).[82]

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 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;

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

[82] 42 U.S.C. § 653a.

- 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.[83] 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 the Arkansas new hire reporting law.

Who Must Be Reported. Employers must report all newly-hired employees and rehired employees who have been separated from the employer for at least 60 consecutive days.[84]

Report Timeframe. Employers must report newly-hired and rehired employees within 20 days. If the report is submitted magnetically or electronically, the employer may submit twice per month, not less than 12 days and not more than 16 days apart.[85]

Information Required. Employers are required to report the employee's name, address, and Social Security number along with the employer's company name, address, and federal tax identification number.[86]

Form & Submission of Report. An employer must make the report by submitting a copy of Form W-4 from the Internal Revenue Service for the employee or an equivalent form. The form may be submitted by first-class mail, magnetically, or electronically.[87]

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

[84] ARK. CODE ANN. § 11-10-902(b)(2).

[85] ARK. CODE ANN. § 11-10-902(b)(4)(c).

[86] ARK. CODE ANN. § 11-10-902(b)(3).

[87] ARK. CODE ANN. § 11-10-902(b)(3),(4).

Location to Send Information.

Arkansas New Hire Reporting Center
P.O. Box 2540
Little Rock, AR 72203
(501) 376-2125
(501) 376-2682(fax)
https://portal.arkansas.gov/service/report-new-hire-or-re-hire/

Multistate Employers. An employer that has employees employed in two or more states and transmits reports magnetically or electronically may comply with the reporting requirements of this section by designating one state in which the employer has employees and to which the employer will transmit the report required by this section and notifying the Secretary of HHS as to which state the reports are being made.[88]

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 the individual's 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 provides a federal court civil remedy and original (but not exclusive) jurisdiction in federal court for claims of trade secret misappropriation.[89] 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).

[88] ARK. CODE ANN. § 11-10-902(b)(5)(A).

[89] 18 U.S.C. §§ 1832 *et seq.*

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 Arkansas, noncompete agreements are enforceable if the agreement is ancillary to an employment relationship or employment agreement.[90] Additionally, covenants not to compete must protect a legitimate business interest and must be limited with respect to time and scope in a manner that is not greater than necessary to defend the protectable business interest of the employer.[91] The statute defines *protectable business interest of the employer* as including, but not limited to, trade secrets; intellectual property; customer lists; goodwill with customers; knowledge of their business practices; methods; profit margins; and, costs.[92]

According to Arkansas law, an employer may use covenants not to compete when a legitimate business interest exists.[93] For instance, customer lists can be a legitimate interest because the law recognizes that customers are one of the most important assets of a business.[94] The person opposing enforcement of a covenant not to compete has the burden of establishing that the contractually specified restraint is overbroad, overlong, or otherwise not reasonably necessary to protect the specified business interests.[95]

As stated above, the burden of proving the unreasonableness of a restrictive covenant lies with the party attempting to invalidate it, usually the former employee.[96] The burden includes the obligation to show that the geographic and temporal restrictions contained within a covenant are reasonable.[97] Because these issues are so fact specific, employers should draft restrictive covenants to match what is necessary to protect their legitimate business interests.

Enforceability Following Employee Discharge. In Arkansas, there is limited case law on the enforceability of noncompete agreements following employee discharge, so it is unclear. In *Bailey v. King*, the court did not consider the specific issue of enforceability against a discharged employee, but cautioned that an employer cannot use a noncompete contract as "a subterfuge to rid himself of a possible future competitor" by hiring an employee, obtaining a noncompete, then firing that employee without reasonable cause.[98]

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

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[90] ARK. CODE ANN. §§ 4-75-101 *et seq*.

[91] ARK. CODE ANN. §§ 4-75-101 *et seq.*; *see also Optical Partners, Inc. v. Dang*, 381 S.W.3d 46, 53 (Ark. 2011); *Jaraki v. Cardiology Assocs. of Ne. Ark., P.A.*, 55 S.W.3d 799, 803 (Ark. Ct. App. 2001).

[92] ARK. CODE ANN. § 4-75-101.

[93] *Bendinger v. Marshalltown Trowell Co*., 994 S.W.2d 468 (Ark. 1999).

[94] *Girard v. Rebsamen Ins. Co.*, 685 S.W.2d 526, 528 (Ark. Ct. App. 1985).

[95] *Dawson v. Temps Plus, Inc.*, 987 S.W.2d 722, 726 (Ark. 1999).

[96] 987 S.W.2d at 726.

[97] 987 S.W.2d at 726.

[98] 398 S.W.2d 906, 908 (Ark. 1966).

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.

Under Arkansas' noncompete statutes, continued employment is sufficient consideration for a covenant not to compete.[99] Moreover, at common law, continued at-will employment has been found to be valid consideration for noncompete agreements.[100] However, case law suggest that a noncompete signed at the inception of employment is not supported by sufficient consideration. Courts have held that there needs to be some performance on the contract, *i.e.*, continued at-will employment for some period however brief, before valid consideration will be found.[101]

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.

Under Arkansas' noncompete statute, which covers agreements ancillary to an employment relationship or employment agreement, reformation is mandatory:

> If restrictions in a covenant not to compete agreement are found to be unreasonable and impose a greater restraint than is necessary to protect the protectable business interest of the employer . . . the court shall reform the covenant not to compete agreement to the extent necessary to:
>
> (A) Cause the limitations contained in the covenant not to compete agreement to be reasonable; and
>
> (B) Impose a restraint that is not greater than necessary to protect the protectable business interest.[102]

The court will enforce the covenant not to compete agreement under the reformed terms and conditions.[103]

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[99] ARK. CODE ANN. § 4-75-101(g).

[100] *See Olin Water Servs. v. Midland Research Labs., Inc.*, 596 F. Supp. 412, 415 (E.D. Ark. 1984); *Credit Bureau Mgmt. Co. v. Huie*, 254 F. Supp. 547, 554 (E.D. Ark. 1966).

[101] *See Olin Water Servs.*, 596 F. Supp. at 415; *Credit Bureau Mgmt. Co.*, 254 F. Supp. at 554.

[102] ARK. CODE ANN. § 4-75-101(f)(1). Prior to the enactment of the statute, courts would not blue pencil and rewrite the contract. *Moore v. Midwest Dist., Inc.*, 76 Ark. App. 397, 402-03 (Ark. Ct. App. 2002).

[103] ARK. CODE ANN. § 4-75-101(f)(2).

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

The aim of trade secrets law is to encourage businesses to invest resources in invention and discovering more efficient methods of production.[104] In light of that aim, the Arkansas legislature has enacted a theft of trade secrets law.[105]

Definition of a Trade Secret. Under the Arkansas Trade Secrets Act, *trade secret* means information, including a formula, pattern, compilation, program, device, method, technique, or process, that 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 is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[106]

Arkansas courts rely on six factors to determine whether something is a trade secret:

1. the extent to which the information is known outside the business;
2. the extent to which the information is known by employees and others involved in the business;
3. the extent of measures taken by the plaintiff to guard the secrecy of the information;
4. the value of the information to the plaintiff and its competitors;
5. the amount of effort or money expended by the plaintiff in developing the information; and
6. the ease or difficulty with which the information could properly be acquired by others.[107]

Misappropriation of a Trade Secret. Under the Arkansas Trade Secrets Act, *misappropriation* means:

- acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means;
- disclosure or use of a trade secret of another (without express or implied consent) by a person who used improper means to acquire knowledge of the trade secret;
- at the time of disclosure or use, knew or had reason to know that the individual's knowledge of the trade secret was derived from or through a person who had utilized improper means to acquire it or acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use or derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
- before a material change of the individual's position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.[108]

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[104] *Southwestern Energy Co. v. Eickenhorst*, 955 F. Supp. 1078, 1084 (W.D. Ark. 1997).

[105] ARK CODE ANN. §§ 4-75-601 *et seq*.

[106] ARK CODE ANN. § 4-75-601.

[107] *Bradshaw v. Alpha Packaging, Inc.*, 379 S.W.3d 536 (Ark. Ct. App. 2010); *Freeman v. Brown Hiller, Inc.*, 281 S.W.3d 749, 757 (Ark. Ct. App. 2008); *City Slickers, Inc. v. Douglas*, 40 S.W.3d 805, 808 (Ark. Ct. App. 2001).

[108] ARK CODE ANN. § 4-75-601(2).

Improper means which would trigger liability include theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.[109] Under the Arkansas law, misappropriation may be enjoined and remedial damages based on the actual loss may be available.[110]

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

Arkansas does not have a statute of general applicability addressing ownership of employee inventions and ideas.

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.[111]
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.[112]
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.[113]

[109] ARK CODE ANN. § 4-75-601(1).

[110] ARK CODE ANN. §§ 4-75-604, 4-75-606.

[111] 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.

[112] 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.

[113] 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.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
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.[114]
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 common to migrant or seasonal agricultural workers who are not fluent or literate in English.[115]
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.[116]
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.[117]
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.[118]
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

[114] 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.

[115] 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.

[116] 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.

[117] 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.

[118] 20 C.F.R. app. § 1002. This poster is available at http://www.dol.gov/vets/programs/userra/poster.htm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	numerous grounds.[119] 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.[120]
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.[121]
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.[122]
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.[123]
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

[119] 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.

[120] 41 C.F.R. §§ 60-300.44, 60-741.44.

[121] 29 C.F.R. § 5.5(a)(l)(i). This poster is available at https://www.dol.gov/whd/regs/compliance/posters/davis.htm.

[122] 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.

[123] 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.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	finds it inappropriate to post this notice, directly providing the poster to its employees is sufficient.[124]
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.[125]
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.[126]
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.[127] **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).[128]

[124] 29 C.F.R. § 525.14. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/disab.htm.

[125] 29 C.F.R. § 471.2. This poster is available at https://www.dol.gov/olms/regs/compliance/EO13496.htm.

[126] 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.

[127] 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.

[128] 29 C.F.R. § 13.5.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
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.[129]
Worker Rights Under Executive Order Nos. 13658 (contracts entered into on or after January 1, 2015), 14026 (contracts entered into on or after January 30, 2022)	Employers that contract with the federal government under Executive Order Nos. 13658 or 14026 must prominently post notice, where accessible to employees, summarizing the applicable minimum wage rate and other required information.[130]

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**
Drug-Free Workplace Policy	An employer that implements a voluntary drug-free workplace program must post a copy of its policy in an appropriate and conspicuous location at the worksite. Copies must also be made available to employees during regular business hours.[131] The statute sets forth numerous elements that must be included in any policy.[132] Notice also must be included in any job vacancy announcements for positions subject to testing.[133] For more information on such programs, see **1.3(e)(ii)**.

[129] 41 C.F.R. § 60-1.35(c). This poster is available at https://www.dol.gov/agencies/ofccp/posters.

[130] 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.

[131] ARK. CODE ANN. § 11-14-105(c).

[132] ARK. CODE ANN. § 11-14-105(a).

[133] ARK. CODE ANN. § 11-14-105(c).

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Human Trafficking Resource Center Hotline Poster	Certain employers are obligated to post notice about the Human Trafficking Resource Center and its hotline. Such notice is required for: (1) hotels and other establishments that have been cited as a public nuisance for prostitution; (2) strip clubs and sexually-oriented businesses; (3) private clubs with a liquor license that do not hold themselves out to be food service establishments; (4) airports, passenger train stations, and bus stations; (5) privately-owned facilities that provide food, fuel, showers or other sanitary facilities, and overnight parking; and (6) an abortion facility. Posters must be displayed conspicuously near entrances or where posters and notices are customarily displayed.[134]
Unemployment Compensation	All employers must post and maintain notice, in readily accessible places, informing employees about unemployment insurance and how to file a claim for benefits.[135]
Wages, Hours & Payroll	Employers with four or more employees must post, in a conspicuous location, a notice summarizing the state wage and hour laws, including minimum wage, equal pay, child labor, and wage collections.[136]
Workers' Compensation	All employers must conspicuously post notice (Form P) informing employees that their employer has secured workers' compensation coverage and summarizing the parties' obligations in the event of any occupational illnesses or injuries.[137]
Workplace Safety: Hand Washing Poster	Retail food employers (*i.e.*, restaurants or food handling facilities) must post a visible notice for all food employees, at all hand washing sinks used by them, that they must wash their hands.[138]
Workplace Safety: No Smoking Signs	Generally speaking, smoking is prohibited in Arkansas workplaces and other public places.[139] Employers with facilities where smoking is prohibited must clearly and conspicuously post "No Smoking" signs or

[134] ARK. CODE ANN. § 12-19-102. This poster is available at https://www.labor.arkansas.gov/wp-content/uploads/2020/07/2ACT1157HumanTraffickingPoster2020.pdf.

[135] ARK. CODE ANN. § 11-10-520. This poster is available at https://dws.arkansas.gov/wp-content/uploads/Employer_poster_on_how_to_file_UI_v09142021_LPS.pdf.

[136] ARK. CODE ANN. § 11-4-216. This poster is available at https://www.labor.arkansas.gov/resources/required-postings/.

[137] ARK. CODE ANN. §§ 11-9-403, 11-9-407. This poster is available at https://www.labor.arkansas.gov/resources/required-postings/. Form P may also be obtained from the insurance carrier.

[138] 007.04.07-002 ARK. CODE R. § 6-301.14.

[139] ARK. CODE ANN. § 20-27-1804(b)(1).

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
	signs using the pictorial representation. In medical facilities, the notice must be in English and Spanish.[140]

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.[141]	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; • 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.[142]	At least 1 year from the date of the personnel action to which any records relate.

[140] ARK. CODE ANN. §§ 20-27-1806, 20-27-709. Employers must identify their own form to satisfy this requirement.

[141] 29 U.S.C. § 626; 29 C.F.R. § 1627.3(a).

[142] 29 C.F.R. § 1627.3(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
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.[143]	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.[144]	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.[145]	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 litigation is terminated).
Title VII & the Americans with Disabilities Act (ADA): Other	An employer must keep and maintain its Employer Information Report (EEO-1).[146]	Most recent form must be retained for 1 year.

[143] 29 C.F.R. § 1627.3(b).

[144] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[145] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[146] 29 C.F.R. § 1602.7.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
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.[147]	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.[148]	At least 6 years after documents are filed or would have been filed but for an exemption.
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).[149]	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;	At least 2 years.

[147] 29 U.S.C. §§ 2001 *et seq.*; 29 C.F.R. § 801.30.

[148] 29 U.S.C. § 1027.

[149] 29 C.F.R. § 1620.32(a).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• job descriptions; • merit and seniority systems; • collective bargaining agreements; and • other matters which describe any pay differentials between the sexes.[150]	
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 under 19; • 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; • 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	3 years from the last day of entry.

[150] 29 C.F.R. § 1620.32(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	each workweek).[151] 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.[152]	
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; • date of birth if under 19; • 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	3 years from the last day of entry.

[151] 29 C.F.R. §§ 516.2, 516.5.

[152] 29 C.F.R. § 516.28.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	employee's total remuneration for employment including fringe benefits and prerequisites.[153]	
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.[154]	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.[155]	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; • 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;	At least 3 years.

[153] 29 C.F.R. §§ 516.2, 516.3. Presumably the regulation's reference to "prerequisites" is an error and should refer to "perquisites."

[154] 29 C.F.R. § 516.5.

[155] 29 C.F.R. § 516.6.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• 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 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.	

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	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.[156]	
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; ▪ 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;	At least 4 years after the date the tax is due or paid, whichever is later.

[156] 29 U.S.C. § 2616; 29 C.F.R. § 825.500.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	▪ 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).[157]	
Immigration	Employers must retain all completed Form I-9s.[158]	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.[159]	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.
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;	4 years after the return is due or the tax is paid, whichever is later.

[157] 26 C.F.R. §§ 31.6001-1, 31.6001-2.

[158] 8 C.F.R. § 274a.2.

[159] 26 U.S.C. § 3402; 26 C.F.R. § 1.6001-1.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• 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.[160]	
Income Tax: W-4 Forms	Employers must retain all completed Form W-4s.[161]	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 employer's trade or business, and the amount of the cash remuneration paid for those services.[162]	At least 4 years after the later of the date the tax is due or paid for the period covered by the return.
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	At least 30 years.

[160] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

[161] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

[162] 26 C.F.R. § 31.6001-4.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	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.[163]	
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; • 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;	Duration of employment plus 30 years.

[163] 29 C.F.R. § 1910.1020(d).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• 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.[164]	
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.[165]	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.[166]	5 years following the end of the calendar year that the record covers.
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.[167]	Immediately preceding AAP year.

[164] 29 C.F.R. § 1910.1020(d).

[165] 29 C.F.R. § 1910.1020(d).

[166] 29 C.F.R. §§ 1904.33, 1904.44.

[167] 41 C.F.R. § 60-1.12(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
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; ▪ 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	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.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• where possible, the gender, race, and ethnicity of each applicant or internet applicant.[168]	
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.[169]	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. The contractor must also permit authorized representatives of the WHD to conduct interviews with workers at the worksite during normal working hours.[170]	3 years.
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;	During the course of the covered contract as well as after the end of the contract.

[168] 41 C.F.R. §§ 60-1.12, 60-300.80, and 60-741.80.

[169] 41 C.F.R. §§ 60-1.12, 60-741.80.

[170] 29 C.F.R. § 23.260.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• 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 relieve a contractor from its reinstatement obligation.[171]	
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.	At least 3 years after the work.

[171] 29 C.F.R. § 13.25.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	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.[172]	
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 • a copy of the contract.[173]	At least 3 years from the completion of the work records containing the information.
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	At least 3 years from the last date of entry.

[172] 29 C.F.R. § 5.5.

[173] 29 C.F.R. § 4.6.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• a certificate of age for employees under 19 years of age.[174]	

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**
Drug Testing	*If an employer requires drug testing pursuant to section 11-3-203 of the Arkansas code, and an employee or applicant tests positive, the parties may agree in writing that the employee will bear the cost of future screens. In that event, employers must maintain all:* • written agreements requiring an employee to bear the cost of drug tests/screens following a positive test; • records of the actual cost of any such drug test (if withheld from employee's pay or if the employee was required to reimburse the employer otherwise); and • records of the actual, corresponding withholdings or reimbursements for the drug tests.[175]	3 years.
Fair Employment Practices: Equal Pay	*Most employers[176] must keep and maintain records pertinent to the equal pay law, for each employee, including:* • salaries; • wage rates; • job classifications; and • other terms and conditions of employment.[177]	3 years.
Income Tax	*All employers must keep and maintain tax withholding records, including:* • employer identification number; • amounts and dates of all wage, annuity, and pension payments;	At least 6 years.

[174] 41 C.F.R. § 50-201.501.

[175] 010.14-400 ARK. CODE R. § B.

[176] A few exceptions to the equal pay law exist. For example, the law does not apply to domestic workers or agricultural employees. ARK. CODE ANN. § 11-4-607.

[177] ARK. CODE ANN. § 11-4-612.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• amounts of tips reported; • names, addresses, Social Security numbers, and occupations of employees and recipients; • any employee copies of Form W-2 or W-2c that were returned to the employer as undeliverable; • dates of employment; • copies of employees' and recipients' Form AR4EC state withholding exemption certificate; • dates and amounts of tax deposits made and confirmation numbers; • copies of monthly payment vouchers filed and confirmation numbers; • copy of annual reconciliation filed and confirmation numbers; and • any records that would assist the commissioner in auditing employers' books and records.[178]	
Unemployment Compensation	*Each employing unit must keep true and accurate work records, including:* • pay period covered by payroll; • Social Security number of each employee; • full name of each employee; • place of employment; • date each employee was hired, rehired, or returned to work after a temporary layoff; • all remuneration (showing separately cash remuneration, value of noncash remuneration, and special payments); • amounts paid to the worker as allowance or reimbursement for business expenses, dates of payment, and amount of expenditures actually incurred; and • with respect to pay periods in which employee performs subject and nonsubject work, the number of hours spent doing each.[179]	5 years from the end of the month following the end of the calendar quarter to which the record pertains.

[178] Arkansas Dep't of Fin. & Admin., *State of Arkansas Withholding Tax Instructions for Employers*, (rev. July 1, 2024), at p.11, *available at* https://www.dfa.arkansas.gov/wp-content/uploads/withholdInstructions-2.pdf.

[179] ARK. CODE ANN. § 11-10-318; Arkansas Dep't of Workforce Servs., *Workforce Services Regulations, R. 12, available at* https://www.dws.arkansas.gov/employers/workforce-services-regulations/.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Wages, Hours & Payroll	*Pursuant to the Arkansas code, all employers must keep true and accurate records of the following, for each person:* • name, address, and occupation; • daily and weekly hours worked; and • wages paid each period.[180] *In addition, per the regulations, employers must also maintain and preserve the following records, with data for each employee:* • full name, and any identifying symbol or number used for time, payroll, or related records; • address; • date of birth (if under 19); • sex and occupation; • time of day and day of week when workweek begins; • regular hour rate of pay for any workweek in which overtime is due, as well as the basis used to determine wages (*i.e.*, per hour, day, piece, etc.); • hours worked each day and total per week; • total daily or weekly straight time earnings; • total overtime compensation; • total additions or deductions from wages per pay period, as well as the nature of those additions or deductions; • total wages per pay period; and • date of payment and the pay period covered by payments.[181] For employees working on fixed schedules, records may be kept showing the schedule of daily and weekly hours along with a statement indicating such hours were worked. In weeks when work varies from the schedule, the exact number of hours, by day and week, must be recorded. For tipped employees, employers must, in addition to the general recordkeeping requirements, keep additional information and data:	1 year from date of record for items required by the Arkansas code. At least 3 years for items required by the regulations. Because the regulations are more detailed and impose a longer retention period, it is recommended that employers retain all payroll records for at least 3 years.

[180] ARK. CODE ANN. § 11-2-115.

[181] 010.14.-102 ARK. CODE R. § A.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• A symbol, letter or other notation placed on the pay records identifying each employee whose wage is determined in part by tips. • Weekly or monthly amount reported by the employee, to the employer, of tips received (this may consist of reports made by the employees to the employer on IRS Form 4070). • Amount by which the wages of each tipped employee have been deemed to be increased by tips as determined by the employer (*i.e.*, tip credit). • Hours worked each workday in any occupation in which the employee does not receive tips, and total daily or weekly straight-time payment made by the employer for such hours. • Hours worked each workday in occupations in which the employee receives tips, and total daily or weekly straight-time earnings for such hours. Employers should be aware that specific records requirements apply to various types of exempt employees, employees authorized to receive sub-minimum wages, employees receiving board, lodging, or other facilities as part of their compensation, and public employees. Employers should consult the regulations for further details.[182]	
Workers' Compensation	All employers must keep records of all employee injuries regardless of their nature.[183]	None specified.

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*

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

[182] 010.14.-102 ARK. CODE R. § B.

[183] ARK. CODE ANN. § 11-9-528; Arkansas Workers' Comp. Comm'n, Rules of the Commission, *Rule 99.08: Reporting Injuries or Deaths*, *available at* http://www.awcc.state.ar.us/rules/rule8.pdf.

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*

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

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*

Arkansas law generally permits examinations—physical, medical, or drug—as a condition of employment, so long as: (1) there is no cost for the testing to the employee; and (2) the individual receives, upon request, a true and correct copy of the examiner's report, free of charge.[184]

For information on Arkansas's voluntary drug and alcohol testing law affecting current employees, see **1.3(e)(ii)**.

3.2(c) *Marijuana Laws*

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

Under federal law, it is illegal to possess or use marijuana.[185]

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

Medical marijuana is legal for qualifying conditions in Arkansas. An employer can establish and implement a substance abuse or drug-free workplace policy that may include a drug testing program that complies with state or federal law and take action against an applicant or employee under the policy.[186] A positive test result for marijuana is one at or above the cutoff concentration level established by the U.S. Department of Transportation or the Arkansas laws regarding being under the influence, whichever is lower.[187]

Marijuana Use in the Workplace. An employer is *not* required to accommodate ingestion of marijuana in a workplace or an employee working while under the influence of marijuana. A cause of action is unavailable against an employer that acts on a good faith belief that a qualifying patient possessed, smoked, ingested, or otherwise engaged in marijuana use on the employer's premises or during work hours, or was under the influence of marijuana while on the employer's premises during work hours, provided a positive test result for marijuana cannot provide the sole basis for the employer's good faith

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184 ARK. CODE ANN. § 11-3-203.

185 21 U.S.C. §§ 811-12, 841 *et seq*.

186 ARK. CONST., amend. 98, § 3.

187 ARK. CONST., amend. 98, § 2.

belief.[188] A *good faith belief* is reasonable reliance on a fact, or that which is held out to be factual, without intent to deceive or be deceived and without reckless or malicious disregard for the truth. It does *not* include a belief formed with gross negligence. A good faith belief may be based on any of the following:

- observed conduct, behavior, or appearance;
- information reported by a person believed to be reliable, including without limitation a report by a person who witnessed marijuana or marijuana paraphernalia use or possession by an applicant or employee in the workplace;
- written, electronic, or verbal statements from the employee or other persons;
- lawful video surveillance;
- a record of government agencies, law enforcement agencies, or courts;
- a positive test result for marijuana;
- a warning label, usage standard, or other printed material that accompany instructions for usable marijuana;
- information from a physician, medical review officer, or a dispensary;
- information from reputable reference sources in print or on the internet; or
- other information.

An employer can exclude a qualifying patient from being employed in or performing a safety sensitive position based on the employer's good faith belief that the qualifying patient was engaged in current marijuana use. A *safety sensitive position* is a position involving a safety sensitive function pursuant to federal regulations governing drug and alcohol testing adopted by the U.S. Department of Transportation or any other rules, guidelines, or regulations adopted by any other federal or state agency, and any position designated in writing by an employer as a safety sensitive position in which a person performing the position while under the influence of marijuana may constitute a threat to health or safety, including without limitation a position that requires any of these activities:

- carrying a firearm;
- performing life-threatening procedures;
- working with confidential information or documents pertaining to criminal investigations; or
- working with hazardous or flammable materials, controlled substances, food, or medicine.

It also includes positions in which a lapse of attention could cause injury, illness, or death, including without limitation a position that includes the operating, repairing, maintaining, or monitoring of heavy equipment, machinery, aircraft, motorized watercraft, or motor vehicles as part of the job duties.[189]

Authorized & Protected Actions. An employer's authorized or protected actions include:

- implementing, monitoring, or taking measures to assess, supervise, or control an employee's job performance;

[188] ARK. CONST., amend. 98, § 3.

[189] ARK. CONST., amend. 98, §§ 2, 3, 6.

- reassigning an employee to a different position or job duties;
- placing an employee on paid or unpaid leave;
- suspending or terminating an employee;
- requiring an employee to successfully complete a substance abuse program before returning to work;
- refusing to hire an applicant; or
- any combination of the above.[190]

Employers with nine or more employees in Arkansas in 20 or more calendar weeks in the current or preceding calendar year are covered under the law.[191]

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.
- An individual whose personal information may have been compromised in a data breach is not required to include in their 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.[192]

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.[193]

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[190] ARK. CONST., amend. 98, § 3.

[191] ARK. CONST., amend. 98, § 2.

[192] IRS 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.

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

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

Any business that acquires, owns, or licenses computerized data that includes personal information must disclose security breach following discovery its discovery to any resident of Arkansas whose unencrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person.[194]

Covered Entities & Information. Any person that conducts business in this state that acquires, owns, or licenses computerized data that includes personal information. Waivers under this statute are void.[195] Under the statute, *personal information* means:

> an individual's first name or first initial and the individual's last name in combination with any one (1) or more of the following data elements when either the name or the data element is not encrypted or redacted:
>
> A. Social Security number;
>
> B. Driver's license number or Arkansas identification card number;
>
> C. Account number, credit card number, or debit card number in combination with any security code, access code, or password that would permit access to an individual's financial account;
>
> D. Medical information;[196] and
>
> E. Biological characteristics, including faceprints, fingerprints, retinal or iris scan, hand geometry, voice analysis, DNA, or any other unique biological characteristics of an individual if the characteristics are used by the owner or licensee to uniquely authenticate the individual's identity when the individual accesses an account.

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

- written notice;
- email notice if the notice is consistent with the provisions regarding electronic records; or
- substitute notice if the cost of providing notice exceeds $250,000, the affected class exceeds 500,000 people, or the business does not have sufficient contact information.[197]

Substitute notice must consist of the following:

- email notice when the business has an email address for the subjected persons;
- conspicuous posting of the notice on the website or the business; and

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[194] ARK. CODE ANN. § 4-110-105.

[195] ARK. CODE ANN. §§ 4-110-101 *et seq.*

[196] ARK. CODE ANN. § 4-110-103(7).

[197] ARK. CODE ANN. § 4-110-105(e).

- notification to statewide media.[198]

If more than 1,000 residents are affected, the entity must also notify the Attorney General. This notification must occur at the same time the breach is disclosed or within 45 days, whichever occurs first. The business must retain a copy of the written determination of the breach and any supporting documents for five years from the date of determination. If the attorney general submits a written request for the determination of the breach, the entity must comply within 30 days following the request. The determination and supporting documentation are confidential and not subject to public disclosure.

Timing of Notice. Notice must be made in the most expedient time and manner possible and without unreasonable delay. Notice may be delayed if a law enforcement agency determines that notification will impede a criminal investigation.[199]

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.[200] 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.[201]

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.[202]

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198 ARK. CODE ANN. § 4-110-105(e)(3)(B).

199 ARK. CODE ANN. § 4-110-105(a)(2), (c)(1).

200 29 U.S.C. § 218(a).

201 29 U.S.C. § 206.

202 29 U.S.C. §§ 203, 206.

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.[203]

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 41 in a workweek.[204] 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*

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

The Arkansas Minimum Wage Act, which includes the state's minimum wage and overtime provisions, applies to employers with four or more employees.[205] As of January 1, 2021, the minimum wage in Arkansas is $11.00 per hour for most nonexempt employees of such employers.[206] In addition, full-time students attending an in-state accredited educational institution who are employed to work no more than 20 hours during weeks school is in session and 40 hours during weeks when school is not in session may be paid not less than 85% of the minimum wage.[207]

3.3(b)(ii) *Tipped Employees*

Tipped employees are paid differently. If an employee earns tips, an employer may take a maximum tip credit of up to the difference between the minimum wage and the $2.63 per hour minimum cash wage. If an employee does not make that amount in tips per hour, the employer must make up the difference between the wage actually earned and the minimum wage.[208] An employer bears the burden of proving that it is not taking a tip credit larger than the amount of tips the employee actually received.

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

The following types of workers are exempt from the Arkansas minimum wage and overtime provisions:

- individuals employed in a *bona fide* executive, administrative, or professional capacity;
- outside salespersons who customarily performs services away from the employer's premises taking orders for goods and services;
- students performing services for a school, college, or university in which they are enrolled and are regularly attending classes;
- individuals employed by the United States;
- certain agricultural employees and members of their immediate family;
- employees principally engaged in the range production of livestock;

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[203] 29 U.S.C. § 3(m)(2)(B).

[204] 29 U.S.C. § 207.

[205] ARK. CODE ANN. § 11-4-203.

[206] ARK. CODE ANN. § 11-4-210.

[207] ARK. CODE ANN. § 11-4-210(b).

[208] ARK. CODE ANN. §§ 11-4-210, 11-4-212.

- certain employees in timber operations;
- certain newspaper employees and newspaper delivery persons; and
- casual domestic employees such as babysitters.[209]

3.3(c) *State Guidelines on Overtime Obligations*

Similar to the federal overtime requirements, overtime compensation in Arkansas is required at a rate not less than one and one-half times the employee's regular rate of pay for hours worked in excess of 40 hours in a workweek.[210]

3.3(d) *State Guidelines on Overtime Exemptions*

Arkansas has adopted the provisions of the FLSA for the executive, administrative, or professional exemption analysis for most employers. Moreover, Arkansas defines computer employees covered by 29 C.F.R. sections 541.400 through 541.402 as "professional employees." Special rules apply to charitable and religious organizations and employers with gross annual sales of less than $500,000 per year.[211]

Overtime regulations provide that retail or service establishments comply with state overtime requirements if they comply with the FLSA's 7(i) exemption.[212] The state's overtime provisions also do not apply to an outside salesperson "who customarily performs his/her services away from his/her employer's premises taking orders for goods or services." For the purpose of this exemption, the state labor department has adopted the federal regulations within 29 C.F.R. part 541.[213]

State law does not provide an overtime exemption for commissioned sales employees.

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.[214] 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.

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[209] ARK. CODE ANN. § 11-4-203.

[210] ARK. CODE ANN. § 11-4-211(a).

[211] 010-14-106 ARK. CODE R. § B.

[212] 010-14-109 ARK. CODE R. § (G).

[213] ARK. CODE ANN. § 11-4-203.

[214] 29 C.F.R. § 785.19.

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.[215]

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.[216] 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 completely relieved from duty during the entirety of the break.[217] 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.[218] Exemptions apply for smaller employers and air carriers.[219]

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.[220] Lactation is considered a related medical condition.[221] 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.[222] 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*

Meal Periods. While there is no general requirement that an Arkansas employer provide employees with a meal period, state law sets forth the conditions under which a meal break may be compensable. *Bona fide* meal periods are unpaid. An employee must be completely relieved from duty for the purpose of eating regular meals. If the employee is required to perform any duties, whether active or inactive, while

[215] 29 C.F.R. § 785.18.

[216] 29 U.S.C. § 218d.

[217] 29 U.S.C. § 218d(b)(2).

[218] 29 U.S.C. § 218d(a).

[219] 29 U.S.C. § 218d(c), (d).

[220] 42 U.S.C. § 2000gg–1.

[221] 29 C.F.R. § 1636.3.

[222] 29 C.F.R. § 1636.3.

eating, the meal period counts as work time and must be paid. It is not necessary that an employee be permitted to leave the premises if the employee is otherwise completely freed from duties during the meal period.[223]

Rest Periods. As with meal periods, Arkansas employers are not required to provide rest breaks, although state law sets forth the conditions under which a rest break is compensable. Rest periods of short duration, *e.g.*, five to 20 minutes, are counted as hours worked and must be paid. Compensable rest period time may not be offset against other working time such as compensable waiting time or on-call time.[224]

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

There are no independent meal or rest period requirements for minor employees in Arkansas—the adult standards apply.

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

The Arkansas meal period provisions do not include any associated penalties or a private right of action.

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

In Arkansas, an individual may breast feed a child in a public place or any place where others are present.[225] Specific to the employment context, the state requires an employer to provide nursing employees with an appropriate space where they can express breast milk in a private, secure, and sanitary location, *i.e.*, not a bathroom stall. This may include an employee's normal work space if it meets the law's requirements.[226]

An employer must also provide nursing employees reasonable break time to express breast milk, which may be paid or unpaid at the employer's discretion. To the extent possible, the break should run concurrently with any breaks already provided. An employer may be exempted from these requirements if providing the required time or space would substantially disrupt its operations. The statute also requires an employee to make reasonable efforts to minimize disruptions to the employer's operations.[227]

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.[228] Therefore, courts and agency regulations have developed a body of law looking at whether an activity—such as on-call,

[223] 010-14-108 ARK. CODE R. § C.

[224] 010-14-108 ARK. CODE R. § C.

[225] ARK. CODE ANN. § 20-27-2001.

[226] ARK. CODE ANN. § 11-5-116.

[227] ARK. CODE ANN. § 11-5-116.

[228] 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."[229]

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*

In Arkansas, an employee must be paid for all time the employee is suffered or permitted to work.[230] Work not requested but suffered or permitted is still work time. If an employer knows or has reason to believe that the work is being performed, the employer must count the time as hours worked. It is the employer's responsibility to exercise control and see that work is not performed if it does not want it to be performed. The employer "cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so."[231]

There are a number of additional issues considered when determining whether particular activities constitute work. This publication looks more closely at pay requirements for waiting or on-call time, travel time, sleeping time, and preliminary and postliminary activities. Arkansas law addresses the compensability of all four.

Waiting or On-Call Time. Whether waiting time is time worked under the Arkansas Minimum Wage Act depends upon the particular circumstances. The administrative regulations distinguish between being engaged to wait and waiting to be engaged.[232] Short periods of inactivity, even where the employee is permitted to leave the work area, are considered work time if the employee is unable to use the time for the employee's own purposes.[233] Conversely, longer periods during which an employee is completely relieved from duty and may use the time effectively for the employee's own purposes are not compensable. Importantly, the employee is not deemed to be completely relieved from duty unless the employee has been informed in advance that the employee may leave the job and will not have to commence work until a definitely specified hour has arrived.[234]

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[229] *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").

[230] ARK. CODE ANN. § 11-4-203.

[231] 010-14-108 ARK. CODE R. § A.

[232] 010-14-108 ARK. CODE R. § B.

[233] 010-14-108 ARK. CODE R. § B.

[234] 010-14-108 ARK. CODE R. § B.

An employee who is required to remain on call on the employer's premises or so close by that the employee cannot use the time effectively for the employee's own purposes is working while on call. An employee who is not required to remain on the employer's premises, but is merely required to leave word at home or with company officials where they may be reached, is not working while on call.[235]

Travel Time. An employee who travels from home before the regular workday and returns home at the end of the workday is engaged in ordinary home-to-work travel which is a normal incident of employment. This is true whether the employee works at a fixed location or at different jobsites. Normal travel from home to work is not considered working time.[236] However, there may be instances when travel from home to work is compensable. For example, if an employee who has gone home after completing their day's work is subsequently called out at night to travel a substantial distance to perform an emergency job for one of the employer's customers, all time spent on such travel is working time. The state labor department does not take a position on whether travel to the job and back home by an employee who receives an emergency call outside of regular hours to report back to the employee's regular place of business to do a job is working time.[237]

Time spent by an employee in travel as part of the employee's principal activity, such as travel from jobsite to jobsite during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the workplace is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice. For example, if an employee normally finishes their work on the employer's premises at 5:00 P.M. and is sent to another job that finishes at 8:00 P.M. and is then required to return to the employer's premises, all of the time is working time. However, if the employee goes home instead of returning to the employer's premises, the travel after 8:00 P.M. is considered home-to-work travel and not hours worked.[238]

Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is considered work time when it cuts across the employee's workday. The employee is simply substituting travel for other duties. The time is not only hours worked on regular working days during normal working hours, but also during the corresponding hours on nonworking days. Regular meal period time is not counted. As an enforcement policy, the state labor department does not consider as work time that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.[239]

Any work which an employee is required to perform while traveling must be counted as hours worked. An employee who drives a truck, bus, automobile, boat, or airplane, or an employee who is required to ride therein as an assistant or helper, is working while riding, except during *bona fide* meal periods or when the employee is permitted to sleep in adequate facilities furnished by the employer.[240]

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[235] 010-14-108 ARK. CODE R. § B.

[236] 010-14-108 ARK. CODE R. § F.

[237] 010-14-108 ARK. CODE R. § F.

[238] 010-14-108 ARK. CODE R. § F.

[239] 010-14-108 ARK. CODE R. § F.

[240] 010-14-108 ARK. CODE R. § F.

Sleeping Time. Under certain conditions, an employee is considered to be working even though some of the time is spent in sleeping or in certain other activities. An employee who is required to be on duty for less than 24 hours is working even though the employee is permitted to sleep or engage in other personal activities when not busy. Where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude *bona fide* meal periods and a regularly-scheduled sleeping period of not more than eight hours from hours worked, provided that the employer furnishes adequate sleeping facilities and the employee can usually enjoy an uninterrupted night's sleep. If the sleeping period is more than eight hours, only eight hours will be credited. If there is no expressed or implied agreement to the contrary, the eight hours of sleeping time and lunch periods constitute hours worked. An employee who resides on the employer's premises on a permanent basis or for extended periods of time is not considered to be working for all the time the employee is on the premises. Ordinarily, the employee may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of freedom from all duties when the employee may leave the premises for the employee's own purposes.[241]

Preliminary and Postliminary Activities. An employer is not liable for failure to pay an employee minimum wage or overtime for walking, riding, or traveling to and from the actual place of performance of the principal activity or activities that the employee performs or an activity that occurs before the time on any particular workday at which the employee begins the principal activity or after the end of the employee's principal activity. Further, an employee's use of an employer's vehicle for the employee's travel, and activities that are incidental to the use of the vehicle for commuting, is not part of the employee's principal activities if the use of the vehicle is within the normal commuting area for the employer's business establishment or the use of the vehicle is subject to an agreement between the employer and employee or the employee's representative. An employee's use of the vehicle is not considered part of the employee's principal activities if the use occurs within normal commuting area for the employer's business establishment and is subject to an agreement between the employer and the employee or the employee's representative. However, an employer is not relieved from liability if the activity is compensable by either:

- an express provision of a written or oral contract in effect at the time of the activity between the employee, the employee's agent, or collective bargaining representative and their employer; or
- workplace custom or practice in effect at the time of the activity between the employer or their agent or collective bargaining representative and the employer.[242]

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

[241] 010-14-108 ARK. CODE R. § D.

[242] ARK. CODE ANN. § 11-4-221.

approved school-supervised and school-administered work experience and career exploration programs.[243] 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.[244] 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*

Arkansas's statutes regulating minors in the workplace[245] are very similar to the provisions of the FLSA. The restrictions on employment of minors are roughly broken down by age and type of work.

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

General Restrictions. Arkansas's child labor statutes regulate the employment of minors under the age of 18 and restrict the employment of minors by age and by the type of job (see Table 9). Note that Arkansas law contains prohibitions for children 14 and 15 years, but does not prohibit any occupation for those 16 and 17 years of age. Employers should adhere to the more stringent federal standard in order to assure full compliance.

Table 9. State Restrictions on Type of Employment by Age

Age Range	Restrictions
Under Age 16	*Minors under age 16 may not work in any occupation dangerous to their life and limb or injurious to their health and morals, including the following:* • railroads; • adjusting any belt to any machinery; • working in proximity to any hazardous or unguarded belt, machinery, or gearing; • oiling, wiping, or cleaning machinery or assisting therein; • operating or assisting in the operation of various machinery (*e.g.*, washing, grinding, or mixing machinery; dough brakes; steam boilers); • work in any saloon, resort, or bar where intoxicating liquor of any kind is sold or dispensed; • work in any pool or billiards room; • soldering; • causing dust in injurious quantities; • scaffolding; • heavy work or the building trades; • mines, coal breakers, coke ovens, or quarries; • manufacturing, mining, or processing occupations;

[243] 29 C.F.R. §§ 570.36, 570.50.

[244] 29 C.F.R. § 570.6.

[245] ARK. CODE ANN. § 11-6-101 *et seq*.

Table 9. State Restrictions on Type of Employment by Age	
Age Range	**Restrictions**
	• occupations involving the operation or tending of hoisting apparatus or of any power-driven machinery other than office machines; • operation of motor vehicles or service as helpers on such vehicles; • public messenger service; • occupations in connection with transportation of persons or property by rail, highway, air, water, pipeline, or other means; • occupations in connection with warehousing and storage; • occupations in connection with communications and public utilities; • occupations in connection with construction; • occupations in or about plants or establishment manufacturing or storing explosives or articles containing explosive components; • occupations in logging and in the operation of any sawmill, lath mill, shingle mill, or cooperage stock mill; • occupations in or about slaughtering and meat packing establishments; • occupations in proximity to pin-setting machinery or gearing in bowling alleys; and • certain agricultural positions.[246] *The following occupations are permitted, however, for minors under age 16 in retail, food service, and gas stations:* • office and clerical work, including operating office machines; • cashiering, selling, modeling, artwork, work in advertising departments, window trimming, and comparative shopping; • price marking and tagging by hand or by machine, assembling orders, packing, and shelving; • bagging and carrying out customers' orders; • errand and delivery work by foot, bicycle, and public transportation; • clean-up work, including the use of vacuum cleaners and floor waxers, and grounds maintenance, but not including the use of power-driven mowers, or cutters; • kitchen work and other work involved in preparing and serving food and beverages, including the operation of machines and devices used in the performance of such work, such as but not limited to dishwashers, toasters, dumb-waiters, popcorn poppers, milk shake blenders, and coffee grinders; • work in connection with cars and trucks if confined to: dispensing gasoline and oil; courtesy service; car cleaning; washing and polishing; and other occupations permitted, but including work involving the use of pits, racks, or lifting apparatus, or involving the inflation of any tire mounted on a rim equipped with a removable retaining ring; and • cleaning vegetables and fruits, and wrapping, sealing, labeling, weighing, pricing, and stocking goods when performed in areas physically separate

[246] ARK. CODE ANN. §§ 11-6-105 to 11-6-107; 010-14-2.300 to 010-14-2.302 ARK. CODE R. *et seq.*

Table 9. State Restrictions on Type of Employment by Age	
Age Range	**Restrictions**
	from freezers/meat coolers and locations where meats are prepared for sale.[247]
Under Age 14	Children under the age of 14 may be employed only by their parents or guardians in any occupation owned or controlled by their parents, provided the employment occurs during school vacations.[248]

Restrictions on Selling or Serving Alcohol. In Arkansas, wholesalers, retailers, and transporters of alcoholic beverages may not allow any employee under age 21 to have anything to do with selling, transporting, or handling alcoholic beverages.[249] Further, subject to certain exceptions, persons under age 21 may not mix or serve alcoholic beverages at an on-premises licensed establishment.[250] However, with a parent's or guardian's written consent, persons age 18 or older *may*:

- sell or handle beer and cooking wines at retail grocery establishments;
- sell and handle alcoholic beverages at restaurants and hotels licensed under Arkansas law; and
- work for a licensed liquor wholesaler or licensed beer wholesaler or by a licensed native winery to handle alcoholic beverages at the place of business of the licensed wholesaler or winery.[251]

Minors under age 16 may not work in any saloon, resort, or bar where intoxicating liquors of any kind are sold or dispensed.[252]

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

Arkansas's child labor laws specify certain hours during which children can work and limit the days children can work. A minor 14 or 15 years of age cannot begin work before 6:00 A.M., work later than 7:00 P.M., and cannot work more than eight hours per day, six days per week, or more than 48 hours a week.[253] On nights preceding nonschool days, a minor 14 or 15 years of age can work until 9:00 P.M., subject to the same restrictions otherwise.[254]

A 16- or 17-year old cannot begin work before 6:00 A.M., work past 11:00 P.M., work more than 10 consecutive hours per day, more than 10 hours in a 24-hour period, more than six days per week, or more than 54 hours per week.[255] When school is not in session the next day, the restrictions are the same,

[247] 010-14-2.301 ARK. CODE R. § C.

[248] ARK. CODE ANN. § 11-6-104.

[249] ARK. CODE ANN. § 3-3-204(A).

[250] ARK. CODE ANN. § 3-9-236.

[251] ARK. CODE ANN. § 3-3-204(b).

[252] ARK. CODE ANN. § 11-6-105.

[253] ARK. CODE ANN. § 11-6-108.

[254] ARK. CODE ANN. § 11-6-108.

[255] ARK. CODE ANN. § 11-6-110.

except that a 16- or 17-year old may be employed until 12:00 midnight,[256] and in certain occupations or circumstances, they may even be allowed to work the hours between 12:00 midnight and 6:00 A.M.[257]

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

The Arkansas child labor laws do not apply to a minor between the ages of 16 and 18 if the minor has graduated from high school, vocational school, or technical school, or is married or a parent.[258] In addition, the child labor laws provide for the following exceptions:

- a child under 16 may be employed in a theatrical production or in a saloon, resort, or bar when the child and the child's parent or guardian perform together as part of the same show and the parent or guardian remains with the child in order to supervise;[259]
- upon written approval of a parent or guardian, a minor may buy, sell, deliver, and collect for newspapers during the school term or during vacation, if the child is attending school and does not engage in the employment or activity except at times when the child's presence is not required at school;[260]
- upon written approval of a parent or guardian, a minor may be employed as a bat boy or bat girl for a professional baseball team during the school term or during vacation, if the child is attending school and does not engage in the employment or activity except at times when the child's presence is not required at school;[261]
- minors aged 14 and older may be employed as a seasonal agricultural laborer to pick, plant, harvest, grade, sort, or haul any crop, fruit, or vegetable outside of school hours;[262]
- occasional, irregular, or incidental work related to and in or around private residences or church childcare facilities, including, but not limited to babysitting, pet sitting, household chores, and manual yard work;[263] and
- minors aged 11 and up may work as a sports official, referee, or umpire in organized youth football, baseball, softball, basketball, or soccer leagues.[264]

Special requirements are also present for child entertainers.[265]

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

The Youth Hiring Act of 2023 repealed the work permit requirement for minors under the age of 16.[266]

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256 ARK. ADMIN. CODE 010.14-318(a)(5).

257 ARK. CODE ANN. § 11-6-110.

258 ARK. CODE ANN. § 11-6-102.

259 ARK. CODE ANN. § 11-6-106.

260 ARK. CODE ANN. § 11-6-112.

261 ARK. CODE ANN. § 11-6-113.

262 ARK. CODE ANN. § 11-6-114.

263 ARK. CODE ANN. § 11-6-115.

264 ARK. CODE ANN. § 11-6-116.

265 ARK. CODE ANN. § 11-12-104; 010-14-2.401 ARK. CODE R.

266 ARK. CODE ANN. § 11-6-109, as repealed by H.B. 1410 (Ark. 2023).

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

Employers that employ minors are subject to visitation and inspection by the Director of the Arkansas Department Labor or their designee.[267] Once an investigation is complete, the Director may file complaints and prosecute violators. Anyone who violates the child labor laws is subject to a civil penalty of not less than $50 and not more than $1,000 for each violation (effective July 31, 2023, these numbers increase to not less than $100 and not more than $5,000). Each day the violation continues constitutes a separate offense with respect to each child employed or permitted to work.[268]

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).[269]

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 payroll deposit account, if it is at a place convenient to their employment and without charge to them.[270]

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.[271]

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.[272] The "prepaid rule" regulation defines

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[267] ARK. CODE ANN. § 11-6-111.

[268] ARK. CODE ANN. § 11-6-103, as amended by S.B. 390 (Ark. 2023).

[269] 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").

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

[271] 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.

[272] 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 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.[273]

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.[274] 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 responsibility for unauthorized charges or other unauthorized access, provided they have registered their payroll card accounts.[275]

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.[276]

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

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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/.

[273] 12 C.F.R. § 1005.2(b)(3)(i)(A).

[274] 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.

[275] 12 C.F.R. § 1005.18.

[276] *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.

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.[277]

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.[278] Because the FLSA requires an employer to pay minimum wage and overtime premiums "free and clear," the employer must 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.[279] Accordingly, among other items, an employer may be required to reimburse an employee for expenses related to work uniforms,[280] tools and equipment,[281] and business transportation and travel.[282] 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.[283]

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[277] 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.

[278] *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).

[279] 29 C.F.R. §§ 531.35, 531.36, and 531.37.

[280] 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.

[281] 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).

[282] 29 C.F.R. § 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c04.

[283] 29 C.F.R. § 778.217.

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;[284]
- 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);[285]
- 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);[286]
- 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;[287]
- 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;[288] 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.[289]

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

[284] 29 C.F.R. § 531.38.

[285] 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*.

[286] 29 C.F.R. § 531.40.

[287] 29 C.F.R. § 531.40.

[288] 29 U.S.C. § 203. However, the cost cannot be treated as wages if prohibited under a collective bargaining agreement.

[289] 29 C.F.R. § 825.213.

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.[290]

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.[291] 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.[292]

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.[293]

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 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.[294]

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.[295]

3.7(b) *State Guidelines on Wage Payment*

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

Authorized Instruments. Wages may be paid in cash or by check. Employees may also be paid by direct or automatic deposit, or by debit card preloaded with the amount of wages, subject to certain conditions.

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

[291] 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.

[292] 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.

[293] 29 C.F.R. § 531.36.

[294] 29 C.F.R. § 531.37.

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

An employee has a right to be paid in cash if the employee has ever received a check drawn on an account with insufficient funds.[296]

Direct Deposit. Direct deposit is permissible in Arkansas. However, the law permits an employee to opt out of electronic direct deposit by providing the employer with a written statement requesting payment by check.[297]

Payroll Debit Card. An employer may pay employees by automatic deposit, or by debit card preloaded with the amount of wages. If an employer pays an employee via preloaded debit card, the employee is entitled to one free withdrawal for the funds for each deposit of wages loaded onto the debit card.[298]

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

An employer in Arkansas must pay its employees "no less frequently than semimonthly."[299] Thus, employers have the flexibility to pay employees more than twice per month.

Different rules apply to corporations with annual gross incomes of $500,000 or more. Such corporations must pay their exempt management-level and executive employees who are paid at a gross rate in excess of $25,000 per year, a minimum of once each calendar month.[300]

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

Employers that discharge an employee must pay all wages due by the next regular payday, and those that fail to make the payment required within seven days of the next regular payday owe the employee double the wages due.[301]

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

Arkansas does not require employers to furnish their employees with earning statements each pay period. In the absence of an applicable state law, an employer would be subject only to the relevant federal law. Although federal law does require employers to provide W-2 forms once a year, the law does not generally require statements with each wage payment.

3.7(b)(v) *Wage Transparency*

Arkansas 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 Arkansas 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.

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[296] ARK. CODE ANN. § 11-4-402, 11-4-403.

[297] ARK. CODE ANN. § 11-4-402.

[298] ARK. CODE ANN. § 11-4-403.

[299] ARK. CODE ANN. § 11-4-401.

[300] ARK. CODE ANN. § 11-4-401.

[301] ARK. CODE ANN. § 11-4-405(a)-(b).

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

In Arkansas, there is no general obligation to indemnify an employee for business expenses. However, the law contains provisions specific to work uniforms.

An employer engaged in any occupation in which apparel is customarily and regularly furnished to an employee for the employee's benefit is entitled to an allowance for the reasonable value of apparel towards satisfying its minimum wage obligation, in an amount not to exceed the fair and reasonable cost of the board, lodging, apparel, or other items and services.[302] The allowance may not be applied towards hours worked in excess of 40 per workweek.[303] Apparel is not "furnished" to the employee unless the employee receives the benefit and the employee's acceptance is voluntary and uncoerced.[304]

An employer is not entitled to an allowance for the cost of apparel furnished to the employee that primarily benefits the employer. Apparel that has a company or business logo is considered primarily for the benefit of the employer. Moreover, an employer is not entitled to an allowance for the cost of apparel that is required by the employer as a condition of employment.[305]

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

Permissible Deductions. An employer is permitted to make deductions that cause an employee's wage to fall below the minimum wage or overtime rate if:

- the deduction is authorized by state labor department rules;
- the deduction is authorized or required by state or federal law;
- the deduction is directed by an employee's voluntary wage assignment or order to pay a sum for the benefit of the employee to a third party, provided that neither the employer nor any person acting on its behalf derives any profit or benefit from the transaction; or
- the deduction is not otherwise prohibited, is for the employee's benefit, and the employee authorizes the deduction in writing.[306]

Prohibited Deductions. Arkansas law prohibits an employer from making deductions from the minimum wage rate for various items, including but not limited to:

- spoilage or breakage;
- cash or inventory shortages or losses; and
- fines or penalties for lateness, misconduct, or quitting by an employee without notice.[307]

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[302] ARK. CODE ANN. § 11-4-213; 010-14-107 ARK. CODE R. § D.

[303] 010-14-107 ARK. CODE R. § D.

[304] 010-14-107 ARK. CODE R. § D.

[305] 010-14-107 ARK. CODE R. § D.

[306] 010-14-107 ARK. CODE R. § B.

[307] 010-14-107 ARK. CODE R. § B.

Further, absent an employee's express written consent, the employee cannot be compelled to pay dues or any other monetary consideration to any labor organization as a prerequisite or condition of employment.[308]

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

Debt Collection. Under Arkansas law, if a plaintiff has obtained a judgment in any court of record, that plaintiff may execute a writ of garnishment to recover the indebtedness from the defendant.[309] If the garnishment includes salaries, wages, or other compensation due from the employer, the employer must withhold any nonexempt wages due or which subsequently become due. The judgment or balance due becomes a lien on salaries, wages, or other compensation due. That lien continues as to subsequent earnings until the total amount due upon the judgment and costs is paid or satisfied. The lien on subsequent earnings must terminate sooner if the employment relationship is terminated or if the underlying judgment is vacated or modified.[310] In addition, the employer may withhold up to $2.50 per pay period in addition to any court-ordered income withholding amount for the administrative cost incurred in each withholding.[311]

Orders of Support. An employer that receives an income withholding order for child or spousal support must begin withholding from the obligor-employee's wages no later than in the first pay period that occurs after 14 days following the date the notice was mailed.[312] The employer must withhold from the employee's disposable earnings an amount sufficient to satisfy the support obligation up to the limits imposed by the federal Consumer Credit Protection Act.[313] In addition to the income withholding for support, Arkansas employers are permitted to withhold $2.50 per pay period as an administrative processing fee.[314]

An employer is prohibited from discharging, refusing to employ, or taking other disciplinary action against an employee on the grounds that the employee is a noncustodial parent subject to an income withholding order. Violation of this provision will incur a fine of up to $50.00 per day.[315]

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

Either an employer or an employee may notify the Arkansas Department of Labor of a wage dispute if the amount in controversy does not exceed $2,000.[316] The Director of the Department of Labor (or any person authorized by the director) is authorized to conduct a hearing to investigate the dispute and may inquire into, hear, and decide disputes arising from wages earned and may allow or reject any deduction from wages.[317] The amount of any award by the Director is presumed to be the amount of wages, if any, due

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[308] ARK. CODE ANN. § 11-3-303.

[309] ARK. CODE ANN. § 16-110-401.

[310] ARK. CODE ANN. § 16-110-415(a).

[311] ARK. CODE ANN. § 16-110-417.

[312] ARK. CODE ANN. §§ 9-14-218, 9-17-502.

[313] ARK. CODE ANN. § 9-14-228.

[314] ARK. CODE ANN. § 9-14-227.

[315] ARK. CODE ANN. § 9-14-226.

[316] ARK. CODE ANN. §§ 11-4-301, 11-4-303.

[317] ARK. CODE ANN. § 11-4-303(a).

and unpaid to the employee.[318] If either the employer or the employee refuse to accept the findings of the Director, then either party has the right to judicial review and may institute action in any court of competent jurisdiction.[319]

The Arkansas Minimum Wage Act (AMWA) provides a private right of action for damages, and an employee is not required to exhaust administrative remedies prior to filing suit.[320]An employee must file suit within two years of the alleged AMWA violations.[321] An employer found to have violated the AMWA will be liable to the aggrieved employee for the full amount of the wages, less any amount actually paid to the employee by the employer, reasonable attorney's fees and costs, and liquidated damages in an amount equal to the amount of unpaid wages; however, liquidated damages will only be available if an employee proves the violation is willful.[322] Employers that violate the statute may also incur civil penalties up to $1,000 for each violation, and every day that a violation continues is considered a separate offense.[323] Note that the AMWA does not provide a cause of action to recover straight-time wages when the employee's wage exceeds the minimum wage and no overtime is involved.[324]

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).[325] 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.[326] 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.[327]

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[318] ARK. CODE ANN. § 11-4-303(c).

[319] ARK. CODE ANN. § 11-4-304.

[320] ARK. CODE ANN. § 11-4-218.

[321] *Douglas v. First Student, Inc.*, 385 S.W.3d 225, 228 (Ark. 2011);

ARK. CODE ANN. § 11-4-218(g).

[322] ARK. CODE ANN. § 11-4-218..

[323] ARK. CODE ANN. § 11-4-206.

[324] *Okeke v. Ark. Dep't of Veterans Affairs*, 2013 WL 9191586, at *1 (Cir. Ct. Ark. 2013); *Helmert v. Butterball, L.L.C.*, 2009 WL 5066759, at *13 (E.D. Ark. Dec. 15, 2009).

[325] 29 U.S.C. § 1002.

[326] 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.

[327] 490 U.S. 107, 119 (1989).

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

Employers in Arkansas are not required to provide paid vacation time to their employees. 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, and the employer must apply the vacation policy in a nondiscriminatory manner. Therefore, employers should draft clear, precise, and complete policies and procedures regarding these benefits, as they can become contractual obligations and subject the employer to liability if withheld or reduced without notice. In Arkansas, because the right to vacation pay is treated as a matter of contract,[328] and courts will generally enforce an employer's written policy,[329] an employer is free to cap vacation accrual, include a "use-it-or-lose-it" provision, and/or require forfeiture of accrued vacation upon termination.

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*

Arkansas 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.[330] 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).[331] However, under COBRA, only an employee and the employee's spouse

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[328] *See Waymack v. KCLA, Inc.*, 664 S.W.2d 509 (Ark. Ct. App. 1984).

[329] *See Health Res. of Ark., Inc. v. Flener*, 286 S.W.3d 704 (Ark. 2008).

[330] 29 U.S.C. § 1144.

[331] 29 U.S.C. § 1161.

and dependent children are considered "qualified beneficiaries."[332] Here again, states may choose to 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*

In Arkansas, couples may register as domestic partners in the City of Eureka Springs, although only municipal employees may obtain health coverage for their domestic partners. State law does not address the issue of whether an employee's domestic partner or civil union 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;[333]
- to care for an immediate family member (spouse, child, or parent) with a serious health condition;[334]
- to take medical leave when the employee is unable to work because of a serious health condition;[335]
- 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.[336] A *covered employee* has completed at least 12 months of employment and has worked at least 1,250 hours in the

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[332] 29 U.S.C. § 1167(3).

[333] 29 C.F.R. §§ 825.102, 825.112, 825.113, 825.120, and 826.121.

[334] 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).

[335] 29 C.F.R. §§ 825.112, 825.113.

[336] 29 U.S.C. § 2611(4); 29 C.F.R. §§ 825.104 to 825.109.

last 12 months at a location where 50 or more employees work within 75 miles of each other.[337] For information on the FMLA, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

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

Arkansas law does not address family and medical leave for private-sector employees.

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.[338] 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*

Arkansas law does not address paid sick leave for private-sector employees.

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.[339] 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

[337] 29 U.S.C. § 2611(2); 29 C.F.R. §§ 825.110 to 825.111.

[338] 80 Fed. Reg. 54,697-54,700 (Sept. 10, 2015).

[339] 42 U.S.C. § 2000e(k); *see also* 29 C.F.R. § 1604.10.

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.[340] FMLA 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.[341] 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*

Arkansas law does not address pregnancy leave for private-sector employees.

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*

An employer that provides maternity or paternity time off to biological parents must, upon request, make the same time off available to employees who adopt a child.[342] Any other benefits provided by the employer (*e.g.*, job guarantee or pay) must be available to both adoptive and biological parents on an equal basis. However, leave does not apply to an adoption: (1) by the spouse of a custodial parent; (2) of a person over 18 years old; or (3) of a foster child by the child's foster parents.[343]

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[340] 29 C.F.R. § 825.202.

[341] 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.

[342] ARK. CODE ANN. § 9-9-105.

[343] ARK. CODE ANN. § 9-9-105.

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.

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

Arkansas 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*

Private employers must grant an unpaid leave of absence to any employee who submits a written request for a leave of absence in order to serve as an organ or bone marrow donor.[344] The leave must equal the time requested by the employee or 90 days, whichever is less. An employer may agree to pay the employee's regular wages during the leave of absence and may grant a leave for more than 90 days. If an employee is paid for such a leave, the employer is entitled to a credit against its Arkansas withholding tax liability equal to 25% of the regular salary or wages paid to the employee while on leave.[345]

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*

Arkansas employers are required to schedule the work of employees on election days to allow employees (who are eligible) the opportunity to vote. The required time is unpaid.[346]

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*

Arkansas law provides leave benefits to any employee elected to public office or appointed by the Governor to a board or commission if the office requires the employee's absence from their

[344] ARK. CODE ANN. § 11-3-205.

[345] ARK. CODE ANN. § 11-3-205.

[346] ARK. CODE ANN. § 7-1-102.

employment.[347] The leave may last as long as the employee requests, not to exceed the duration of the term of office.[348] The leave of absence must not impair the employee's seniority rights.[349]

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.[350] 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 additional federal statutes.[351] 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*

Although not a specific leave entitlement, an employer may not discharge or otherwise penalize an employee as a result of an absence due to jury service, provided the employee gave reasonable notice of the jury duty summons to their employer.[352]

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*

An employer may not discharge or discipline a crime victim or a representative of the victim for:

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[347] ARK. CODE ANN. § 21-4-101(a).

[348] ARK. CODE ANN. § 21-4-101(b).

[349] ARK. CODE ANN. § 21-4-101(c).

[350] 28 U.S.C. § 1875.

[351] *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).

[352] ARK. CODE ANN. § 16-31-106; *Frolic Footwear, Inc. v. Arkansas*, 683 S.W.2d 611, 612(Ark. 1985).

1. participation at the prosecuting attorney's request in preparation for a criminal justice proceeding; or
2. attendance at a criminal justice proceeding if the attendance is reasonably necessary to protect the interests of the victim.[353]

The victim's representative may include a member of the victim's family or an individual designated by the victim or by a court.[354]

An employee who is accountable for the crime or for a crime arising from the same conduct, criminal episode, or plan is not eligible for time off.[355]

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.[356]

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

[353] ARK. CODE ANN. § 16-90-1105.

[354] ARK. CODE ANN. § 16-90-1101(5).

[355] ARK. CODE ANN. § 16-90-1101(8).

[356] 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)).

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.[357] 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.[358] 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.

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. The Arkansas Military Service Protection Act prohibits discrimination against any person because of military service.[359] The Act declares this right to be a civil right and mirrors many provisions of the Arkansas Civil Rights Act (see **3.11**). For employers with more than five employees, their employees have the right to obtain and hold employment without discrimination because of military service.[360] Courts may look to USERRA for guidance in interpreting the Military Service Protection Act.[361]

A person who is called to active state duty as a member of the armed forces of Arkansas or any other state, including the National Guard, a reserve component of the armed forces or the militia, has the same employment and re-employment rights, privileges, benefits, and protections in employment as though called to active duty in the service of the United States. Further, an employer is prohibited from denying such individual hiring, retention in employment, promotion or other incidents or advantages of employment because of any obligation as a member of the armed services.[362]

Other-Military Related Protections: Spousal Unemployment. While not restricted to just military service, individuals are not disqualified from unemployment benefits if they leave work to accompany a spouse because of a change in the location of the spouse's employment that makes it impractical to commute.[363]

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.

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[357] 29 C.F.R. § 825.126(a).

[358] 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).

[359] ARK. CODE ANN. §§ 12-62-801 to 12-62-808.

[360] ARK. CODE ANN. § 12-62-805(a)(2)(A).

[361] *Brown v. Union Pac. R.R. Co.*, 2009 WL 1110824, at *4 n.1 (E.D. Ark. Apr. 24, 2009).

[362] ARK. CODE ANN. § 12-62-413(a).

[363] ARK. CODE ANN. § 11-10-513(b)(4).

3.9(l)(ii) *State Guidelines on Other Leaves*

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

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.[364] Employers are also required to comply with all applicable occupational safety and health standards.[365] 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.[366] 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*

Arkansas does not have an approved state plan under the Fed-OSH Act that covers public or private-sector employees. Accordingly, employers must abide by the Fed-OSH Act.

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*

In Arkansas, it is illegal for the driver of a motor vehicle to use a handheld wireless device for wireless interactive communication while operating the vehicle.[367] The prohibition covers typing, text messaging,

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[364] 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.

[365] 29 U.S.C. § 654(a)(2).

[366] 29 U.S.C. § 667(c)(2).

[367] ARK. CODE ANN. §§ 27-51-1501 to 27-51-1506.

emailing, or accessing information on the internet. The prohibition against texting also includes accessing, reading, or posting to social networking sites.[368]

These restrictions apply to employees driving for work purposes and could expose an employer to liability. Employers therefore should be cognizant of, and encourage compliance with, the law.

Additional exceptions apply, for emergencies, law enforcement, and other emergency personnel, among other things.[369] There are greater restrictions on cell phone use for drivers under the ages of 18 and 21.[370] Further, cell phone use is restricted in school zones when children are present outside the building and in highway work zones when highway workers are present.[371]

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. By statute in Arkansas, the person or entity exercising control over a physical location may prohibit the carrying of a concealed handgun at the location.[372] Further, an employer may terminate an employee for flagrantly or unreasonably displaying a handgun in plain sight of others at the employer's place of business. The employer may bring a civil action against an employee who knowingly displays in a flagrant or unreasonable manner a handgun in plain sight of others at the employer's place of business.[373]

Firearms in Company Parking Lots. An employer cannot prohibit an employee from transporting or storing a legally owned firearm in the employee's private motor vehicle in the employer's parking lot when the firearm is lawfully possessed and is stored out of sight inside a locked private motor vehicle in the employer's parking lot. An employer cannot prohibit or attempt to prevent an employee from entering the employer's parking lot because the employee's private motor vehicle contains a firearm if the firearm is kept for lawful purposes and is stored out of sight in the employee's locked vehicle.[374]

An employer has the right to:

- prohibit a person who is not an employee from storing a firearm in an employee's motor vehicle in the employer's parking lot; and
- prohibit an employee's entry onto the employer's place of business or in the parking lot because the person's private motor vehicle contains a firearm in the following circumstances:

[368] ARK. CODE ANN. § 27-51-1504.

[369] ARK. CODE ANN. § 27-51-1504.

[370] ARK. CODE ANN. §§ 27-51-1601 to 27-51-1608.

[371] ARK. CODE ANN. §§ 27-51-1609, 27-15-1610.

[372] ARK. CODE ANN. § 5-73-306.

[373] ARK. CODE ANN. § 16-120-802.

[374] ARK. CODE ANN. § 11-5-117.

- the parking lot is on the grounds of an owner-occupied single-family detached residence or a tenant-occupied single-family detached residence and the single-family detached residence or tenant-occupied single-family detached residence is being used as a residence;
- the employer reasonably believes that the employee is in illegal possession of the firearm;
- the employee is operating a private employer-owned motor vehicle during and in the course of the employee's duties on the employer's behalf, unless the employee is required to transport or store a firearm as part of the employee's duties;
- the private motor vehicle is not permitted in the parking lot for reasons unrelated to the employee's transportation, storage, or possession of a firearm;
- the employee is the subject of an active or pending employment disciplinary proceeding; or
- the employee has been adjudicated mentally incompetent or not guilty in a legal proceeding by reason of mental disease or defect.[375]

The statute does not prevent an employer from prohibiting a person who fails to transport or store the firearm in compliance with these provisions from transporting or storing a firearm in the parking lot or from entering onto the employer's place of business or the employer's parking lot.[376]

A former employee who possesses a firearm in their private motor vehicle is not criminally liable for possessing the handgun in their private motor vehicle in the former employer's parking lot while the former employee is physically leaving the employer's parking lot immediately following the employee's termination or other reason for separating from employment.[377]

An employer is not liable in a civil action for damages, injuries, or death resulting from or arising out of an employee's or another person's actions involving a handgun transported or stored in the employer's parking lot or from allowing a person to enter the employer's place of business or parking lot, including without limitation the theft of a handgun from an employee's private motor vehicle, unless the employer intentionally solicited or procured the other person's actions. A handgun possessed in a parking lot does not solely constitute a failure on the part of an employer to provide a safe workplace.[378]

An employer may terminate an employee for flagrantly or unreasonably displaying a handgun in plain sight of others at the employer's place of business or in plain sight in an employee's motor vehicle. Further, a private employer may bring a civil action against an employee that knowingly displays in a flagrant or unreasonable manner a handgun in plain sight of others at the employer's place of business or in plain sight in an employee's motor vehicle, except when the display of a handgun is incidental and reasonably related to the transfer of the employee's handgun from a locked container located within the employee's motor vehicle to another part of the employee's motor vehicle or employee's person.[379]

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[375] ARK. CODE ANN. § 11-5-117.

[376] ARK. CODE ANN. § 11-5-117.

[377] ARK. CODE ANN. § 11-5-117.

[378] ARK. CODE ANN. § 16-120-802.

[379] ARK. CODE ANN. § 16-120-802.

Signage Requirements. The person or entity exercising control over a physical location wishing to prohibit firearms at that location must post a written notice clearly readable at a distance of not less than 10 feet stating that "carrying a handgun is prohibited." If the location does not have a roadway entrance, there must be a written notice placed anywhere on the premises, and there must be at least one written notice posted within every three acres of a location with no roadway entrance.[380]

The above requirements do not apply to a location that is:

- a publicly owned and maintained parking lot, if an individual with a concealed handgun license is carrying a concealed handgun in their motor vehicle or has left the concealed handgun in the individual's locked and unattended motor vehicle; or
- a parking lot of a private employer, and a person with a concealed handgun license is carrying a concealed handgun as provided under Arkansas Code Annotated section 11-5-117 or 5-73-326.[381]

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.

3.10(d)(ii) *State Guidelines on Smoking in the Workplace*

The Arkansas Clean Indoor Air Act prohibits smoking in the workplace and other public places. Specifically, the Act prohibits smoking in all public places and enclosed areas within places of employment, including but not limited to common work areas, auditoriums, classrooms, conference and meeting rooms, private offices, elevators, hallways, health care facilities, cafeterias, employee lounges, stairs, and restrooms.[382] Smoking medical marijuana is prohibited in all places where smoking tobacco is prohibited by law.[383]

The prohibitions on smoking in places of employment must be communicated to each prospective employee upon application for employment.[384]

Antiretaliation Provisions. Individuals who make complaints about violations of the Act's smoking prohibitions are protected from discrimination and retaliation for making their complaints.[385]

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.

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[380] ARK. CODE ANN. § 5-73-306(18).

[381] ARK. CODE ANN. § 5-73-306(18).

[382] ARK. CODE ANN. § 20-27-1804(b)(1).

[383] ARK. CONST. amend. 98, § 6.

[384] ARK. CODE ANN. § 20-27-1804(b)(3).

[385] ARK. CODE ANN. § 20-27-1804(b)(2).

3.10(e)(ii) *State Guidelines on Suitable Seating for Employees*

Arkansas 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 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*

An employer may, in addition to, or instead of, filing criminal charges against an individual, seek a temporary restraining order, a preliminary injunction, or an injunction under Arkansas Rule of Civil Procedure 65 prohibiting further unlawful acts by that individual at the worksite. The *worksite* includes any place at which work is being performed on behalf of the employer, if an employer or an employer's employee or invitee has:

- suffered unlawful violence by an individual by: terroristic act; rape; battery; domestic battering and assault on a family or household member; or a crime of violence;
- received a threat of violence by an individual which can reasonably be construed as a threat which may be carried out at the worksite as: terroristic threatening; threatening a catastrophe; assault; or domestic battering; or
- been stalked or harassed at the worksite by: loitering; criminal trespass; harassment; or stalking.[386]

Upon granting any restraining order, preliminary injunction, or injunction, a court may, among other appropriate orders:

- order the defendant not to visit, assault, molest, or otherwise interfere with the employer or the employer's operations or the employer's employee or invitee at the employer's worksite;
- order the defendant to cease stalking the employer's employee or invitee at the employer's worksite;
- order the defendant to cease harassment of the employer or the employer's employee or invitee at the employer's worksite;
- order the defendant not to abuse or injure the employer, including the employer's property, or the employer's employee or invitee at the employer's worksite;
- order the defendant not to telephone the employer or the employer's employee or invitee at the employer's worksite; or
- such other necessary and appropriate relief as is deemed appropriate in the discretion of the court.[387]

[386] ARK. CODE ANN. § 11-5-115(a).

[387] ARK. CODE ANN. § 11-5-115(b).

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");[388] (2) the Americans with Disabilities Act (ADA);[389] (3) the Age Discrimination in Employment Act (ADEA);[390] (4) the Equal Pay Act;[391] (5) the Genetic Information Nondiscrimination Act of 2009 (GINA);[392] (6) the Civil Rights Acts of 1866 and 1871;[393] 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);[394]
- 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.[395] 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.[396]

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[388] 42 U.S.C. §§ 2000e *et seq.* Title VII applies to employers with 15 or more employees. 42 U.S.C. § 2000e(b).

[389] 42 U.S.C. §§ 12101 *et seq.* The ADA applies to employers with 15 or more employees. 42 U.S.C. § 12111(5).

[390] 29 U.S.C. §§ 621 *et seq*. The ADEA applies to employers with 20 or more employees. 29 U.S.C. § 630.

[391] 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.

[392] 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)).

[393] 42 U.S.C. §§ 1981, 1983.

[394] 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.

[395] The EEOC's website is available at http://www.eeoc.gov/.

[396] 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*

Arkansas's comprehensive FEP law is the Arkansas Civil Rights Act of 1993 (ACRA).[397] ACRA prohibits discrimination on the basis of the following:

- race;
- religion;
- national origin (includes ancestry);
- gender (includes pregnancy, childbirth, or related medical conditions); and
- disability.[398]

Effective July 6, 2023, the definitions of race and national origin encompass natural, protective or cultural hairstyles including Afros, dreadlocks, twists, locs, braids, cornrow braids, Bantu knots, curls, and hair styled to protect hair texture or for cultural significance.[399]

The ACRA defines an *employer* as "a person who employs nine (9) or more employees in the State of Arkansas in each of twenty (20) or more calendar weeks in the current or preceding calendar year."[400] The statute further exempts religious corporations and other religious entities.[401]

Note that there is a difference between the ACRA, Title VII, and the ADA in regard to what entities are considered employers. While the ACRA covers employers with nine or more employees in-state, Title VII and the ADA cover employers with 15 or more employees.

3.11(a)(iii) *State Enforcement Agency & Civil Enforcement Procedures*

Arkansas law does not provide for a state enforcement agency or administrative procedure for employment discrimination under the ACRA. Therefore, individuals must bring lawsuits to enforce the employment related parts of the law. The statute of limitations under the ACRA is one year from the date of the alleged discrimination or within 90 days of receipt of a right-to-sue letter or determination from the federal EEOC, whichever is later.[402] The ACRA gives a longer period of time to sue than Title VII or the ADA, as the latter require that an employee file their charge with the EEOC within 180 days of the alleged discriminatory act.[403] However, if a charge of discrimination is not timely filed with the EEOC, the filing cannot be relied on to support the timeliness of the ACRA claim.[404]

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397 ARK. CODE ANN. §§ 16-123-102 to 16-123-108.

398 ARK. CODE ANN. § 16-123-107.

399 ARK. CODE ANN. § 16-123-102.

400 ARK. CODE ANN. § 16-123-102(5).

401 ARK. CODE ANN. § 16-123-103(a).

402 ARK. CODE ANN. § 16-123-107(c)(3).

403 42 U.S.C. § 2000e-5(e)(1).

404 *Burkhart v. American Railcar Indus., Inc.*, 603 F.3d 472, 476 (8th Cir. 2010).

3.11(a)(iv) *Additional Discrimination Protections*

Medical Marijuana. Arkansas medical marijuana law prohibits discrimination by employers in hiring, termination, or any term or condition of employment based on status as a medical marijuana qualifying patient.[405]

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."[406] 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.[407]

3.11(b)(ii) *State Guidelines on Equal Pay Protections*

An Arkansas employer is required to pay employees equal compensation for equal service, and is prohibited from discriminating against any employee in the matter of wages or compensation solely on the basis of sex.[408] An employer is further prohibited from discriminating in the payment of wages or compensation and from paying female employees a lower salary or wage rate than rates paid to male employees for comparable work.[409] Nothing in the law prohibits variation in rates of pay based upon seniority, experience, training, skill, ability, differences in duties and services, differences in the shift or time of the day worked, or any other reasonable differentiation.[410]

Employees may bring an action for wages and liquidated damages within two years of the accrual of the wages.[411] Employers that violate the wage discrimination law or discriminate against an employee

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[405] ARK. CONST., amend. 98, § 3(f)(3).

[406] 29 U.S.C. § 206(d)(1).

[407] 42 U.S.C. § 2000e-5.

[408] ARK. CODE ANN. § 11-4-601.

[409] ARK. CODE ANN. § 11-4-610(a).

[410] ARK. CODE ANN. § 11-4-610(b).

[411] ARK. CODE ANN. § 11-4-611.

because the employee made a complaint are also subject to fines of up to $500 and up to one year in prison, or both.[412]

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.[413]

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

[412] ARK. CODE ANN. § 11-4-608.

[413] 42 U.S.C. § 2000gg-1. The regulations provide definitions of *pregnancy*, *childbirth*, and *related medical conditions*. 29 C.F.R. § 1636.3.

- temporary suspension of an employee's essential job function(s).[414]

The PWFA also provides for reasonable accommodations related to lactation, as described in **3.4(a)(iii)**.

An employee seeking a reasonable accommodation must request an accommodation.[415] 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.[416] 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."[417]

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.[418]

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;

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414 29 C.F.R. § 1636.3.

415 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1636.3.

416 29 C.F.R. § 1636.3.

417 29 C.F.R. § 1636.4.

418 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1630.2(p).

- allowing an employee whose work requires standing to sit and whose work requires sitting to stand, as needed; and
- allowing an employee to take breaks to eat and drink, as needed.[419]

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*

Arkansas 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.[420] Multiple decisions of the U.S. Supreme Court[421] 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.[422] 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 Arkansas.

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[419] 29 C.F.R. § 1636.3.

[420] Note that the Notification and Federal Employee Anti-Discrimination and Retaliation ("No FEAR") Act mandates training of federal agency employees.

[421] *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).

[422] 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.

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 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*

There is no general whistleblower law addressing protections for private-sector whistleblowers in Arkansas.

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)[423] and the Railway Labor Act (RLA)[424] 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 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*

Arkansas is a right-to-work state. Arkansas's right-to-work law provides that no employee can be denied the opportunity to obtain employment because of membership in or affiliation with a labor union or an individual's failure or refusal to join a labor organization. In addition, an employee cannot be compelled to pay dues to any labor organization as a prerequisite to, condition of, or continuance of employment

[423] 29 U.S.C. §§ 151 to 169.

[424] 45 U.S.C. §§ 151 *et seq*.

unless they have voluntarily consented in writing to do so.[425] An employer that violates this provision is guilty of a misdemeanor and may be fined between $100 and $5,000.[426]

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).[427] 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.[428] 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*

Arkansas does not have a mini-WARN law requiring advance notice to employees of a plant closing.

4.1(c) *State Mass Layoff Notification Requirements*

Arkansas does not require that an employer notify the state unemployment insurance department or another department in the event of a mass layoff. However, if an employer terminates a business or sells the assets of a business, then the business must provide notice within 10 days of the termination or sale to the Arkansas Department of Workforce Services. The notice must contain the former name and address of the business, the new name and address of the business, the name of any new owner, and that owner's name and present address.[429]

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.

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[425] ARK. CODE ANN. § 11-3-303.

[426] ARK. CODE ANN. § 11-3-304(b)(1).

[427] 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.

[428] 20 C.F.R. §§ 639.4, 639.6.

[429] Arkansas Dep't of Workforce Servs., *Workforce Services Regulations, R.13, available at* https://www.dws.arkansas.gov/employers/workforce-services-regulations/.

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.[430] 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.[431]

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.	No notice requirement located. Arkansas requires employers with group accident and health insurance policies to offer post-termination continued coverage for up to 120 days upon election of the covered individual. The law does not require such employers to provide notification of continued coverage to an employee upon termination.[432]
Unemployment Notice	**Generally.** All Arkansas employers must provide an unemployment rights notice to employees upon their separation from employment. The method of delivery is at the employer's discretion.[433]

[430] 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.

[431] 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.

[432] ARK. CODE ANN. § 23-86-114.

[433] ARK. ADMIN. CODE 003.20.2-5. This model notice, Appendix A to Rule 5, is available at https://dws.arkansas.gov/workforce-services/employers/employer-forms/.

Table 11. State Documents to Provide at End of Employment	
Category	**Notes**
	Multistate Workers. Arkansas does not require that employees be again notified as to the jurisdiction under whose unemployment compensation law services have been covered. It is recommended, however, that employers consider providing notice of the jurisdiction where services will be covered for unemployment purposes. Employers should also follow that state's general notice requirement, if applicable.

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.

4.3(b) *State Guidelines on References*

Arkansas law does not require employers to provide former employees with references or service letters. However, if an employee provides written consent to disclose certain employment information, current and former employers may be entitled to immunity from civil liability for providing a reference.[434] Specifically, if written consent is provided, a current or former employer may reveal the following employee information to a prospective employer:

- date and duration of employment;
- current pay rate and wage history;
- job description and duties;
- the last written performance evaluation prepared prior to the date of the request;
- attendance information;
- results of drug or alcohol tests administered within one year prior to the request;
- threats of violence, harassing acts, or threatening behavior related to the workplace or directed at another employee;
- whether the employee was voluntarily or involuntarily separated from employment and the reasons for the separation; and
- whether the employee is eligible for rehire.[435]

To be valid, the consent must be on a separate form from the prospective employer's employment application or, if included in the application, in bold letters and in larger typeface than the largest typeface in the text of the application form. The consent form must state, at a minimum, language similar to the following: "I, (applicant), hereby give consent to any and all prior employers of mine to provide

[434] ARK. CODE ANN. § 11-3-204(a).

[435] ARK. CODE ANN. § 11-3-204(a).

information with regard to my employment with prior employers to (prospective employer)." The consent must be signed and dated by the applicant and will be valid only for the length of time that the application is considered active by the prospective employer but in no event longer than six months.[436]

[436] ARK. CODE ANN. § 11-3-204(b)(1).