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STATE

Littler on

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

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

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

DISCLAIMER

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

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1.1 Classifying Workers: Employees v. Independent Contractors

1.1(a) *Federal Guidelines on Classifying Workers*

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

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

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

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

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

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

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

[2] In addition to an evaluation of the right to control how the work is to be performed, the economic realities test also requires an examination of the underlying "economic realities" of the work relationship—namely, do the workers "depend upon someone else's business for the opportunity to render service or are [they] in business for themselves." *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988); *see also Rutherford Food Corp. v. McComb*, 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 Delaware, as elsewhere, an individual who provides services to another for payment generally is considered either an independent contractor or an employee. For the most part, the distinction between an independent contractor and an employee is dependent on the applicable state law (see Table 1).

The Workplace Fraud Act. While there is no statewide statute on independent contractor status applicable to all industries, Delaware has a statute concerning employee classification in the construction services industry, the Workplace Fraud Act.[5] The Workplace Fraud Act makes clear that all divisions of the Delaware Department of Labor, including the Division of Unemployment Insurance, the Office of Workers' Compensation, the Division of Revenue, and the Office of the Attorney General will cooperate and share information to thwart violations of this law.[6] Employers that build, improve, rehabilitate, "work on," clear or landscape buildings, structures, and roads of all types are "construction services" employers covered by the Workplace Fraud Act.[7] The law creates a presumption that all workers in the construction services industry are employees unless the employer can prove that the individual is either an exempt person or independent contractor.[8] An *exempt person* is a sole proprietor who: (1) employs only immediate family members; (2) performs services free from direction and control; (3) furnishes all required tools and equipment; and (4) exercises complete control over the management and operations of the business.[9] An *independent contractor* is a person who: (1) performs work free from the employer's control and direction; (2) is customarily engaged in an independently established trade, occupation, profession, or business; and (3) performs work outside the usual course of business of the employer for whom the work is performed.[10]

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

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

[5] DEL. CODE ANN. tit.19, §§ 3501 *et seq*.; *see also* Delaware Dep't of Labor, Div. of Indus. Affairs, *Workplace Fraud*, *available at* https://dia.delawareworks.com/labor-law/workplace-fraud.php.

[6] DEL. CODE ANN. tit.19, § 3507.

[7] DEL. CODE ANN. tit.19, § 3501(a)(1).

[8] DEL. CODE ANN. tit.19, § 3503(c).

[9] DEL. CODE ANN. tit.19, § 3501(a)(6).

[10] DEL. CODE ANN. tit.19, § 3501(a)(7).

The Workplace Fraud Act prohibits the following: (1) misclassification of workers; (2) the formation of an entity for the purpose of evading liability or detection of a violation; (3) aiding, abetting, assisting, advising, or facilitating a violation of the Workplace Fraud Act law; and (4) retaliating against a person because a person has made a complaint or given information to the Delaware Department of Labor under the Workplace Fraud Act.[11]

Employers and individuals may be liable for civil penalties, may be ordered to pay restitution to misclassified individuals, may be required to take actions necessary for full compliance under "all applicable labor laws," and may be debarred from work on Delaware public works.[12] Each misclassified worker constitutes a separate violation of the Workplace Fraud Act. Employees may also file a private civil action for misclassification or retaliation, and seek treble damages for lost wages or benefits, as well as other actual damages, attorneys' fees and costs, although they must first file a claim with the Delaware Department of Labor.[13]

Additionally, state wage theft law prohibits employers from misclassifying a worker as an independent contractor for purposes of avoiding wage, tax, or workers' compensation obligations. Employers that violate the law are subject to civil and criminal penalties.[14]

Table 1. State Tests for Classifying Workers

Purpose of Determining Employee Status	State Agency	Test to Apply
Fair Employment Practices Laws	Delaware Department of Labor, Labor Law Enforcement Section	There are no relevant statutory definitions or case law identifying a test for independent contractor status in this context.[15]

[11] DEL. CODE ANN. tit.19, §§ 3503, 3505, and 3509.

[12] DEL. CODE ANN. tit.19, §§ 3505, 3510.

[13] DEL. CODE ANN. tit.19, § 3508.

[14] DEL. CODE ANN. tit.11, § 841D; tit.19, § 1102A.

[15] However, in a nonprecedential opinion, the Third Circuit Court of Appeals indicated that the standard used in cases under Title VII of the Civil Rights Act of 1964 ("Title VII") should also be used in employment discrimination cases under Delaware state law, noting that Title VII standards are "virtually identical" to those under the corollary state law. *Shah v. Bank of Am.*, 346F. App'x 831, 834 n.2 (3d Cir. 2009). Thus, the court applied the *Darden* common law agency, saying it must specifically consider:

> the hiring party's right to control the manner and means by which the product is accomplished [;] . . the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Shah, 346F. App'x at 834 (citing *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S.318, 323-24 (1992)).

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
Income Taxes	Delaware Department of Finance, Division of Revenue	Internal Revenue Service (IRS) 20-factor test.[16]
Unemployment Insurance	Delaware Department of Labor, Division of Unemployment Insurance	Statutory test, adopting the ABC test. Regardless of whether an employee-employer relationship exists under common-law standards, an individual performing services for wages will be considered an employee, unless each of the following are proven: "(i) Such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under the individual's contract for the performance of services and in fact; and (ii) Such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and (iii) Such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed."[17]
Wage & Hour Laws	Delaware Department of Labor, Office of Labor Law Enforcement	The Delaware Wage Act defines an independent contractor using the ABC test. Courts have used a common-law test, considering the following three factors:

[16] The Delaware income tax withholding statute specifically references the Internal Revenue Code for determining withholding requirements. DEL. CODE ANN. tit.30, § 1151(a); *see also* Delaware Dep't of Fin., Div. of Revenue, *Employers Guide (Withholding Tables)*, *available at* http://revenue.delaware.gov/services/wit_folder/section8.shtml ("Whether the relationship of employer and employee exists under the usual common law rules and the IRS Regulations will be determined in doubtful cases by examination of the facts of each case.").

[17] DEL. CODE ANN. tit. 19, § 3302(10)(k); *see also* Delaware Dep't of Labor, Div. of Unemployment Ins., *Employer FAQs*, *available at* https://ui.delawareworks.com/employer-faqs.php.

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
		1. whether the employer retained control over the means and methods of doing the work; 2. whether the person was taxed like an employee; and 3. whether other benefits consistent with a standard employment contract were provided.[18]
Workers' Compensation	Delaware Department of Labor, Division of Industrial Affairs	Common-law test, adopting the Restatement (Second) of Agency section 220 test for determining whether an individual is an employee or independent contractor of a single business. The test considers the following 10factors: 1. the extent of control, which, by the agreement, the alleged employer may exercise over the details of the work; 2. whether or not the individual employed is engaged in a distinct occupation or business; 3. the kind of occupation, with reference to whether in the locality the work is usually done under the direction of the employer or by a specialist without supervision; 4. the skill required for the occupation; 5. whether the employer or the worker supplies the instrumentalities, tools, and place of work; 6. the length of time for which the individual is employed; 7. the method of payment, and whether payment is made based on the time or the job; 8. whether or not the work is a part of the regular business of the employer;

[18] DEL. CODE ANN. tit. 19, § 1101 (incorporating DEL. CODE ANN. tit. 19, § 3501); *See Fairfield Builders, Inc. v. Vattilana*, 304 A.2d 58, 60-61 (Del. 1973); *see also Rypac Packaging Mach., Inc. v. Coakley*, 2000 WL 567895, at **12-13 (Del. Ch. May 1, 2000).

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
		9. whether or not the parties believe they are creating the relationship of master and servant; and 10. whether the alleged employer is or is not in business.[19]
Workplace Safety	Not applicable	There are no relevant statutory definitions or case law identifying a test for independent contractor status in this context. Delaware does not have an approved state plan under the federal Occupational Safety and Health Act.

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 simplified acquisition threshold for work in the United States, and for subcontractors under those prime contracts where the subcontract value exceeds $3,500.[20]

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

[19] *Falconi v. Coombs & Coombs, Inc.*, 902 A.2d 1094, 1099-100 (Del. 2006).

[20] 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.

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.[21] 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.[22]

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

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

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

1.3 Restrictions on Background Screening & Privacy Rights in Hiring

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

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

There is no applicable federal law restricting employer inquiries into an applicant's criminal history. However, the federal Equal Employment Opportunity Commission (EEOC) has issued enforcement guidance pursuant to its authority under Title VII of the Civil Rights Act of 1964 ("Title VII").[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.

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[21] *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).

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

[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.

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*

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

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

Delaware places no statutory restrictions on a private employer's use of conviction records.

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

In Delaware, an employer is prohibited from requiring an applicant to disclose any information contained in an expunged record in any application, interview, or in any other way.[24]

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[25] governs an employer's acquisition and use of virtually any type of information gathered by a "consumer reporting agency"[26] regarding job applicants for use in hiring decisions or regarding employees for use in decisions concerning retention, promotion, or termination. Preemployment reports created by a consumer reporting agency (such as credit reports, criminal record reports, and department of motor vehicle reports) are subject to the FCRA, along with any other consumer report used for employment purposes.

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

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[24] DEL. CODE ANN. tit. 11, § 4372(d).

[25] 15 U.S.C. §§ 1681 *et seq*.

[26] 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).

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]."[27]

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

Delaware 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.

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.

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

Delaware law prohibits an employer from requiring or requesting that an employee or applicant do any of the following:

- disclose a username or password to allow the employer to access personal social media;

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

- access personal social media in the employer's presence;
- use personal social media as a condition of employment;
- divulge any personal social media;
- add a person, including the employer, to a personal social media contacts list, or invite or accept an invitation from any person, including the employer, to join a group associated with the prospective or current employee's personal social media; or
- alter personal social media settings that affect a third party's ability to view the content.[28]

Personal social media is defined as a social networking site account created and operated by an employee or applicant exclusively for personal use.[29] *Social networking site* is defined as an "internet-based, personalized, privacy-protected website or application . . . that allows users to construct a private or semi-private profile site within a bounded system, create a list of other system users who are granted reciprocal access to the individual's profile site, send and receive e-mail, and share personal content, communications, and contacts."[30]

Adverse Action. An employer cannot discharge, discipline, threaten to discharge or discipline, or otherwise retaliate against an employee or applicant for not complying with a request or demand by the employer that violates the social media law. The social media provisions do not prohibit an employer from terminating or otherwise taking an adverse action against an employee or applicant, however, if the action is otherwise permitted by law.[31]

Exceptions. The law does not affect an employer's rights and obligations—under its personnel policies, federal or state law, case law, or other rules or regulations—to require or request an employee to disclose a username, password, or social media reasonably believed to be relevant to an investigation of allegations of employee misconduct or violation of applicable laws and regulations. However, the social media must be used solely for purposes of that investigation or a related proceeding.[32]

Additionally, the law does not preclude an employer from complying with a duty to screen employees, or applicants before hiring, or to monitor or retain employee communications established under federal or state law or by a self-regulatory organization, as defined in the Securities and Exchange Act.[33] Moreover, an employer may view, access, or use information about an employee or applicant that is in the public domain.[34]

The Delaware law also exempts accounts and devices that are employer-provided. The statutory definition of *personal social media* does not include an account on a social networking site created or operated by an employer, or an account operated by an employee as part of their employment.[35] An employer can

[28] DEL. CODE ANN. tit. 19, § 709A(b).

[29] DEL. CODE ANN. tit. 19, § 709A(a)(5).

[30] DEL. CODE ANN. tit. 19, § 709A(a)(6).

[31] DEL. CODE ANN. tit. 19, § 709A(h).

[32] DEL. CODE ANN. tit. 19, § 709A(c).

[33] DEL. CODE ANN. tit. 19, § 709A(f).

[34] DEL. CODE ANN. tit. 19, § 709A(g).

[35] DEL. CODE ANN. tit. 19, § 709A(a)(5).

monitor, review, access, or block electronic data stored on its network or on an electronic communications device it supplied or for which it wholly or partly paid.[36]

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.[37] The law bars most private-sector employers from requiring, requesting, or suggesting that an employee or job applicant submit to a polygraph test, and from using or accepting the results of such a test.

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

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

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

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

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

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

Employers, their agents, or their representatives cannot require, request, or even suggest that an employee or applicant take a polygraph, lie detector, or similar test or examination as a condition of employment or continued employment.[38] Employers may not directly or indirectly cause an employee or applicant to take such tests. There are no exceptions to this law that are applicable to private employers.

[36] DEL. CODE ANN. tit. 19, § 709A(e).

[37] 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.

[38] DEL. CODE ANN. tit. 19, § 704.

The statutory definition of *lie detector* includes, but is not limited to, "any electromechanical device which records or analyzes vocally produced sound frequency variations associated with stress for the purpose of determining the truth of any oral statement."[39]

In addition, an employer cannot discharge or in any manner discriminate against an employee because the employee:

- complained or gave information to the state labor department pursuant to this law;
- caused to be instituted or is about to cause to be instituted any proceedings under this law; or
- testified or is about to testify in any proceeding under this law.[40]

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

Employers that violate the polygraph provisions are liable for civil penalties, of no less than $1,000 and no more than $5,000 per offense.[41]

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.[42] 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.[43] Employers not legally mandated to implement workplace substance abuse and drug and alcohol testing policies may still do so to promote workplace safety, deter illegal drug use, and diminish absenteeism and turnover. For more information on drug testing requirements under federal law, see LITTLER ON EMPLOYMENT TESTING.

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

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

Delaware law contains no express provisions regulating preemployment drug or alcohol screening by private employers.

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[39] DEL. CODE ANN. tit. 19, § 704.

[40] DEL. CODE ANN. tit. 19, § 704(f).

[41] DEL. CODE ANN. tit. 19, § 704(c), (f).

[42] 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.

[43] 41 U.S.C. §§ 8101 *et seq*.; *see also* 48 C.F.R. §§ 23.500 *et seq*.

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

1.3(f)(i) *Salary History Inquiry Restrictions*

It is an unlawful employment practice in Delaware for an employer or an employer's agent to: (1) screen applicants based on their compensation histories, including by requiring that an applicant's prior compensation satisfy minimum or maximum criteria; or (2) seek the compensation history of an applicant from the applicant or a current or former employer.[44] *Compensation* includes monetary wages as well as benefits and other forms of compensation.

An employer or agent is not prohibited from discussing and negotiating compensation expectations with an applicant, provided that the employer or agent does not request or require the applicant's compensation history. Further, and perhaps more importantly, an employer or agent may seek the applicant's compensation history *after* an offer of employment that includes terms of compensation has been extended to the applicant and accepted—for the sole purpose of confirming the applicant's compensation history.

An employee alleging a violation of this law may file a civil action within two years of the alleged violation.[45]

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[46] and a cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act[47] if the employee purchases a qualified health plan through the exchange; and

[44] DEL. CODE ANN. tit. 19, § 709B.

[45] DEL. CODE ANN. tit. 10, § 8111, as amended by Delaware SB 27 (2023); DEL. CODE ANN. tit. 19, §§ 709B, 1113.

[46] 26 U.S.C. § 36B.

[47] 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.[48] 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.[49]
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.[50] 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.[51]
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.[52] In either case, distribution may be accomplished electronically. Employers may use a format other than the FMLA poster as a model notice, if the

[48] 29 U.S.C. § 218b.

[49] 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.

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

[51] 29 C.F.R. § 2590.606-1.

[52] 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.[53] 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.[54]
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.[55] 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.[56]
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.[57]

[53] 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.

[54] 29 C.F.R. § 825.300(a).

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

[56] 26 C.F.R. § 31.3402(f)(2)-1. The IRS provides this form at https://www.irs.gov/pub/irs-pdf/fw4.pdf.

[57] 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.[58]

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.
Fair Employment Practices Documents: Pregnancy, Childbirth, and Related Conditions Discrimination	Employers with four or more employees must provide written notice to new employees, informing them of their right to be free from discrimination related to pregnancy, childbirth, and related conditions, and their right to reasonable accommodation.[59]
Fair Employment Practices Documents: Sexual Harassment	Employers with four or more employees must distribute the Delaware Sexual Harassment Notice, physically or electronically, to new employees at the commencement of employment.[60]
Healthy Delaware Families Act Notice	Employers must provide written notice of the law's provisions to each employee when they are hired. It should include the following: • The employee's right to family and medical leave benefits under this chapter and the terms under which it may be used. • The amount of family and medical leave benefits. • The procedure for filing a claim for family and medical leave benefits.

[58] 29 C.F.R. § 531.59.

[59] DEL. CODE ANN. tit. 19, §§ 710, 716.

[60] DEL. CODE ANN. tit. 19, § 711A(f). The Delaware Sexual Harassment Notice, which is published by the Delaware Department of Labor, Division of Industrial Affairs, is available at https://labor.delaware.gov/divisions/industrial-affairs/discrimination/sexual-harassment/. Failure to distribute the required information sheet does not in and of itself result in an employer's liability to any present or former employee in any action alleging sexual harassment. An employer's compliance with the notice requirement does not insulate the employer from liability for sexual harassment of any current or former employee or applicant.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
	• The right to job protection and benefits continuation under § 3707 of this title. • That discrimination and retaliatory personnel actions against the employee for requesting, applying for, or using family and medical leave benefits is prohibited under § 3708 of this title. • That the employee has a right to file a complaint for violations of this chapter. • Whether family and medical leave benefits are available to the employee through the State or an approved private plan under § 3716 of this title.[61]
Phone, Email & Internet Monitoring	An employer must provide notice to its employees if it intends to implement a policy to monitor or intercept telephone or email communications, or internet access or usage. Notice can be accomplished either by: (1) one-time notice (such as upon hire) to each employee of any monitoring or intercepting policy, either electronically or in writing, with the employee's signed acknowledgement; or (2) notice, at least once, during each day that the employee accesses employer-provided email or internet access services. Some exceptions apply.[62]
Tax Documents	Delaware law states that employees are entitled to the same number of withholding exemptions as the number of withholding exemptions to which they are entitled for federal income tax withholding purposes. An employer may rely upon the number of federal withholding exemptions claimed by the employee. However, The Delaware Department of Revenue states on its website that in order to claim Delaware exemptions, an employee must now use the Delaware W-4 form..[63]
Wage & Hour Documents	Employers with four or more employees must notify new employees in writing of their pay rates, as well as the day, hour, and place of pay.[64]

[61] DEL. CODE ANN. tit. 19, §§ 3701-3724.6.

[62] DEL. CODE ANN. tit. 19, § 705. Exceptions include law enforcement activities pursuant to court order and "processes that are designed to manage the type or volume of incoming or outgoing electronic mail or telephone voice mail or Internet usage" for maintenance or security purposes. DEL. CODE ANN. tit. 19, § 705(e). There are penalties of $100 for each violation. DEL. CODE ANN. tit. 19, § 705(c).

[63] DEL. CODE ANN. tit 30, § 1151(b). Also, see FAQs at https://revenue.delaware.gov/frequently-asked-questions/delaware-w-4-employees-withholding-allowance-certificate/. The Employee's Withholding Allowance Certificate (Form DE-W4) is available at https://revenuefiles.delaware.gov/2021/DE-W4.pdf.

[64] DEL. CODE ANN. tit. 19, § 1108.

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.[65] 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).[66]

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;

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

[66] 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.[67] 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 Delaware's new hire reporting law.

Who Must Be Reported. Delaware employers must report all employees who are newly hired and those rehired after at least 60consecutive days of separation.[68]

Report Timeframe. Employers must report within 20 days from the date of hire. However, if an employer transmits reports magnetically or electronically, employers must make two monthly transmissions, not less than 12 days nor more than 16 days apart.[69]

Information Required. The report must contain the employee's name, address, Social Security number, as well as the date services for remuneration were first performed. The report must also contain the employer's name, address, and federal tax identification number.

Form & Submission of Report. Each report must be made on a federal Form W-4 or, at the option of the employer, an equivalent form, and may be transmitted to the State Directory of New Hires by first-class mail, magnetically, or electronically.[70]

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

[68] DEL. CODE ANN. tit. 30, § 1156A(e)(4).

[69] DEL. CODE ANN. tit. 30, § 1156A(a).

[70] DEL. CODE ANN. tit. 30, § 1156A(c).

Location to Send Information.

Delaware Health and Social Services
P.O. Box 913
84A Christiana Rd.
New Castle, DE 19720
(302) 577-7171
(302) 326-6239 (fax)
www.dhss.delaware.gov

Multistate Employers. An employer that has employees in Delaware and at least one other state, and that transmits reports magnetically or electronically, may designate a single state as the state to which the employer will send all reports of new employees. Employers choosing to designate a state for reporting purposes must provide written notification to the Secretary of HHS and transmit all reports to such state.[71]

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 recently, 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.[72] 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).

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[71] DEL. CODE ANN. tit. 30, § 1156A(a)(2).

[72] 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*

Under Delaware law, employers may seek to keep trade secret and proprietary information confidential and preclude unfair competition via nondisclosure agreements, including covenants not to compete. These types of contracts ordinarily limit an employee's ability to solicit customers or engage in competition with the employer after the employment has ceased.

A valid contract exists if the agreement satisfies the requirements of mutual assent and consideration. Generally, to be enforceable, a covenant not to compete must: (1) meet general contract law requirements; (2) be reasonable in scope and duration, both geographically and temporally; (3) advance a legitimate economic interest of the party enforcing the covenant; and (4) survive a balance of the equities.[73] The validity and enforceability of these contracts under Delaware law vary with each factual situation—they are not mechanically enforced.[74]

Once it is determined that a valid contract exists, Delaware courts will examine the reasonableness of the agreement's scope. Any covenants restricting future employment must be reasonable as to the geographic and temporal limitations and must foster the employer's legitimate economic interests.[75] These limitations will be considered in their totality, based on how the following factors operate together.[76] The employer bears the burden of proving a restrictive covenant's reasonableness.

Delaware courts consider injunctive relief an extreme remedy. To obtain an injunction, the employer must show a reasonable probability of success on the merits, imminent threat of irreparable harm, and the harm resulting for a failure to issue an injunction outweighs the hard to the opposing party if the court issues the injunction.[77] The employer may establish proof of irreparable harm by demonstrating a threat of injury (immediate loss of business) that will occur before a trial could be conducted. Additionally, the employer needs to establish that monetary damages and/or equitable relief granted at a later date will not adequately compensate for the harm.[78]

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[73] *See, e.g.*, *All Pro Maids, Inc. v. Layton*, 2004 WL 1878784 (Del Ch. Aug. 9, 2004); *Delaware Express Shuttle Inc. v. Older*, 2002 WL 31458243, at *11 (Del. Ch. Oct. 23, 2002).

[74] *Gamble v. Walker*, 1994 WL 384617 (Del. Ch. July 18, 1994) (citing *LewMor, Inc. v. Fleming*, 1986 WL 1244(Del. Ch. Jan. 29, 1986)).

[75] *See Knowles-Zeswitz Music, Inc. v. Cara*, 260 A.2d 171 (Del. Ch. 1969).

[76] *See Delaware Elevator, Inc. v. Williams*, 2011 WL 1005181 (Del. Ch. Mar. 16, 2011) ("All else equal, a longer restrictive covenant will be more reasonable if geographically tempered, and a restrictive covenant covering a broad area will be more reasonable if temporally tailored.").

[77] *See Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 394 (Del. 1996); *Emerson Radio Corp. v. International Jensen Inc.*, 1996 WL 483086, at *6 (Del. Ch. Aug. 20, 1996).

[78] *A.S.G. Indus. v. MLZ, Inc.*, 1978 WL 2496 (Del. Ch. June 8, 1978).

Enforceability Following Employee Discharge. In Delaware, employee discharge does not alter whether the covenant is enforceable.[79]

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

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

In Delaware, employment itself is sufficient consideration for a noncompete signed at the inception of employment.[80] While an extremely fact-specific question, Delaware courts have found that a beneficial change in an employee's status can also provide the requisite consideration for a noncompete agreement entered into after the start of employment.[81] Further, Delaware courts have held that mere continued employment is sufficient consideration for a noncompete agreement entered into after the start of employment.[82]

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.

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[79] *See Tri-State Courier & Carriage, Inc. v. Berryman*, 2004 WL 835886 (Del. Chanc. Ct. Apr. 15, 2004). It should be noted, however, that the holding in this case ultimately involved a noncompete in a stock purchase agreement. The employee had been subject to a noncompete convent while employed. He was then terminated. After his termination, he agreed to sell his shares of the employer's stock back to the employer. As part of that stock purchase agreement, the former employee agreed to another covenant not to compete.

[80] *See All Pro Maids, Inc. v. Layton*, 2004 WL 1878784 (Del. Ch. Aug. 9, 2004). In *All Pro Maids, Inc.*, the employer offered the employee at-will employment and at the same time, presented her with the agreement that included a noncompete. The Court found there was valid consideration in her employment and continued employment.

[81] *Faw, Casson & Co. v. Cranston*, 375 A.2d 463, 466-67 (Del. Ch. 1977); *see also RHIS, Inc. v. Boyce* 2001 WL 1192203 (Del. Ch. Sept. 26, 2001) (holding that a "change of employment condition from a probationary hire to a permanent employee is sufficient consideration to support the covenant."); *Hammermill Paper Co. v. Palese*, 1983 WL 19786 (Del. Ch. June 14, 1983).

[82] *Weichert Co. of Pa. v. Young*, 2007 WL 4372823 (Del. Ch. Dec. 7, 2007); *All Pro Maids, Inc. v. Layton*, 2004 WL 1878784 (Del. Ch. Aug. 9, 2004).

Under Delaware law, covenants will be enforced to the extent that it is reasonable to do so. If a provision is overbroad, the court may take the "reasonable alteration approach" whereby it modifies over-encompassing provisions to make them narrower and the covenant enforceable.[83]

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

Delaware law protects an employer's trade secrets under the state version of the Uniform Trade Secrets Act.[84]

Definition of a Trade Secret. Under the Delaware Trade Secrets Act, a *trade secret* is defined as:

> [I]nformation, including a formula, pattern, compilation, program, device, method, technique or process, that:
>
> a. 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
>
> b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[85]

Misappropriation of a Trade Secret. Once information rises to the level of being a trade secret, the courts will examine whether the employee has misappropriated that information. Under the Delaware Trade Secrets Act, *misappropriation* means:

1. 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; or
2. Disclosure or use of a trade secret of another without express or implied consent by a person who:
    a. Used improper means to acquire knowledge of the trade secret; or
    b. At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade [secret] was:
        i. Derived from or through a person who had utilized improper means to acquire it;
        ii. Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
        iii. Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
3. Before a material change of the person'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.[86]

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[83] *Knowles-Zeswitz Music, Inc. v. Cara*, 260 A.2d 171, 175 (Del. Ch. 1969).

[84] DEL. CODE ANN. tit 6, §§ 2001 *et seq*.

[85] DEL. CODE ANN. tit 6, § 2001(4).

[86] DEL. CODE ANN. tit 6, § 2001(2).

Thus, misappropriation under the Delaware act can occur in one of two manners: (1) acquisition by improper means; or (2) improper disclosure or use.[87] Delaware courts use the following four-step inquiry in evaluating claims of trade secret misappropriation:

1. Does a trade secret exist (*i.e.*, have the statutory elements—commercial utility arising from secrecy and reasonable steps to maintain secrecy—been shown);
2. Has the secret been communicated by the plaintiff to the defendant;
3. Was such communication pursuant to an express or implied understanding that the matter's secrecy would be respected;
4. Has the secret information been improperly (*e.g.*, in breach of the understanding) used or disclosed by the defendant to the injury of the plaintiff.[88]

Once evidence of misappropriation is shown, the statute provides for both injunctive and monetary relief.[89] Actual or threatened misappropriation may be enjoined by a court. The injunction is usually terminated when the trade secret ceases to exist, although it can be continued for an additional period to eliminate any commercial advantage that would be derived from the earlier misappropriation.[90] Damages include recovery for actual loss caused by the misappropriation and unjust enrichment.[91]

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

Disputes sometimes arise between current or former employees and their employers regarding ideas and inventions developed during the course of the employment relationship. Delaware law allows an employer to provide, in an employment agreement, that an employee must assign (or offer to assign) any of the employee's rights in an invention to the employer, so long as the invention relates to the employer's business or results from any work performed for the employer. This provision does "not apply to an invention that the employee developed entirely on the employee's own time without using the employer's equipment, supplies, facility or trade secret information."[92]

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 50employees 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.

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87 *Bell Helicopter Textron v. Tridair Helicopters, Inc.*, 982 F. Supp. 318 (D. Del. 1997).

88 *Total Care Physicians, P.A. v. O'Hara*, 798 A.2d 1043, 1053 (Del. Super. Ct. 2001) (internal quotation omitted).

89 DEL. CODE ANN. tit 6, §§ 2002, 2003.

90 DEL. CODE ANN. tit 6, § 2002(a).

91 DEL. CODE ANN. tit 6, § 2003(a).

92 DEL. CODE ANN. tit. 19, § 805.

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.[93]
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.[94]
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.[95]
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.[96]
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 29U.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.[97]
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.[98]

[93] 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.

[94] 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.

[95] 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.

[96] 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.

[97] 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.

[98] 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.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
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.[99]
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.[100]
In addition to the federal posters required for all employers, government contractors may be required to post the following posters.	
"EEO is the Law" Poster with the EEO is the Law Supplement	Employers subject to Executive Order No. 11246 must prominently post notice, where it can be readily seen by employees and applicants, explaining that discrimination in employment is prohibited on numerous grounds.[101] 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.[102]
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.[103]
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

[99] 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.

[100] 20 C.F.R. app. § 1002. This poster is available at http://www.dol.gov/vets/programs/userra/poster.htm.

[101] 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.

[102] 41 C.F.R. §§ 60-300.44, 60-741.44.

[103] 29 C.F.R. § 5.5(a)(l)(i). This poster is available at https://www.dol.gov/whd/regs/compliance/posters/davis.htm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	attaching a notice to the contract, or may post the notice at the worksite.[104]
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.[105]
Notice to Workers with Disabilities/Special Minimum Wage Poster	Employers of workers with disabilities under special minimum wage certificates authorized by the Service Contract Act or the Walsh-Healey Public Contracts Act must post notice, explaining the conditions under which the special minimum wages may be paid. Where an employer finds it inappropriate to post this notice, directly providing the poster to its employees is sufficient.[106]
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.[107]
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.[108]
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

[104] 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.

[105] 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.

[106] 29 C.F.R. § 525.14. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/disab.htm.

[107] 29 C.F.R. § 471.2. This poster is available at https://www.dol.gov/olms/regs/compliance/EO13496.htm.

[108] 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.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	right to earn and use paid sick leave. Notice may be provided electronically if customary to the employer.[109] **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).[110]
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.[111]
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.[112]

[109] 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.

[110] 29 C.F.R. § 13.5.

[111] 41 C.F.R. § 60-1.35(c). This poster is available at https://www.dol.gov/agencies/ofccp/posters.

[112] 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.

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

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

Table 6. State Posting & Notice Requirements

Poster or Notice	Notes
Benefits & Leave: Holiday and Vacation Benefits	Employers with four or more employees must post accessible notice, where employees normally pass, informing them about employer policies and practices concerning vacation pay, sick leave, and comparable matters.[113]
Child Labor	All employers with four or more employees must conspicuously post notice summarizing the state employment laws, including child labor provisions.[114]
Fair Employment Practices: Discrimination in Employment	All employers with four or more employees must conspicuously post notice summarizing the state employment laws, including the state prohibitions against discrimination in employment on numerous grounds, including race, sex, genetic information, reproductive health decisions, marital status, gender identity, and other protected classifications.[115]
Healthy Delaware Families Act	Employers must provide written notice of the law's provisions to each employee when they request covered leave or when the employer knows that their leave may qualify for benefits under the law. Additionally, employers must display a poster in a conspicuous place at their place of business that is accessible to employees that gives notice of employee rights. The poster must be displayed in English, Spanish, and any other language that is the first language spoken by at least 5% of the employer's workforce, if such a poster has been provided by the state.[116] It should include the following: • The employee's right to family and medical leave benefits under this chapter and the terms under which it may be used. • The amount of family and medical leave benefits.

[113] DEL. CODE ANN. tit. 19, § 1108. Employers must create their own forms to satisfy this posting requirement.

[114] While this requirement seemingly does not appear in the Delaware labor code, this information is included on the mandatory labor law poster. This poster is available in English at https://laborfiles.delaware.gov/main/dia/olle/Labor_Law_Poster.pdf. It is also available in Spanish at https://laborfiles.delaware.gov/main/dia/olle/Labor%20Law%20Poster%20-%20Spanish.pdf.

[115] DEL. CODE ANN. tit. 19, §§ 716, 710(7). This poster is available in English at https://laborfiles.delaware.gov/main/dia/olle/Labor_Law_Poster.pdf. It is also available in Spanish at https://laborfiles.delaware.gov/main/dia/olle/Labor%20Law%20Poster%20-%20Spanish.pdf.

[116] DEL. CODE ANN. tit. 19, §§ 3701-3724.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
	• The procedure for filing a claim for family and medical leave benefits. • The right to job protection and benefits continuation under § 3707 of this title. • That discrimination and retaliatory personnel actions against the employee for requesting, applying for, or using family and medical leave benefits is prohibited under § 3708 of this title. • That the employee has a right to file a complaint for violations of this chapter. • Whether family and medical leave benefits are available to the employee through the State or an approved private plan under § 3716 of this title.
Human Trafficking Awareness	Certain Delaware employers are obligated to post notice concerning human trafficking. Notice is required for locations designated by the state Human Trafficking Interagency Coordinating Council.[117]
Unemployment Insurance	All employers must post and maintain a notice informing employees that their employer has secured unemployment insurance coverage (Form UC-6) and summarizing the state unemployment regulations. Notice is provided by the state unemployment division to employers after they have established coverage and must be posted where readily accessible to employees.[118]
Wages, Hours & Payroll: Omnibus Labor Law Poster	Employers with four or more employees must conspicuously post notice summarizing the state employment laws, including laws governing breaks, minimum wage, and wage payment.[119] The state provides an omnibus poster for this purpose, which covers numerous topics.[120]
Wages, Hours & Payroll: Reduction in Wages or Payday Changes	Employers with four or more employees must notify employees in writing, or through a workplace posting, if there is any reduction in regular rate of pay, or any changes in the day, hour, and place of payment or benefits.[121]

[117] DEL. CODE ANN. tit. 11, § 787(l). Employers must create their own forms to satisfy this posting requirement.

[118] DEL. CODE ANN. tit. 19, § 3317. More information about the unemployment insurance system in Delaware is available at https://laborfiles.delaware.gov/main/dui/handbook/UI%20Employer%20Handbook.pdf (Unemployment Insurance Employer Handbook).

[119] DEL. CODE ANN. tit. 19, §§ 908, 1108.

[120] This poster is available in English at https://laborfiles.delaware.gov/main/dia/olle/Labor_Law_Poster.pdf. It is also available in Spanish https://laborfiles.delaware.gov/main/dia/olle/Labor%20Law%20Poster%20-%20Spanish.pdf.

[121] DEL. CODE ANN. tit. 19, § 1108. Employers must create their own form to satisfy this posting requirement, if necessary.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Whistleblower Protection	All employers must post conspicuous notice informing employees of the state's whistleblower protection law.[122]
Workers' Compensation	All employers must post notice, in a conspicuous and accessible location where employees normally pass, summarizing employer and employee obligations under the law. This topic is addressed in the state's omnibus labor law poster.[123]
Workplace Safety: Hazardous Chemical Information	All employers must post conspicuous notice, in accessible locations, informing employees of their rights to information about hazardous chemicals present in their workplace.[124]
Workplace Safety: Where Smoking Permitted	Generally speaking, smoking (including use of electronic smoking devices) is prohibited in indoor workplaces.[125] There are numerous exceptions, and signs must be prominently posted and properly maintained where smoking is allowed. Signs must read: "Warning: Smoking Permitted."[126]

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.[127]	At least 3 years from the date of entry.

[122] DEL. CODE ANN. tit. 19, § 1707. Employers must create their own form to satisfy this posting requirement.

[123] DEL. CODE ANN. tit. 19, § 2306. This poster is available in English at https://laborfiles.delaware.gov/main/dia/olle/Labor_Law_Poster.pdf. It is also available in Spanish at https://laborfiles.delaware.gov/main/dia/olle/Labor%20Law%20Poster%20-%20Spanish.pdf.

[124] DEL. CODE ANN. tit. 16, § 2405. Employers must identify their own form to satisfy this posting requirement.

[125] DEL. CODE ANN. tit. 16, § 2903.

[126] DEL. CODE ANN. tit. 16, § 2905. Employers must identify their own form to satisfy this posting requirement.

[127] 29 U.S.C. § 626; 29 C.F.R. § 1627.3(a).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
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.[128]	At least 1 year from the date of the personnel action to which any records relate.
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.[129]	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.[130]	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	*When a charge of discrimination has been filed or an action brought against the employer, it must:*	Until final disposition of

[128] 29 C.F.R. § 1627.3(b).

[129] 29 C.F.R. § 1627.3(b).

[130] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Disabilities Act (ADA): Complaints of Discrimination	• 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.[131]	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).[132]	Most recent form must be retained for 1 year.
Employee Polygraph Protection Act (EPPA)	*Records pertaining to a polygraph test must be maintained for the specified time period including, but not limited to, the following:* • a copy of the statement given to the examinee regarding the time and place of the examination and the examinee's right to consult with an attorney; • the notice to the examiner identifying the person to be examined; • copies of opinions, reports, or other records given to the employer by the examiner; • where the test is conducted in connection with an ongoing investigation involving economic loss or injury, a statement setting forth the specific incident or activity under investigation and the basis for testing the particular employee; and • where the test is conducted in connection with an ongoing investigation of criminal or other misconduct involving loss or injury to the manufacture, distribution, or dispensing of a controlled substance, records specifically identifying the loss or injury in question and	At least 3 years following the date on which the polygraph examination was conducted.

[131] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[132] 29 C.F.R. § 1602.7.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	the nature of the employee's access to the person or property that is the subject of the investigation.[133]	
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.[134]	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).[135]	3 years.
Equal Pay Act: Other	*Covered employers must maintain any additional records made in the regular course of business relating to:* • payment of wages; • wage rates; • job evaluations; • job descriptions; • merit and seniority systems; • collective bargaining agreements; and • other matters which describe any pay differentials between the sexes.[136]	At least 2 years.
Fair Labor Standards Act (FLSA): Payroll Records	*Employers must maintain the following records with respect to each employee subject to the minimum wage and/or overtime provisions of the FLSA:* • full name and any identifying symbol used in place of name on time or payroll records; • home address with zip code; • date of birth, if 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);	3 years from the last day of entry.

[133] 29 U.S.C. §§ 2001 *et seq.*; 29 C.F.R. § 801.30.

[134] 29 U.S.C. § 1027.

[135] 29 C.F.R. § 1620.32(a).

[136] 29 C.F.R. § 1620.32(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• 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 each workweek).[137] 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);	

[137] 29 C.F.R. §§ 516.2, 516.5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• 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.[138]	
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 employee's total remuneration for employment including fringe benefits and prerequisites.[139]	3 years from the last day of entry.
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.[140]	At least 3 years from the last effective date.

[138] 29 C.F.R. § 516.28.

[139] 29 C.F.R. §§ 516.2, 516.3. Presumably the regulation's reference to "prerequisites" is an error and should refer to "perquisites."

[140] 29 C.F.R. § 516.5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
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.[141]	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; • 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;	At least 3 years.

[141] 29 C.F.R. § 516.6.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• 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. *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.[142]	
Federal Insurance	*Employers must keep FICA records, including:*	At least 4 years after the date

[142] 29 U.S.C. § 2616; 29 C.F.R. § 825.500.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Contributions Act (FICA)	• 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; • 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).[143]	the tax is due or paid, whichever is later.
Immigration	Employers must retain all completed Form I-9s.[144]	3 years after the date of hire or 1 year following the termination of employment, whichever is later.

[143] 26 C.F.R. §§ 31.6001-1, 31.6001-2.

[144] 8 C.F.R. § 274a.2.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
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.[145]	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; • 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.[146]	4 years after the return is due or the tax is paid, whichever is later.
Income Tax: W-4 Forms	Employers must retain all completed Form W-4s.[147]	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:*	At least 4 years after the later of the date the tax

[145] 26 U.S.C. § 3402; 26 C.F.R. § 1.6001-1.

[146] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

[147] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• 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.[148]	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 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	At least 30 years.

[148] 26 C.F.R. § 31.6001-4.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	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.[149]	
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; • 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.[150]	Duration of employment plus 30 years.
Workplace Safety: Analyses Using Medical	*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	At least 30 years.

[149] 29 C.F.R. § 1910.1020(d).

[150] 29 C.F.R. § 1910.1020(d).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
and Exposure Records	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.[151]	
Workplace Safety: Injuries and Illnesses	*Employers must preserve and retain records of employee injuries and illnesses, including:* • OSHA 300Log; • the privacy case list (if one exists); • the Annual Summary; • OSHA 301 Incident Report; and • old 200and 101Forms.[152]	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.[153]	Immediately preceding AAP year.
Equal Employment Opportunity: Personnel & Employment Records	*Government contractors covered by Executive Order No. 11246 and those required to provide affirmative action to persons with disabilities and/or disabled veterans and veterans of the Vietnam Era must retain the following records:* • records pertaining to hiring, assignment, promotion, demotion, transfer, lay off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship; • other records having to do with requests for reasonable accommodation, the results of any physical examination, job advertisements and postings, applications, resumes; and • any and all expressions of interest through the internet or related electronic data technologies as to which the contractor considered the individual for a particular position, such as on-line resumes or internal resume databases, records identifying job seekers contacted	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 150employees or does not have a contract

[151] 29 C.F.R. § 1910.1020(d).

[152] 29 C.F.R. §§ 1904.33, 1904.44.

[153] 41 C.F.R. § 60-1.12(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	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 • where possible, the gender, race, and ethnicity of each applicant or internet applicant.[154]	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.
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.[155]	Until final disposition of the complaint, compliance review or action.

[154] 41 C.F.R. §§ 60-1.12, 60-300.80, and 60-741.80.

[155] 41 C.F.R. §§ 60-1.12, 60-741.80.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
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.[156]	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; • 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	During the course of the covered contract as well as after the end of the contract.

[156] 29 C.F.R. § 23.260.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	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.[157]	
Davis-Bacon Act	*Davis-Bacon Act contractors or subcontractors must maintain the following records with respect to each employee:* • name, address, and Social Security number; • work classification; • hourly rates of wages paid (including rates of contributions or costs anticipated for *bona fide* fringe benefits or cash equivalents); • daily and weekly number of hours worked; and • deductions made and actual wages paid. • • *Contractors employing apprentices or trainees under approved programs must maintain written evidence of:* • registration of the apprenticeship programs; • certification of trainee programs; • the registration of the apprentices and trainees; • the ratios and wage rates prescribed in the program; and • worker or employee employed in conjunction with the project.[158]	At least 3 years after the work.
Service Contract Act	*Service Contract Act contractors or subcontractors must maintain the following records with respect to each employee:* • name, address, and Social Security number; • work classification; • rates of wage;	At least 3 years from the completion of the work records

[157] 29 C.F.R. § 13.25.

[158] 29 C.F.R. § 5.5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• 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.[159]	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 • a certificate of age for employees under 19 years of age.[160]	At least 3 years from the last date of entry.

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

Table 8 summarizes the state record-keeping requirements.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Income Tax	*Every employer required to withhold tax must keep all pertinent records, including:* • amount and dates of all wage payments and tips subject to tax; • names, addresses, and occupations of employees receiving payments;	At least 3 years after the taxes became due or were paid, whichever is later.

[159] 29 C.F.R. § 4.6.

[160] 41 C.F.R. § 50-201.501.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• periods of employment if employees receiving payments; • Social Security numbers of employees receiving payments; • employees' income tax withholding forms; • employer's identification number; and • dates and amounts of deposits.[161]	
Unemployment Compensation	*All employing units must keep and maintain records, for each pay period, including:* • beginning and ending date of each pay period; and • total amount paid, including commissions.[162] *Records must also be kept for each worker, including:* • name and Social Security number; and • wages for each pay period (showing separately cash payments, reasonable cash value of noncash payments, estimated or actual gratuities received, and special payments, such as bonuses or gifts).[163] *For employees eligible to receive partial unemployment benefits, records also must include, for each such employee:* • amount of wages earned by week; • specific dates of weeks of less than full-time work; and • number of hours lost, if any, due to the individual's unavailability for work.[164]	4 years.
Wages, Hours & Payroll	*Every employer must make and keep records for each employee, including:* • name, address, occupation; • rate of pay and amount paid each pay period; and • hours worked each day and week.[165] Employers should be aware that additional records may be required for certain types of workers, including, for example, student learners or workers with disabilities	At least 3 years.

[161] Del. Dep't of Finance, *Withholding Regulations and Employers' Duties*, § 22, *available at* http://revenue.delaware.gov/services/wit_folder/section22.shtml.

[162] 19-1000-1202 DEL. ADMIN. CODE § 1.

[163] 19-1000-1202 DEL. ADMIN. CODE §§ 1, 4.

[164] 19-1000-1202 DEL. ADMIN. CODE § 22.6.

[165] DEL. CODE ANN. tit. 19, §§ 907, 1108(6).

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	employed by charitable nonprofits, who are authorized to receive less than the minimum wage.[166]	
Workers' Compensation	*All employers subject to the workers' compensation law must record all injuries, fatal or otherwise, that are received by employees in the course of their employment. To enable reporting, records should include:* • name, location, and nature of employer's business; • name, age, sex, and occupation of the injured employee; • time, nature, and cause of the injury; and • any other information necessary to comply.[167]	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*

In Delaware, employees can request and inspect their own personnel file, "used to determine that employee's own qualifications for employment, promotion, additional compensation, termination or disciplinary action."[168] *Personnel file* is broadly defined to include, "if maintained by the employer, any application for employment, wage or salary information, notices of commendations, warning or discipline," as well as information about deductions, fringe benefits, leave, job title, performance reviews, and retirement, medical, and attendance records.[169] Such files do not include records "relating to the investigation of a possible criminal offense, letters of reference, documents which are being developed or prepared for use in civil, criminal or grievance procedures or materials which are used by the employer to plan for future operations" or information available under the federal Fair Credit Reporting Act.[170]

Employers must make these records available during regular business hours and in the ordinary place the records are kept. Employers may require the inspection to occur during the employee's personal time.

[166] *See* 19 DEL. ADMIN. CODE 1300-WAGE 9. § 905.9 (individuals with disabilities receiving sub-minimum wage); 19 DEL. ADMIN. CODE 1300-STUDENT 7. § 906.18 (student-learners receiving sub-minimum wage). Note that as of January 31, 2024, employers may no longer pay sub-minimum wages to individuals with disabilities. H.B. 112 (Del. 2021).

[167] DEL. CODE ANN. tit. 19, § 2313.

[168] DEL. CODE ANN. tit. 19, § 732.

[169] DEL. CODE ANN. tit. 19, § 731(3).

[170] DEL. CODE ANN. tit. 19, § 731(3).

Employers may also require employees to submit a written request to access the file.[171] Employers have discretion as whether to allow employees to remove the file or make copies.[172]

Any employer that unlawfully refuses an employee access to the employee's personnel file will be subject to a civil penalty of not less than $1,000 nor more than $5,000 for each violation.[173]

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*

Delaware law places no statutory restrictions on background credit or criminal screenings for current employees.

Delaware, however, does restrict employer access to employee social media. Under the law, employers cannot require or request that an employee provide access, in any form, to the employee's social media account. Further, employers cannot discharge, discipline, threaten to discharge or discipline, or otherwise retaliate against an employee who refused access to the employee's social media account.[174] In addition, Delaware law prohibits employers from requesting or requiring that employees undergo polygraph, lie detector, or similar testing.[175] For information on state law related to background screening, 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*

Delaware law contains no express provisions regulating drug or alcohol testing by private employers.

3.2(c) *Marijuana Laws*

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

Under federal law, it is illegal to possess or use marijuana.[176]

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

In Delaware, physicians may authorize the use of marijuana to treat symptoms associated with multiple illnesses and diseases. Under the state medical marijuana law, unless a failure to do so would cause the

[171] DEL. CODE ANN. tit. 19, § 732.

[172] DEL. CODE ANN. tit. 19, § 733.

[173] DEL. CODE ANN. tit. 19, § 735(a).

[174] DEL. CODE ANN. tit. 19, § 709(A).

[175] DEL. CODE ANN. tit. 19, § 704.

[176] 21 U.S.C. §§ 811-12, 841 *et seq*.

employer to lose monetary licensing-related benefits, employers cannot discriminate against a person in hiring, termination, or any condition of employment based on that person's status as an authorized medical marijuana user or the qualified patient's positive marijuana drug test.[177] An employer can prohibit, and discipline an employee for, ingesting marijuana at the workplace, and can prohibit an employee working while under the influence of marijuana.[178]

Ruling on a motion to dismiss, a state superior court judge held: (1) the federal Controlled Substances Act (CSA) does not preempt Delaware's Medical Marijuana Act (DMMA); (2) an implied private right of action exists under the DMMA for 4905A violations; (3) status as a medical marijuana cardholder does not automatically equate to having a disability under the federal Americans with Disabilities Act (ADA) or Delaware's Persons with Disabilities Employment Protections Act (DEPA), though it is possible a person with a disability could also be a qualifying patient; (4) discrimination against a medical marijuana cardholder cannot form the basis of a common law wrongful termination claim.[179]

A state trial court judge affirmed a decision by the Industrial Accident Board that denied a workers' compensation claimant's request for out-of-pocket medical marijuana expenses because it found the individual did not prove medical marijuana treatment was reasonable and necessary. Per the judge: "The General Assembly's finding that medical marijuana can effectively treat some patients does not amount to a finding that medical marijuana is 'reasonable and necessary' to treat *all* patients. . . . [T]he General Assembly's acknowledgment of medical marijuana's efficacy in treating some patients does not preclude a finding that medical marijuana is not reasonable or necessary for a particular patient."[180]

Delaware also permits marijuana for recreational use by individuals 21 years of age or older. Notwithstanding permitting recreational marijuana use, individuals cannot consume marijuana or cannabis products in any public place or while in a moving vehicle. When transporting in a vehicle, a personal use quantity or less of marijuana must be in a closed container or otherwise not readily accessible to anyone inside the vehicle.[181] Driving under the influence of marijuana remains prohibited.[182]

With respect to employers, the law does not impose any restriction or requirement regarding accommodations, policies, or discipline concerning recreational marijuana in the workplace.[183] An employer may regulate or prohibit possession, use, consumption, distribution, and growing of marijuana in any property the employer owns, occupies, or controls.[184]

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[177] DEL. CODE ANN. tit. 16, § 4905A. *But see, e.g.*, *Breech v. Town of Ocean View*, 2016 WL 4368173 (Aug. 15, 2016) (affirming denial of unemployment benefits, holding protections do not apply to non-cardholder).

[178] DEL. CODE ANN. tit. 16, § 4907A.

[179] *Chance v. Kraft Heinz Foods Co.*, 2018 WL 6655670 (Dec. 17, 2018) (termination based on testing positive for marijuana).

[180] *Nobles-Roark v. Back Burner*, 2020 WL 4344551 (July 28, 2020).

[181] DEL. CODE ANN. tit. 4, § 1307; DEL. CODE ANN. tit. 16, §§ 4701(37), 4764A.

[182] DEL. CODE ANN. tit. 4, § 1306.

[183] DEL. CODE ANN. tit. 4, § 1305.

[184] DEL. CODE ANN. tit. 4, § 1308. The law does contain a limited exception for property owners who rent a residential dwelling to restrict the possession and consumption of marijuana if certain conditions are met. *See* DEL. CODE ANN. tit. 4, §§ 1308(1)-(3).

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.[185]

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.[186]

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

Delaware law requires that when a covered entity becomes aware of a breach of the security system, the entity must conduct a reasonable and prompt investigation to determine the likelihood that personal information has or will be misused. If the investigation discovers that misuse is reasonably likely to occur, the entity must give notice to the affected Delaware residents.[187]

Covered Entities & Information. Any individual or commercial entity that conducts business in Delaware and that owns or licenses computerized data is covered under the Delaware data security breach statute.[188] Commercial entities include but are not limited to corporations, partnerships, limited liability companies, and other legal entities.[189] Under the statute, *personal information* means: Delaware resident's first name or first initial and last name in combination with any one or more of the following data elements that relate to the individual:

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

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

[187] DEL. CODE ANN. tit. 6, § 12B-102.

[188] DEL. CODE ANN. tit. 6, § 12B-102(a).

[189] DEL. CODE ANN. tit. 6, § 12B-101(2).

1. Social Security number;
2. driver's license number or state or federal identification card number;
3. account number, or credit or debit card number, in combination with any required security code, access code, or password that would permit access to a resident's financial account;
4. passport number;
5. username or email address, in combination with a password or security question and answer that would permit access to an online account;
6. medical history, mental or physical condition, medical treatment or diagnosis, or DNA profile
7. health insurance policy number, subscriber information, or any other unique identifier used by a health insurer to identify a person;
8. unique biometric data generated from measurements or analysis of human body characteristics for authentication purposes; or
9. an individual tax identification number.[190]

Personal information does not include information that is publicly available.[191]

A *breach of security* includes the unauthorized acquisition of computerized data that compromises the security, confidentiality, or integrity of personal information is not a breach of security to the extent that personal information contained therein is encrypted, unless such unauthorized acquisition includes, or is reasonably believed to include, the encryption key and the person that owns or licenses the encrypted information has a reasonable belief that the encryption key could render that personal information readable or useable.[192]

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

- written notice;
- telephonic notice;
- electronic notice, if it is compliant with the federal e-sign act; or
- substitute notice if the covered entity demonstrates that:
  - the cost of providing notice would exceed $75,000;
  - the affected class of persons to be notified exceeds 100,000; or
  - the covered entity does not have sufficient contact information.[193]

Substitute notice must consist of all of the following:

- email notice, if the individual or entity has email addresses for the members of the affected class;

[190] DEL. CODE ANN. tit. 6, § 12B-101(7).

[191] DEL. CODE ANN. tit. 6, § 12B-101(7).

[192] DEL. CODE ANN. tit. 6, § 12B-101(4).

[193] DEL. CODE ANN. tit. 6, § 12B-101(4).

- conspicuous posting of the notice on the website page of the individual or the commercial entity, if the individual or the commercial entity maintains one; and
- notice to major statewide media.[194]

An entity is deemed to be in compliance if it maintains its own notice procedures as part of an information security policy and those procedures are consistent with the timing and notice requirements in the data security breach statute.[195] An entity is also compliant if it maintains and abides by security breach notice procedures pursuant to the laws, regulations, or other guidelines established by its primary state or federal regulator.[196]

If the affected number of Delaware residents to be notified exceeds 500, the covered entity must also provide notice of the breach to the state attorney general. If the breach of security includes a Social Security number, the covered entity must offer reasonable identity theft prevention services and, if applicable, identity theft mitigation services at no cost to the resident for one year. The covered entity must provide all information necessary for the resident to enroll in the services and shall include information on how such resident can place a credit freeze on their credit file. The services are not required if, after an appropriate investigation, the person reasonably determines that the breach of security is unlikely to result in harm to the individuals whose personal information has been breached.

In the case of a breach of security that involves login credentials for an individual's email account furnished by the covered entity, the covered entity cannot comply by providing the security breach notification to the affected email address, but may instead comply by providing notice: (1) by another method described in section 12B-101(3); or (2) by clear and conspicuous notice delivered to the individual online when the individual is connected to the online account from an IP address or online location from which the covered entity knows the individual customarily accesses the account.[197]

Timing of Notice. Notice must be given without unreasonable delay but not later than 60 days after determination of the breach. Notification may be delayed if the entity could not, through reasonable diligence, identify certain residents whose personal information was breached within 60 days.[198]

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.

194 DEL. CODE ANN. tit. 6, § 12B-101(3)(d).

195 DEL. CODE ANN. tit. 6, § 12B-103.

196 DEL. CODE ANN. tit. 6, § 12B-103.

197 DEL. CODE ANN. tit. 6, § 12B-103.

198 DEL. CODE ANN. tit. 6, § 12B-102.

As a general rule, federal wage and hour laws do not preempt state laws.[199] 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.[200]

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.[201]

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.[202]

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

Nonexempt employees must be paid one-and-a-half times their regular rate of pay for all hours worked over 40 in a workweek.[203] 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 minimum wage in Delaware is currently $13.25 per hour for most nonexempt employees.[204] On January 1, 2025 the minimum wage will increase to $15.00.

3.3(b)(ii) *Tipped Employees*

Tipped employees are paid differently because tips may be considered pay of their wages if they earn at least $30 per month in tips.[205] The minimum cash wage that a tipped employee needs to be paid is $2.23 per hour. If direct wages and tips do not equal at least the minimum wage, an employer must pay the employee the difference.[206]

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[199] 29 U.S.C. § 218(a).

[200] 29 U.S.C. § 206.

[201] 29 U.S.C. §§ 203, 206.

[202] 29 U.S.C. § 3(m)(2)(B).

[203] 29 U.S.C. § 207.

[204] DEL. CODE ANN. tit. 19, § 902.

[205] DEL. CODE ANN. tit. 19, § 902.

[206] DEL. CODE ANN. tit. 19, § 902.

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

The Delaware Minimum Wage Act exempts the following job classifications from the minimum wage requirements:

- *bona fide* executive, administrative, or professional personnel;
- agricultural and domestic workers;
- outside salespersons who work on a commission basis;
- volunteers with educational, charitable, religious, or nonprofit organizations;
- federal employees;
- employees in the fish and seafood industry (including those whose job is to can or pack such marine products up through the first processing);
- minors under the age of 18employed as junior counselors or counselors in training working at a nonprofit organization's summer camp; and
- inmates employed by the state.[207]

In addition, to avoid hardship or the possible limitation of employment opportunities, the Delaware Department of Labor may authorize a subminimum wage for individuals who are learners or apprentices or whose earning capacity is impaired by age or by physical or mental disability. If the department approves a lower wage for particular employees, it will issue a license to an employer seeking to take advantage of this provision, fixing the wages at a certain level. Beginning January 31, 2024, an employer may not employ or agree to employ or otherwise remunerate or compensate an individual with a disability at an hourly rate lower than the minimum wage. The Employment First Oversight Commission will oversee the development and implementation of a plan to phase out the subminimum wage for individuals with disabilities on or before January 31, 2024.[208]

3.3(c) *State Guidelines on Overtime Obligations*

Delaware does not have a separate overtime provision. Therefore, the payment of overtime in Delaware is regulated by the FLSA, which establishes a 40-hour overtime standard for covered 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.[209] 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

[207] DEL. CODE ANN. tit. 19, § 901.

[208] DEL. CODE ANN. tit. 19, §§ 905-06; 750 - 54.

[209] 29 C.F.R. § 785.19.

be permitted to leave the premises if they are otherwise completely freed from duties during meal periods.

Federal law contains no generally applicable rest period requirements for adults. Under the FLSA, rest periods of short duration, running from five to 20 minutes, must be counted as "hours worked" and must be paid.[210]

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.[211] 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.[212] 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.[213] Exemptions apply for smaller employers and air carriers.[214]

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.[215] Lactation is considered a related medical condition.[216] 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.[217] For more information on these topics, see **LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES**.

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[210] 29 C.F.R. § 785.18.

[211] 29 U.S.C. § 218d.

[212] 29 U.S.C. § 218d(b)(2).

[213] 29 U.S.C. § 218d(a).

[214] 29 U.S.C. § 218d(c), (d).

[215] 42 U.S.C. § 2000gg–1.

[216] 29 C.F.R. § 1636.3.

[217] 29 C.F.R. § 1636.3.

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

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

Meal Periods. A Delaware employer must provide an unpaid meal break of at least 30 minutes to each employee scheduled to work at least seven and one-half hours consecutively. The meal period must occur after the first two hours and before the employee has completed five and one-half hours of work.[218]

This requirement does not apply to professional employees of school boards working directly with children, or in cases where a collective bargaining agreement or other written agreement between the employer and employee provides otherwise.[219] Further, the state labor department is authorized to issue exemptions to the meal period requirement if the following criteria are met:

- compliance would adversely affect public safety;
- only one employee can perform certain duties;
- the employer has fewer than five employees on that particular shift; or
- the continuous nature of the employer's operations requires employees to respond to urgent or unusual conditions at all times, and the employees are compensated for their meal break periods.[220]

Where the above exemptions apply, employers must still allow employees to eat meals at their work stations or other authorized locations and to use restroom facilities as reasonably necessary. Moreover, employees covered by these exemptions must be paid for time spent eating at their work stations and using restroom facilities.[221]

Exempt Employees. The meal period requirements apply to exempt employees. Neither the meal period statute, nor the accompanying regulation concerning exemptions, defines *employee*, and there is no general definition statute or regulation that applies to the meal period provisions. Accordingly, in the absence of an express definition, coupled with the fact the legislature specifically exempted other types of workers from the meal period statute's requirements, the law should be interpreted as applying to exempt employees.[222]

Meal Period Waiver. The meal period requirements do not apply where a written employer-employee agreement provides otherwise.[223]

Rest Periods. There are no generally applicable rest period requirements for adults in Delaware.

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[218] DEL. CODE ANN. tit. 19, § 707.

[219] DEL. CODE ANN. tit. 19, § 707.

[220] DEL. CODE ANN. tit. 19, § 707.

[221] 19-1000-1327 DEL. ADMIN. CODE § 2.0.

[222] *See* DEL. CODE ANN. tit. 19, § 707;19-1000-1327 DEL. ADMIN. CODE § 2.0.

[223] DEL. CODE ANN. tit. 19, § 707.

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

There is a more stringent requirement for meal and rest breaks for minors in Delaware. A minor under age 18must not be employed or permitted to work more than five hours continuously without a nonworking period of at least 30 minutes.[224]

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

Employers that violate the meal period provisions, or that discharge or discriminate against employees for exercising protected rights concerning meal period violations, are subject to a civil penalty of between $1,000 and $5,000 per violation.[225] Employers that employ or permit a minor to work in violation of any child labor law, including the break period requirement, will be subject to a civil penalty of up to $10,000 for each violation.[226]

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

In Delaware, individuals have a right to breast feed in any public accommodation in which they are permitted to be.[227] Although this law does not mention employers, it can be construed to include places of employment.

Further, Delaware's fair employment practices statute requires an employer to make reasonable accommodations to an applicant or employee's known limitations related to pregnancy, unless an employer can demonstrate the accommodation would impose an undue hardship on its business operations. *Reasonable accommodation* may include, but is not limited to, break time and appropriate facilities for expressing breast milk.[228]

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.[229] Therefore, courts and agency regulations have developed a body of law looking at whether an activity—such as on-call, 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."[230]

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

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[224] DEL. CODE ANN. tit. 19, § 507.

[225] DEL. CODE ANN. tit. 19, § 707.

[226] DEL. CODE ANN. tit. 19, § 509.

[227] DEL. CODE ANN. tit. 31, § 310.

[228] DEL. CODE ANN. tit. 19, §§ 710-11.

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

[230] *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").

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*

Delaware law does not address general hours of work or compensable activities.

3.6 Child Labor

3.6(a) *Federal Guidelines on Child Labor*

The FLSA limits the tasks minors, defined as persons under 18 years of age, can perform and the hours they can work. Occupational limits placed on minors vary depending on the age of the minor and whether the work is in an agricultural or nonagricultural occupation. There are exceptions to the list of prohibited activities for apprentices and student-learners, or if an individual is enrolled in and employed pursuant to approved school-supervised and school-administered work experience and career exploration programs.[231] 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.[232] 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*

Delaware's statutes regulating minors in the workplace 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. Delaware restricts the employment of persons under the age of 18by age and by the type of job (see Table 9).

Table 9. State Restrictions on Type of Employment by Age

Age Range	Restrictions
Under Age 18	*Minors under age18 cannot work in, about, or in connection with:* • occupations that the U.S. Secretary of Labor prohibits, or deems injurious to minors' health, safety, welfare, or morals; • blast furnaces; • docks or wharves; • railroads;

[231] 29 C.F.R. §§ 570.36, 570.50.

[232] 29 C.F.R. § 570.6.

Table 9. State Restrictions on Type of Employment by Age	
Age Range	**Restrictions**
	• installation or repair of electrical wires; • distilleries where alcoholic beverages are manufactured, bottled, labeled, wrapped, or packaged; • manufacturing of dangerous or toxic chemicals or compounds; • any occupation as a pilot, firefighter, or engineer on any vessel engaged in commerce; or • any occupation as a messenger for a telegraph, telephone, or messenger company in the distribution, delivery, collection, or transmission of goods or messages before 6:00 A.M. or after 10:00 P.M. of any day in any town or city having a population of over 20,000 persons.[233]
Under Age 16	Minors under age 16 additionally cannot work in, about, or in connection with: • occupations that the U.S. Secretary of Labor prohibits, or deems injurious to minors' health, safety, welfare, or morals; • employment during the prescribed school day; • meat slicers; • deep fat fryers; • steamers and pressure cookers used in the preparation of food; • boilers; • stripping and sorting tobacco; • construction or demolition projects; • tunnels or excavation; • mines, quarries, or borrow pits; • coal breakers or coke ovens; or • operation, cleaning, or adjusting of any power-driven machinery, appliances or tools, other than office machinery and food or beverage dispensing machines where the moving parts are not exposed to the operator.[234] However, the above restrictions do not apply to minors under age 16 who are: • excused from school attendance by school officials; • enrolled in a work study, student-learner, or similar program where employment is an integral part of the course of study, and employment is procured and supervised by the school district; or • engaged in farm labor under adult supervision.[235]
Under Age 14	Minors under age 14cannot be employed unless an exception applies as set forth in **3.6(b)(iii)**.[236]

[233] DEL. CODE ANN. tit. 19, § 507.

[234] DEL. CODE ANN. tit. 19, § 506.

[235] DEL. CODE ANN. tit. 19, § 506.

[236] DEL. CODE ANN. tit. 19, §§ 502, 505.

Restrictions on Selling or Serving Alcohol. In Delaware, individuals who are 18 or older may serve alcohol to patrons of establishments licensed for the on-premises sale and consumption of alcoholic liquor. Individuals who are 18 or older may sell or serve alcoholic liquor for patrons of a tavern or taproom, enter a tavern or taproom to pick up a food order for delivery through a third-party delivery service, or work in any capacity in a tavern or taproom except that an individual less than 21 years of age may not prepare alcoholic liquor for patrons of a tavern or taproom. Individuals who are 18 or older may also work in:

- an office, warehouse, or other facility used by an importer in the operation of its business;
- make or assist in deliveries of alcohol to licensed establishments in the state;
- transport or assist in the transporting of alcohol to or from the importer's warehouse at a store but may not sell or serve alcoholic beverages;
- enter any licensed establishment in the state for the purpose of making or assisting in the delivery of alcoholic liquor or for any purpose related to such delivery, except that such individuals may not be employed as a salesperson or sales representative; or
- employed in a store by a retailer but may not sell or serve alcoholic liquors.

Individuals who are at least 16 years of age may work in a catering business serving liquors, or bowling alley licensed to serve alcoholic beverages provided that they may not be engaged in the sale or service of alcoholic liquor.

Individuals aged 14 or older may work in clubs with authorized licensed dining facilities, hotels, racetracks, and restaurants, provided that they shall not be involved in the sale or service of alcoholic liquor.[237]

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

In Delaware, minors under age 18cannot work more than 12 hours in a day (school and work hours combined). Moreover, they must have at least eight consecutive hours of nonwork, nonschool time in each 24-hour period.[238]

When school is in session, minors under age 16cannot work:

- more than four hours in one day;
- 18 hours in any week when school is in session for five days;
- six days in any week;
- during school hours unless enrolled in a work study, student-learner, or similar program where the employment is an integral part of the course of study, and employment is procured and supervised by the school district; or
- between 7:00 P.M. and 7:00 A.M.[239]

[237] DEL. CODE ANN. tit. 4, § 904.

[238] DEL. CODE ANN. tit. 19, § 507.

[239] DEL. CODE ANN. tit. 19, § 506.

However, a minor under age 16 may work until 9:00 p.m. from June 1 through Labor Day.[240] When school is not in session, or on nonschool days, minors under age 16cannot work more than eight hours in a day, 40 hours in any week, or six days in any week.[241]

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

Employ, for purposes of Delaware's child labor laws, does not include:

- farm work performed on a farm in a nonhazardous occupation;
- domestic work performed in or about a private home;
- work performed in a business owned by a parent or one legally standing in the place of a parent in a nonhazardous occupation;
- work performed by nonpaid volunteers in a charitable or nonprofit organization with the written consent of a parent or one legally standing in the place of a parent;
- work performed for operations primarily devoted to equine activities with the written consent of a parent or one legally standing in the place of a parent;
- caddying on a golf course;
- delivery of newspapers to the consumer;
- employment of a graduate of an accredited school who is employed in a hazardous occupation in which a course of study has been completed but only to the extent that said hazardous occupation would otherwise be prohibited;
- hazardous work performed by nonpaid volunteers of a volunteer fire department or company or volunteer rescue squad who have completed or are taking a course of study relating to firefighting or rescue and who are 14 years of age or older; or
- any child over the age of 14 years who may be employed, permitted, or suffered to work in any nonhazardous occupation in any facility used for the purpose of canning or preserving, or preparation for canning or preserving, perishable fruits and vegetables.[242]

Special rules apply to child entertainers. In general, children under 16 years of age cannot be employed for compensation of any kind as a model, performer, or entertainer upon the stage of any theater or concert hall, or in connection with any theatrical performance or other exhibition or show. However, the Delaware Department of Labor may issue a permit allowing a child under 16to be employed as a model, performer, or entertainer for a limited period, when, in the department's opinion, a permit is justified by the evidence presented to it.[243]

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

An employment certificate is required for all employees under age 18. A minor may not begin employment until the employer has in its possession a valid and verified employment certificate issued by the

[240] DEL. CODE ANN. tit. 19, § 506.

[241] DEL. CODE ANN. tit. 19, § 506.

[242] DEL. CODE ANN. tit. 19, § 502.

[243] DEL. CODE ANN. tit. 19, § 508.

superintendent of the minor's school district or the authorized agent of the superintendent of schools. The employer must keep the employment certificate on file for each minor it employs.[244]

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

The Delaware Department of Labor enforces the state's child labor laws. Violations of the child labor laws carry civil penalties of up to $10,000 for each violation.[245]

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).[246]

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.[247]

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.[248]

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.[249] The "prepaid rule" regulation defines

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[244] DEL. CODE ANN. tit. 19, § 504.

[245] DEL. CODE ANN. tit. 19, § 509.

[246] 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").

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

[248] 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.

[249] 12 C.F.R. § 1005.18; *see also* Consumer Fin. Prot. Bureau, *CFPB Bulletin 2013-10: Payroll Card Accounts (Regulation E)* (Sept. 12, 2013) and Consumer Fin. Prot. Bureau, *Ask CFPB: Prepaid Cards, If my employer offers me a payroll card, do I have to accept it?* (Sept. 4, 2020), *available at* https://www.consumerfinance.gov/ask-cfpb/if-my-employer-offers-me-a-payroll-card-do-i-have-to-accept-it-en-407/.

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.[250]

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.[251] 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.[252]

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.[253]

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

[250] 12 C.F.R. § 1005.2(b)(3)(i)(A).

[251] 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.

[252] 12 C.F.R. § 1005.18.

[253] *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.[254]

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.[255] 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.[256] Accordingly, among other items, an employer may be required to reimburse an employee for expenses related to work uniforms,[257] tools and equipment,[258] and business transportation and travel.[259] 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.[260]

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[254] 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.

[255] *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).

[256] 29 C.F.R. §§ 531.35, 531.36, and 531.37.

[257] 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.

[258] 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).

[259] 29 C.F.R. § 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c04.

[260] 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;[261]
- 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);[262]
- 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);[263]
- 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;[264]
- 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;[265] 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.[266]

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

[261] 29 C.F.R. § 531.38.

[262] 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*.

[263] 29 C.F.R. § 531.40.

[264] 29 C.F.R. § 531.40.

[265] 29 U.S.C. § 203. However, the cost cannot be treated as wages if prohibited under a collective bargaining agreement.

[266] 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.[267]

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.[268] 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.[269]

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.[270]

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.[271]

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.[272]

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

[268] 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.

[269] 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.

[270] 29 C.F.R. § 531.36.

[271] 29 C.F.R. § 531.37.

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

3.7(b) *State Guidelines on Wage Payment*

Delaware's Wage Payment and Collection Act applies to all employers except the federal government, the State of Delaware, or any political subdivision thereof, and it governs the manner in which employees must be compensated.[273]

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

Authorized Instruments. Wages may be paid by cash or check. The employer must make suitable arrangements for employees to cash their paychecks for the full amount due at a bank or other business establishment convenient to the place of employment.[274]

Direct Deposit. Mandatory direct deposit is not permitted in Delaware. Upon an employee's written request, employers may pay by direct deposit to a bank account designated by the employee.[275]

Payroll Debit Card. Delaware employers may comply with wage payment requirements by issuing a payroll debit card that provides the functional equivalent of cash or a check.[276] The term *payroll debit card* refers to "a card that provides an employee with the appropriate means of obtaining all wages earned in a defined pay period in a form that is the equivalent of payment by cash, check, or direct deposit."[277] *Functional equivalent* is defined as "a change in the form of the payment of wages without impacting the substantive rights or value of the employee's wages. For example, a debit card in lieu of cash, check, or credit must provide the full amount of wages without cost to the employee on the regular payday."[278]

Employers are responsible for implementing a payroll debit card system that delivers the full amount of wages to employees on the regular payday, without cost to them. According to the regulations, "[e]mployers may use a pre-paid debit card or general payroll fund account to establish suitable arrangements for converting wages into an employee's disposable income."[279]

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

Paydays must be designated in advance, and unless it is otherwise specified, employees must be paid at least once every calendar month.[280] Regardless of the length of the pay period, employers must pay all wages conceded to be due within seven days of the close of the pay period. If the regular payday falls on a nonworkday, wages must be paid on the preceding workday.[281] If, however, the regular payday is on or before the final day of the pay period and the pay period does not exceed 16 days, the employer may delay until the next pay period compensation for:

- overtime hours worked by employees;

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[273] DEL. CODE ANN. tit. 19, §§ 1101 *et seq*.

[274] DEL. CODE ANN. tit. 19, § 1102.

[275] DEL. CODE ANN. tit. 19, § 1102.

[276] 19-1000-1324 DEL. ADMIN. CODE § 2.0.

[277] 19-1000-1324 DEL. ADMIN. CODE § 1.8.

[278] 19-1000-1324 DEL. ADMIN. CODE § 1.7.

[279] 19-1000-1324 DEL. ADMIN. CODE § 2.0.

[280] DEL. CODE ANN. tit. 19, §§ 702, 1102.

[281] DEL. CODE ANN. tit. 19, § 1102.

- employees hired or resuming employment during the pay period; and
- part-time or temporary employees with variable working time.[282]

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

Regardless of whether an employee is discharged, suspended, laid off, or quits voluntarily, an employer must pay the employee's final wages on the later of: (1) the next regularly scheduled payday; or (2) three business days after the last day worked. Payment may be made in the employer's customary manner or, if the employee requests, by mail.[283]

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

Delaware employers with three or more employees must furnish to each employee at the time of payment a statement, either on the check, by a separate slip, or electronically, showing:

- wages due;
- the pay period for which the wages are due; and
- the total amount of deductions, separately specified.[284]

For an employee who is paid at an hourly rate, the total number of hours for the pay period must be shown on the wage statement.[285] Where the statement is furnished electronically, an employee may request that the statement be provided in written form on a separate slip. Additionally, the electronic statement must be in a form capable of being retained by the employee.[286]

3.7(b)(v) *Wage Transparency*

Delaware employers may not require employees to refrain from inquiring about, discussing, or disclosing the employee's wages or the wages of another employee. Employers relatedly may not require employees to sign a waiver that attempts to deny them the right to do so. Similarly, employers may not discharge, discipline, or otherwise discriminate against an employee who inquires about, discusses, or discloses the employee's wages, or the wages of a coworker.[287]

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

Employers with three or more employees must notify each employee in writing or through a posted notice of any reduction in the regular rate of pay, or any change to the day, hour, and place of payment, before the change occurs.[288]

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[282] DEL. CODE ANN. tit. 19, § 1102.

[283] DEL. CODE ANN. tit. 19, § 1103.

[284] DEL. CODE ANN. tit. 19, § 1108(4).

[285] DEL. CODE ANN. tit. 19, § 1108(4).

[286] DEL. CODE ANN. tit. 19, § 1108(4).

[287] DEL. CODE ANN. tit. 19, § 711(i).

[288] DEL. CODE ANN. tit. 19, § 1108(2); Delaware Dep't of Labor, Div. of Indus. Relations, *Wage Payment*, *available at* https://dia.delawareworks.com/labor-law/wage-payment.php.

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

In Delaware, there is no general obligation to indemnify an employee for business expenses. Further, state law contains no express provisions addressing how uniform, tool, and/or equipment expenses incurred during employment are treated in the wage payment, minimum wage, and/or overtime contexts.

That being said, any employer that is party to an agreement to pay or provide benefits or wage supplements to any employee must pay owed amounts within 30 days after such payments are required to be made. The term *benefits or wage supplements* is defined to include "compensation for employment other than wages, including, but not limited to, reimbursement for expenses[.]"[289]

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

Permissible Deductions. In Delaware, an employer can deduct from employee wages if:

- required or empowered to do so by state or federal law;
- the deductions are for medical, surgical, or hospital care or service, do not financially benefit the employer, and are openly, clearly, and in due course recorded in the employer's books; or
- the employee provides signed authorization for a deduction for a lawful purpose accruing to the employee's benefit.[290]

The Delaware Department of Labor may prohibit deductions for which an employee provides written authorization if the department finds the deduction is not in the public interest.[291]

Under certain circumstances, an employer may take deductions for providing a cash advance or goods or services to an employee. To deduct for employee charges for goods or services or a cash advance, a signed, written agreement between an employer and employee is required. The agreement must specify the amount of the value of goods or services, along with the repayment schedule and method of payment. The deduction cannot exceed 15% of an employee's gross wages per pay period. If employment ends, and an employee owes more than 15% of gross wages, the outstanding amount can be withheld from final wages, but only if this term is included in the parties' original agreement.[292]

Prohibited Deductions. An employer cannot deduct from employee wages for cash or inventory shortages, including shortages caused by employee's failure to follow proper credit card, check cashing, or accounts receivable procedures.[293] Likewise, an employer cannot deduct from employee wages for a financial loss due to damage to the property of the employer, a customer, or client,[294] nor may an employer take deductions from an employee's final wages for unreturned company property.[295] However, an employer may request that a deposit be paid, but the deposit cannot be deducted from employee wages unless the employee provides written consent. If a deduction is authorized, the full deduction must

[289] DEL. CODE ANN. tit. 19, § 1109.

[290] DEL. CODE ANN. tit. 19, § 1107.

[291] DEL. CODE ANN. tit. 19, § 1107.

[292] 19-1000-1300 DEL. ADMIN. CODE § 1328-3.

[293] 19-1000-1300 DEL. ADMIN. CODE § 1328-2.

[294] 19-1000-1300 DEL. ADMIN. CODE § 1328-4.

[295] 19-1000-1300 DEL. ADMIN. CODE § 1328-5.

be made by the first regular payday after the property was provided to the employee. The deposit must be returned when the property is returned. If the property is returned after final wages have been paid, the deposit must be given immediately when the property is returned, if possible, but no later than the next regular payday.[296]

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

Debt Collection. Generally, 85% of an employee's wages are protected from garnishment unless the garnishment is for Delaware-imposed fines, taxes, or costs. On any amount of wages due, only one attachment may be made. *Wages* includes salaries, commissions, and every other form of remuneration paid to an employee by an employer for labor or services.[297]

Orders of Support. A larger percentage of an employee's wages are available for garnishment for child support purposes, and a broader range of income sources can be tapped as well. For example, assets held or amounts payable under a retirement plan are exempt from attachment, as are "eligible rollover distributions," as defined under federal law, so long as the distributions are contributed to a retirement plan within 60 days. Under a qualified domestic relations order or child support payment order, however, retirement plan assets are not exempt from claims of an alternate payee. Additionally, support orders take precedence over all other wage attachments.[298]

In addition to deducting the garnished amounts, an employer may deduct an administrative fee. An employer that violates the terms of an order of support may be fined up to $5,000. An employer that fails to hire an individual as a result of an order of support incurs a fine of $200.[299]

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

Minimum Wage Act. Once a showing has been made to the Delaware Department of Labor that there are reasonable grounds to believe a provision of the minimum wage statute has been violated, the Superior Court of Delaware may permit the department:

- to enter the employer's place of employment, with one day's notice (upon demand, the department may inspect, examine, and copy any employment and payroll record);
- to question any employer, employee, or other person at the employer's place of business;
- to require the employer to provide full and correct statements, made under oath, regarding wages, hours, and other matters related to enforcement of the statute;
- to investigate facts, conditions, or matters that the department deems necessary to determine whether the provisions of the statute have been violated; and
- to hold hearings, examine witnesses under oath, issue subpoenas, request production of documentation, and compel attendance of witnesses on matters relating to possible violations.[300]

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[296] 19-1000-1300 DEL. ADMIN. CODE § 1328-5.

[297] DEL. CODE ANN. tit. 10, § 4913.

[298] DEL. CODE ANN. tit. 13, §§ 513, 2208; *see* DEL. CODE ANN. tit. 30, § 1156A.

[299] DEL. CODE ANN. tit. 13, § 513.

[300] DEL. CODE ANN. tit. 19, § 903.

An employer that hinders or delays the department in its investigation of a possible wage violation may be subjected to fines in the amount of $1,000 to $5,000.[301]

An employee alleging a violation of the Minimum Wage Act may bring a civil action against the employer and, upon prevailing, may recover all unpaid wages, attorneys' fees, and costs.[302] Taking adverse employment action against an employee who lodges a complaint, gives the state information, or testifies in any proceeding may subject an employer to fines in the amount of $1,000 to $5,000, in addition to the back wages owed.[303]

Wage Payment and Collection Act. As with the Minimum Wage Act, once a showing has been made to the Department of Labor that there are reasonable grounds to believe a provision of the wage payment laws has been violated, the Superior Court of Delaware may permit the department to take the same five actions noted above under the Minimum Wage Act.[304]

The statute also affords a private right of action. An employee may bring suit for claimed unpaid wages within one year of the time the claim accrued.[305] Employers that fail to timely pay wages are liable to the employee for unpaid wages plus liquidated damages in the amount of 10% of the unpaid wages for each day they are unpaid or 100% of the wages owed, whichever is smaller. In addition, aggrieved employees may recover costs and attorneys' fees.[306] An employer may not discriminate against an employee who files a complaint or who provides the Department of Labor with information regarding the activities of the employer. Additionally, an employer may not falsely state that wages have been credited to a bank account.

A violation of any provision of the wage payment law subjects the employer to a fine of between $1,000 and $5,000 for each violation.[307]

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).[308] 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.[309] Further, the U.S. Supreme Court, in *Massachusetts v. Morash*, noted that extensive state

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[301] DEL. CODE ANN. tit. 19, § 910.

[302] DEL. CODE ANN. tit. 19, § 911.

[303] DEL. CODE ANN. tit. 19, § 910.

[304] DEL. CODE ANN. tit. 19, § 1111(b).

[305] DEL. CODE ANN. tit. 19, § 1113; *Compass v. American Mirrex Corp.*, 72 F. Supp. 2d 462, 467 (D. Del. 1999); *Martinez v. Gastroenterology Assocs*., 2005 WL 1953091, at *2 (Del. Super. Ct. July 5, 2005).

[306] DEL. CODE ANN. tit. 19, § 1103(b).

[307] DEL. CODE ANN. tit. 19, § 1112.

[308] 29 U.S.C. § 1002.

[309] 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.

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.[310]

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

Delaware law does not require employers to provide vacation pay, sick pay, or other personal time off. However, once an employer establishes 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.

Delaware employers that have vacation policies must make available to each employee in writing, or through a poster notice maintained in a place accessible to the employees and where they normally pass, the employer's policies with regard to vacation pay, sick leave, and comparable matters.[311] Vacation pay is not included in the calculation of wages, but is considered to be a wage supplement and benefit. Moreover, an employer that is party to an agreement to provide such benefits or wage supplements must pay those amounts within 30 days after payment is owed.[312] However, this obligation does not necessarily mandate that an employer must pay out unused vacation at the end of employment. An employer's vacation policy can require forfeiture of accrued vacation upon termination.[313]

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*

Delaware 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.

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.

310 490 U.S.107, 119(1989).

311 DEL. CODE ANN. tit.19, § 1108(3).

312 *See Nye v. Univ. of Del.*, 897 A.2d 768, n.15 (Del. 2006); *State ex rel. Lawrence v. American Ins. Co.*, 559 A.2d 1247 (Del. 1989); *GMC v. Local 435 of Int'l Union*, 546 A.2d 974 (Del. 1988).

313 *See Haggerty v. Christiana Care Corp*., 2002 Del. C.P. LEXIS 35 (Del. Ct. Com. Pl. Dec. 4, 2002); *Lloyd v. Wilmington Sav. Fund Soc'y*, 1985 Del. Super. LEXIS 1194 (Del. Super. Ct. May 28, 1985).

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.[314] 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).[315] However, under COBRA, only an employee and the employee's spouse and dependent children are considered "qualified beneficiaries."[316] 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*

Delaware law continues to provide for recognition and solemnization of civil unions, although as of July 1, 2014, civil unions in the state were converted to marriages.[317] Parties to a civil union "have all the same rights, protections and benefits," and are bound by "the same responsibilities, obligations and duties" under all types of Delaware laws, rules, and regulations "as are granted to, enjoyed by or imposed upon married spouses."[318] Moreover, two individuals of the same gender who are parties to a valid legal union "other than a marriage (whether designated as a civil union, a domestic partnership or another relationship) established in another jurisdiction" will be treated the same as spouses married in Delaware.[319]

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[314] 29 U.S.C. § 1144.

[315] 29 U.S.C. § 1161.

[316] 29 U.S.C. § 1167(3).

[317] DEL. CODE ANN. tit.13, §§ 202, 218.

[318] DEL. CODE ANN. tit.13, § 212.

[319] DEL. CODE ANN. tit.13, § 101.

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;[320]
- to care for an immediate family member (spouse, child, or parent) with a serious health condition;[321]
- to take medical leave when the employee is unable to work because of a serious health condition;[322]
- 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.[323] A *covered employee* has completed at least 12 months of employment and has worked at least 1,250 hours in the last 12 months at a location where 50 or more employees work within 75 miles of each other.[324] 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*

Delaware law does not currently address family and medical leave for private-sector employees. However, the Healthy Delaware Families Act provides creates a statewide paid family and medical leave insurance program funded through employer and employee contributions. Paid family and medical leave (PFML) contributions will begin to be required in 2025, and covered employees will be able to access benefits in 2026.

Covered Employers, Employees & Family Members. The law applies to employers with 10 or more employees working in Delaware. However, employers with 10 to 24 employees in Delaware must comply with the law's parental leave requirements only; employers with 25 or more employees in Delaware are

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320 29 C.F.R. §§ 825.102, 825.112, 825.113, 825.120, and 826.121.

321 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).

322 29 C.F.R. §§ 825.112, 825.113.

323 29 U.S.C. § 2611(4); 29 C.F.R. §§ 825.104 to 825.109.

324 29 U.S.C. § 2611(2); 29 C.F.R. §§ 825.110 to 825.111.

subject to the parental, family caregiving, and medical leave requirements. To determine business size, employers count covered employees and those employees the employer reasonably expects to meet coverage requirements during the previous 12 months. When a change in the number of employees causes an employee to gain or lose coverage, the employer must provide notice. If an employer contracts with a professional employment organization (PEO) in order to lease workers, the employer-client is considered to be the employer of the workers for purposes of the law, not the PEO.

Generally, covered employees are those who primarily report to work at a Delaware worksite; however, employers can elect to classify individuals who work primarily at a worksite outside Delaware as employees. *Primarily* is defined as working at least 60% of an employee's work hours physically in the state. Exceptions exist for certain state employees. To qualify for PFML benefits, an employee must have been employed by the employer for at least 12 months and performed 1,250 hours of service for the employer during the previous 12-month period; when evaluating these eligibility criteria, the law uses standards in the FMLA. Additionally, the employee must submit an application and comply with forthcoming regulations.

Under the law, a covered family member is a child, parent, or spouse, all of which take their definitions from the FMLA.[325]

Covered Uses & Amount of Leave. PFML will cover the following types of leave, although the types of leave available to employees can vary depending on how many employees their employer has.

- *Parental Leave*: Birth, adoption, placement through foster care, or care for a child during the first year after the child's birth, adoption, or placement;
- *Family Caregiver Leave*:
  - care for a family member with a serious health condition (will look to the definitions in the federal FMLA);
  - qualifying military exigency (as defined in the FMLA); and
- *Medical Leave*: Serious health condition that makes employee unable to perform the functions of their position (as defined in the FMLA).[326]

Employees are eligible for up to 12 weeks of paid parental leave, six weeks of paid family caregiver leave, or six weeks of paid medical leave in an application year. Employees are limited overall to 12 weeks of PFML benefits in a single application year and six weeks of medical and/or family caregiving leave in any 24-month period. Employees are further limited to using medical and/or family caregiving leave once in a 24-month period. If two parents employed by the same employer are entitled to parental or family caregiver leave, the employer may limit aggregate number of weeks of leave to which both may be entitled to 12 weeks during any 12-month period.[327]

Employers with 10 to 24 employees may temporarily reduce the maximum parental leave benefit to six weeks for the first five years after the start of the law's benefit provisions are in effect (*i.e.*, for all claims submitted before January 1, 2031). However, employers that wish to do so must notify the state by

[325] DEL. CODE ANN. tit. 19, § 3701; 19-1000-1401 DEL. ADMIN. CODE § 1401-1.0.

[326] DEL. CODE ANN. tit. 19, § 3702.

[327] DEL. CODE ANN. tit. 19, § 3703.

January 1, 2024 and inform their employees in writing by December 1, 2024.[328] Additional limitations may apply when two parents or other family members work for one employer.[329]

Employees may take leave on an intermittent or reduced schedule basis, but only when medically necessary and supported by documentation. Breaking up the leave schedule does not affect the overall amount of leave employees may take. Notably, benefits will not be payable for absences of less than one workday in a workweek.[330]

PFML will run concurrently with qualifying FMLA leave. Employers may require employees to use paid time off (vacation and sick leave) before accessing PFML benefits. The use of such leave may count toward the total leave under the law, but only if employees are not required to exhaust all PTO. **Effective March 11, 2024**, an employer may require an employee to use up to 75% of their PTO before accessing PFML benefits, provided that employers give notice of this policy. Employers and employees may agree in writing to use an employee's PTO to supplement their wages up to 100% of their average weekly wage. Additionally, employers may require that payment made under the law be made concurrently or otherwise coordinated with payments made or leave allowed under the terms of disability or family care leave policies or provisions in a collective bargaining agreement if employers provide employees written notice of this requirement. **Effective March 11, 2024**, employees cannot receive more than 100% of their wages while receiving PFML benefits. Both the employer and the employee must make sure any supplemental benefits or wages are correctly calculated to avoid overpayment.[331]

Contribution & Benefit Amounts. Beginning January 1, 2025, employers participating in the state plan must remit employer and employee contributions to the state. Employers cannot deduct more than half of the contribution from employees' wages; alternatively, employers may elect to pay the employee's share of the contribution. For 2025 and 2026, contributions will equal the following percentages of wages: .32% (parental leave); .4% (medical leave); and .08% (family caregiver leave). Beginning in 2027, the state will adjust the contribution rate based on consumer price index changes.[332]

The minimum weekly benefit cannot be less than $100 a week unless the employee's average weekly wage is less than $100 a week (in which case the minimum benefit is the employee's full wage), whereas the maximum weekly benefit is 80% of the employee's average weekly wage rounded up to the nearest dollar. For 2026 and 2027, $900 is the maximum weekly benefit. For 2028 and future years, the maximum amount will increase based on consumer price index changes, rounded to the nearest $5. PFML benefits cannot result in an employee receiving more than 100% of their weekly wage.

The first benefit payment must be made within 30 days after the employer has notified the state of an approved claim, with subsequent payments being made every two weeks.[333]

Requesting & Documenting Leave. Employees must provide notice of their intent to take leave 30 days in advance, if known, or as soon as practicable. Failure to do so could result in a delay of benefits. When

[328] DEL. ADMIN. CODE § 1401-4.0.

[329] DEL. ADMIN. CODE § 1401-4.2.

[330] DEL. CODE ANN. tit. 19, § 3706.

[331] DEL. CODE ANN. tit. 19, § 3709; 19-1000-1401 DEL. ADMIN. CODE § 1401-10.0.

[332] DEL. CODE ANN. tit. 19, § 3705.

[333] DEL. CODE ANN. tit. 19, § 3704.

employees submit a leave application, employers must collect and retain information verifying parental leave status, a serious health condition (SHC) or qualifying exigency.

For SHC-related absences, employees must support a leave request with certification from a health care provider. Generally, a certification will suffice if it includes the date the SHC began, the condition's probable duration, and appropriate medical facts regarding the condition. Additionally, the law describes information the certification must include for family member and employee SHC-related absences, as well as intermittent or reduced schedule absences for planned medical treatment and absences. Employers may be able to request a second – and in some instances, third – opinion, which the law covers in more detail.

Employers must approve or deny an application for benefits within five business days of their receipt of a completed application that includes documentation necessary to review the claim. The employer must notify the state within three business days of approving a claim. If an employer denies a claim, it must notify the employee of the reason for the denial.

Assuming the employee is taking an approved absence, the law allows employers to reasonably require employees to recertify their absence, but generally not more than once during a 30-day period. Employers must cover recertification costs that exceed what an employee's health insurance covers.[334]

Job Protections & Prohibitions. The law provides job restoration rights to employees; specifically, when leave ends, employees are entitled to be restored to the position they held when leave began or to a position with equivalent seniority, status, employment benefits, pay, and other terms and conditions of employment, including fringe benefits and service credits. During leave, employers must maintain employee health care benefits during the absence until PFML benefits terminate, though employees must continue to pay their share of the cost of such benefits.[335]

Employees cannot waive their rights under the law. Additionally, the law prohibits interfering with, restraining, or denying the exercise of, or the attempt to exercise, any right protected under the law, along with retaliation against individuals who exercise their rights under the law. An absence control policy cannot count covered leave as an occurrence that may lead to or result in discipline, discharge, demotion, suspension, or any other adverse action. Protections apply to individuals who mistakenly, but in good faith, allege violations of the law.[336]

Employer Notice Requirements. Upon hiring an employee, when an employee requests leave, and/or when an employer knows that an employee's leave may be for a qualifying event, employers must provide notice of:

- The employee's right to PFML benefits and the terms under which it may be used.
- The amount of PFML benefits.
- The procedure for filing a PFML claim.
- The right to job protection and benefits continuation.

[334] DEL. CODE ANN. tit.19, §§ 3702, 3703, 3710; 19 DEL. ADMIN. CODE § 1401-7.3.

[335] DEL. CODE ANN. tit. 19, § 3707.

[336] DEL. CODE ANN. tit. 19, §§ 3708, 3709.

- That discrimination and retaliation for requesting, applying for, or using PFML benefits is prohibited.
- That the employee has a right to file a complaint for violations.
- Whether PFML benefits are available to the employee through the state or an approved private plan.

Employers must conspicuously display and maintain a poster at their place of business that contains the same information in English, Spanish, and any language that is the first language spoken by at least five percent of the employer's workforce, if the poster has been provided by the Delaware Department of Labor. **Effective March 11, 2024**, notice must be provided to all existing employees at least 30 days prior to the start of contributions on January 1, 2025. Notice may be distributed electronically via email.[337]

Finally, when employees file a new claim for benefits, employers must advise them of the following:

- PFML benefits may be subject to federal and state income taxes.
- Requirements exist pertaining to federal and state estimated tax payments on PFML benefits.
- Applicable taxes will be deducted and withheld from their PFML benefits payment.

The Delaware Department of Labor may adopt regulations to establish additional requirements surrounding this notice requirement and may further provide employers with a template notice.[338]

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.[339] 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*

Delaware 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.

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337 19-1000-1401 DEL. ADMIN. CODE § 1401-11.3.

338 19-1000-1401 DEL. CODE ANN. tit. 19, § 3710.

339 80 Fed. Reg. 54,697-54,700 (Sept.10, 2015).

Pregnancy Discrimination Act (PDA). Under the PDA, which as part of Title VII applies to employers with 15or 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.[340] Policies and practices involving such matters as the commencement and duration of leave, the availability of extensions, reinstatement, and payment under any health or disability insurance or sick leave plan must be applied to disability due to pregnancy, childbirth, or related medical conditions on the same terms as they are applied to other disabilities.

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

Family and Medical Leave Act (FMLA). A pregnant employee may take FMLA leave intermittently for prenatal examinations or for her own serious health condition, such as severe morning sickness.[341] 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.[342] 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*

Delaware law does not mandate pregnancy leave for private-sector employees. However, as described in **3.11(c)(ii)**, Delaware requires employers of four or more employees to make reasonable accommodations to the known limitations of employees or applicants related to their pregnancy. Among the reasonable

[340] 42 U.S.C. § 2000e(k); *see also 29* C.F.R. § 1604.10.

[341] 29 C.F.R. § 825.202.

[342] 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.

accommodations described in the statute are job restructuring, modified work schedules, and time off to recover from childbirth.[343]

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*

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

3.9(e) *School Activities Leave*

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

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

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

Delaware 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*

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

3.9(g) *Voting Time*

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

There is no federal law concerning time off to vote.

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

Delaware law does not address time off to vote for private-sector employees.

Delaware employers are obligated to permit leave for employees to serve as election officials, however, so long as they have vacation time accrued and available for use.[344] An employer may not terminate or otherwise discriminate against an employee who has such time available and takes a leave of absence to work as an election official. An employee may not take leave, however, if the employee serves in a critical-need position. *Critical-need positions* include anyone in the field of "public safety, corrections,

[343] DEL. CODE ANN. tit.19, § 710(19).

[344] DEL. CODE ANN. tit.15, § 4709(a).

transportation, health care, utilities," anyone employed by a small business with 20 or fewer employees, or anyone who is otherwise necessary for the employer to operate on election day.[345]

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*

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

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

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

The Jury System Improvements Act prohibits employers from terminating or disciplining "permanent" employees due to their jury service in federal court.[346] 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.[347] 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*

Jury Duty. An employer may not deprive an employee of employment, or threaten or coerce an employee with respect to employment, because the employee receives a summons, responds to a summons, serves as a juror, or attends court for prospective jury service.[348] Additionally, if an employer terminates an employee because of the response to a subpoena or jury service, the employee may, within 90 days of that discharge, bring a civil suit to obtain reinstatement of employment and recover damages for wages lost and reasonable attorneys' fees incurred as a result of the wrongful termination. An employer, however, is not required to compensate an employee who is absent due to jury service.[349]

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345 DEL. CODE ANN. tit.15, § 4709(e).

346 28 U.S.C. § 1875.

347 *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).

348 DEL. CODE ANN. tit.10, § 4515(a).

349 DEL. CODE ANN. tit. 10, § 4514.

Leave to Comply with a Subpoena. An eligible employee may take time off from work for attendance at a criminal justice proceeding in response to a subpoena. There is no requirement that the employee be compensated for absences taken pursuant to this leave law.[350] For further information, see **3.9(i)(ii)**.

Leave to Attend Judicial Proceedings. An eligible employee may take time off from work for participation at the prosecutor's request in preparing for a criminal justice proceeding or attendance at a criminal justice proceeding if the attendance is reasonably necessary to protect the interests of the victim. Again, however, employers are not obligated to pay the employee for absences taken pursuant to this leave law.[351] For further information, see **3.9(i)(ii)**.

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*

Under Delaware law, an eligible employee may take time off from work for: (1) participation at the prosecutor's request in preparing for a criminal justice proceeding; (2) attendance at a criminal justice proceeding if the attendance is reasonably necessary to protect the interests of the victim; or (3) attendance at a criminal justice proceeding in response to a subpoena.[352] There is no requirement that the employee be compensated for absences taken pursuant to this leave law.

An employee is eligible for time off if the employee is:

- the victim of the crime at issue in the proceedings;
- the parent, guardian, or custodian of a victim who is unable to meaningfully understand or participate in the legal process due to physical, psychological, or mental impairment;
- the spouse (includes same-sex civil unions, domestic partnerships, and marriages), adult child or stepchild, parent or sibling of the victim, if the victim is deceased; or
- the legal representative of the victim (*i.e.*, a member of the victim's family or an individual designated by the victim or by the court).[353]

An employee who is a defendant, codefendant, or coconspirator with respect to the crime is not eligible for time off.[354]

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[350] DEL. CODE ANN. tit. 11, § 9409.

[351] DEL. CODE ANN. tit. 11, § 9409.

[352] DEL. CODE ANN. tit.11, § 9409.

[353] DEL. CODE ANN. tit.11, § 9401.

[354] DEL. CODE ANN. tit.11, § 9401.

Additionally, Delaware requires employers of four or more employees to make reasonable accommodations to the known limitations of employees or applicants related to domestic violence, a sexual offense, or stalking. Among the reasonable accommodations described in the statute are reasonable changes in schedules or allowing the individual to use accrued leave to address the domestic abuse, sexual offense, or stalking.[355] Employers may, but are not required to, request that an employee provide verification from a domestic violence service provider, medical provider, mental health provider, law enforcement, court order, or a family medical leave document.[356]

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.[357]

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

1. **Qualifying Exigency Leave.** An eligible employee may take up to 12 weeks of unpaid leave in a single 12-month period if the employee's spouse, child, or parent is an active duty member of one of the U.S. armed forces' reserve components or National Guard, or is a reservist or member of the National Guard who faces recall to active duty if a qualifying exigency exists.[358] An eligible employee may also take leave for a qualifying exigency if a covered family member

[355] DEL. CODE ANN. tit.19, § 711.

[356] DEL. CODE ANN. tit. 19, § 710.

[357] 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)).

[358] 29 C.F.R. § 825.126(a).

is a member of the regular armed forces and is on duty, or called to active duty, in a foreign country.[359] 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. Delaware law provides that National Guard members called to state active duty are entitled to the same employment rights, principles, and protections they would have if called for military training under federal law protecting reservists and National Guard members. If any employer fails to comply with any provisions of federal or state law relating to employment rights of an employee who is a reservist or National Guard member, the employee can sue the employer for damages.[360]

Other-Military Related Protections: Spousal Unemployment. Delaware unemployment insurance law includes a provision concerning spouses, which is not military-specific but may be applicable to military spouses. An individual who quits or is discharged from work to accompany their spouse to a place from which it is impractical for such individual to commute, due to a change in location of that individual's spouse's employment, will *not* be considered to have left work voluntarily without good cause for purposes of unemployment compensation.[361]

3.9(l) *Other Leaves*

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

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

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

Volunteer Emergency Responder Leave. Delaware's Volunteer Emergency Responders Job Protection Act (VERJPA) provides protected leave for employees who must miss work as a result of their duties as volunteer emergency personnel. The VERJPA prevents an employer from firing or taking disciplinary action against an employee:

- who misses up to seven consecutive days of work while responding to a governor-declared state of emergency;
- who misses up to 14consecutive days of work while responding to a president-declared state of emergency; or
- who is absent from work due to an injury sustained while acting as a volunteer emergency responder.

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[359] 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. 29C.F.R. § 825.126(a)(3).

[360] DEL. CODE ANN. tit.20, § 905.

[361] DEL. CODE ANN. tit.29, § 3314.

Eligible employees include volunteer firefighters, members of a ladies auxiliary of a volunteer fire company, volunteer emergency medical technicians, and volunteer fire police officers. The following employees are *not* entitled to leave under the VERJPA: (1) essential state workers; (2) members of the armed forces and National Guard; (3) certain hospital employees; and (4) employees of public utilities, Internet service providers, or cellular telephone service providers who are necessary to maintain the integrity of networks and facilities or assist first responders.

Leaves of absence under the VERJPA are unpaid. Employers may request that an employee provide notice of the need for leave under the VERJPA as well as proof of that need from the person in charge of the volunteer emergency service. In the case of an employee taking leave for an injury sustained during a volunteer emergency response, an employer may request proof from the responsible medical professional.[362]

Additionally, employers are prohibited from discriminating in the hiring or discharging of any employee because of that person's membership in a volunteer emergency responder organization. The VERJPA also prohibits employers from taking any discriminatory adverse actions against such an employee related to the employee's compensation and the terms, conditions, and privileges of employment.[363]

Employment Protection During Quarantine. Delaware law forbids an employer from permanently terminating an employee as a result of the employee's isolation or quarantine in the event of a public health emergency. This job protection does not apply, however, to an employee "who has been quarantined as a result of refusing to comply with an examination, treatment or vaccination program" or whose conduct caused the state of emergency.[364]

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

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[362] DEL. CODE ANN. tit.19, §§ 1801 to 1808.

[363] DEL. CODE ANN. tit.19, § 719A.

[364] DEL. CODE ANN. tit.20, § 3136(6)(d).

[365] 29 U.S.C. § 654(a)(1). An *employer* is defined as "a person engaged in a business affecting commerce that has employees." 29U.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.

[366] 29 U.S.C. § 654(a)(2).

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.[367] 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*

Although Delaware promulgated a plan for its own regulations related to workplace safety,[368] it never obtained the requisite approval for these regulations by the U.S. Secretary of Labor pursuant to 29U.S.C. section 667.[369] Accordingly, because Delaware's failure to submit a plan for federal approval precludes application of its safety regulations, the area of workplace safety within the state is preempted by the federal Occupational Health and Safety Act.[370]

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*

Delaware prohibits using a cell phone while driving without hands-free equipment.[371] A driver may engage in a call with a hands-free electronic communication device while utilizing hands-free equipment so long as the driver does not hold the hands-free electronic communication device in their hand or hands. A driver may also activate or deactivate any hands-free equipment while driving.[372] Drivers may not text while driving.

These prohibitions 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 restriction.

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*

Delaware does not have a statute specifically addressing the possession or storage of firearms in the workplace or in company parking lots.

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[367] 29 U.S.C. § 667(c)(2).

[368] DEL. CODE ANN. tit.19, § 106.

[369] *Figgs v. Bellevue Holding Co.*, 652 A.2d 1084, 1089-90 (Del. Super. Ct. 1994).

[370] *Toll Bros., Inc. v. Considine*, 706 A.2d 493, 496 (Del. 1998) (citing *Figgs v. Bellevue Holding Co.*, 652 A.2d 1084, 1089-90 (Del. Super. Ct. 1994)).

[371] DEL. CODE ANN. tit.21, § 4176C.

[372] DEL. CODE ANN. tit.21, § 4176C.

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*

Delaware's Clean Indoor Air Act evidences the legislature's finding that it is in the best interest of the people of the state to protect nonsmokers from involuntary exposure to smoke in places of employment.[373] Smoking, including use of electronic smoking devices, is prohibited in indoor workplaces.[374] Certain areas are exempted, such as certain indoor areas where private social functions are held, certain hotel or motel rooms, and fundraising activities sponsored by volunteer emergency services companies or fraternal benefit societies.[375]

Posting Requirements. "Warning: Smoking Permitted" signs must be prominently displayed and properly maintained where smoking is permitted. The letters on the sign must be at least one inch in height.[376]

Antiretaliation Provisions. Employers may not discharge or discriminate against an employee because the employee has given information to the Department of Labor, has caused to be initiated or is about to cause to be initiated any proceedings, or has testified or is about to testify in proceedings under the Clean Indoor Air Act. Employers that do so are subject to a civil penalty of not less than $2,000 and not more than $10,000 for each violation.[377]

Penalties. Any person that violates the Clean Indoor Air Act is subject to an administrative penalty of $100 for the first violation and not less than $250 for each subsequent violation.[378]

3.10(e) *Suitable Seating for Employees*

3.10(e)(i) *Federal Guidelines on Suitable Seating for Employees*

Federal law does not address suitable seating requirements for employees.

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

Delaware 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

[373] DEL. CODE ANN. tit.16, § 2901.

[374] DEL. CODE ANN. tit.16, § 2903.

[375] DEL. CODE ANN. tit.16, § 2904.

[376] DEL. CODE ANN. tit.16, § 2905.

[377] DEL. CODE ANN. tit.16, § 2907.

[378] DEL. CODE ANN. tit.16, § 2907.

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*

Delaware law does not address employer workplace violence protection orders.

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");[379] (2) the Americans with Disabilities Act (ADA);[380] (3) the Age Discrimination in Employment Act (ADEA);[381] (4) the Equal Pay Act;[382] (5) the Genetic Information Nondiscrimination Act of 2009 (GINA);[383] (6) the Civil Rights Acts of 1866 and 1871;[384] 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);[385]
- 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.[386] Employees must first exhaust their administrative remedies by filing a

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[379] 42 U.S.C. §§ 2000e *et seq.* Title VII applies to employers with 15 or more employees. 42 U.S.C. § 2000e(b).

[380] 42 U.S.C. §§ 12101 *et seq.* The ADA applies to employers with 15 or more employees. 42 U.S.C. § 12111(5).

[381] 29 U.S.C. §§ 621 *et seq*. The ADEA applies to employers with 20 or more employees. 29 U.S.C. § 630.

[382] 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.

[383] 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)).

[384] 42 U.S.C. §§ 1981, 1983.

[385] 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.

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

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.[387]

3.11(a)(ii) *State FEP Protections*

The Delaware Discrimination in Employment Act (DDEA) prohibits discrimination on the basis of:

- Race (includes traits historically associated with race, including hair texture and protective hairstyles. "Protective hairstyles" include braids, locs, and twists).
- color;
- age (40 or more years of age);
- religion;
- sex (including pregnancy);
- sexual orientation;
- gender identity;
- national origin;
- marital status;
- volunteer responder status;
- status as a victim of domestic violence, sexual offense, or stalking;
- reproductive health decision status;
- family responsibility status;
- genetic information; and
- housing status.[388]

The DDEA protects employees in all aspects of employment, including hiring, terms and conditions of employment, compensation, and termination.[389] It is also unlawful for an employer to limit, segregate, or classify employees in any way that would deprive or tend to deprive individuals of employment opportunities, or otherwise adversely affect their employment status, because of the protected classification.[390]

The DDEA generally covers state public and private employers that employ four or more employees within Delaware at the time of the alleged violation.[391] Employment agencies, labor organizations, and some joint labor-management committees are also required to comply with the DDEA.[392] For sexual orientation and gender identity discrimination purposes, the term *employer* does not include religious corporations,

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[387] 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.

[388] DEL. CODE ANN. tit.19, §§ 711, 718.

[389] DEL. CODE ANN. tit. 19, § 711(a)(1).

[390] DEL. CODE ANN. tit. 19, § 711(a)(2).

[391] DEL. CODE ANN. tit. 19, § 710(7).

[392] DEL. CODE ANN. tit. 19, §§ 710-11.

associations or societies, whether wholly or partially supported by government funds.[393] Courts have analyzed claims under the DDEA using the familiar federal Title VII *McDonnell Douglas* "burden shifting" standard.[394]

Disability. Delaware also prohibits discrimination in employment against individuals with disabilities under its Handicapped Persons Employment Protections Act (HPEPA), which closely mirrors the federal Americans with Disabilities Act (ADA) and the ADA Amendments Act of 2008 (ADAAA).[395] The HPEPA requires employers to make reasonable accommodations for qualified handicapped individuals. A *qualified individual* is one who, with or without reasonable accommodation, can satisfactorily perform the essential functions of the job in question.[396] An employer makes a reasonable accommodation by making reasonable changes in the workplace to enable the person with a disability to perform the essential job functions.[397] *Reasonable accommodations* may include, but are not limited to, making facilities accessible, modifying equipment and providing mechanical aids to assist with operation of equipment, or making reasonable changes to schedules or duties of the job in question. Because the language of the HPEPA closely mirrors that of the ADA, state disability claims are analyzed under the federal ADA standard.[398]

Age Discrimination. The DDEA specifically states that it does not prohibit compulsory retirement of an employee 65 years of age or older, if the individual has been employed in a *bona fide* executive or high policy-making position for the two-year period immediately preceding retirement and is entitled to an immediate annual nonforfeitable retirement benefit of at least $44,000.[399]

Delaware also makes it an unlawful employment practice for an employer to request or require that an applicant for employment disclose their age, date of birth, or dates of attendance or graduation from an educational institution unless:

- there is a bona fide occupational qualification or need for such information; or
- the information is required in order to comply with any provision of state or federal law, or the requirements of any regulatory, licensing, or certifying body or organization.

For an individual's age to constitute a "bona fide occupational qualification or need" an employer must establish that age is an essential component of one's ability to successfully perform a particular job, and is necessary to the normal operation of a business.[400]

The DDEA generally covers state public and private employers that employ four or more employees within Delaware at the time of the alleged violation.[401] Employment agencies, labor organizations, and some

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393 DEL. CODE ANN. tit. 19, § 710(7).

394 *See, e.g.*, *Zechman v. Christiana Care Health Sys.*, 2007 WL 1891123, at *5 n.2 (D. Del. June 26, 2007); *Giles v. Family Ct. of Del.*, 411A.2d 599 (Del. 1980); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

395 DEL. CODE ANN. tit. 19, §§ 720 *et seq*.

396 DEL. CODE ANN. tit. 19, § 722(5).

397 DEL. CODE ANN. tit. 19, § 722(6).

398 *See Zechman v. Christiana Health Care Sys.*, 2007 WL 1891123, at *6 n.4 (D. Del. 2007).

399 DEL. CODE ANN. tit. 19, § 711(o)(1).

400 DEL. CODE ANN. tit. 19, § 711.

401 DEL. CODE ANN. tit. 19, § 710(7).

joint labor-management committees are also required to comply with the DDEA.[402] For sexual orientation and gender identity discrimination purposes, the term *employer* does not include religious corporations, associations or societies, whether wholly or partially supported by government funds.[403] Courts have analyzed claims under the DDEA using the familiar federal Title VII *McDonnell Douglas* "burden shifting" standard.[404]

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

The Delaware Department of Labor has jurisdiction over unlawful employment practices. An employee alleging a violation of the DDEA must first exhaust administrative remedies by filing a complaint with the Delaware Office of Anti-Discrimination within 300 days of the alleged violation. A verified charge of discrimination will be deemed filed on the date it is sent to the Department of Labor.[405] The employee may then file a civil action.[406] The department will then serve a copy of the charge on the employer by certified mail.[407] The employer may file an answer within 20 days of the receipt of the charge, including certification that a copy of the answer was mailed to the charging party at the address provided.[408]

Within 60 days from the date the charge is served upon the employer, the department will issue preliminary findings with recommendations to:

1. dismiss the charge, unless additional information is received that warrants further investigation;
2. refer the case for mediation; or
3. refer the case to investigation.[409]

If, after investigating the charge, the department determines that there is reasonable cause to believe the charge is valid, the parties will be required to appear for conciliation.[410] Nothing said or done as part of conciliation efforts may be made public by the department or used as evidence in a subsequent proceeding without the written consent of the persons concerned.[411] If the attempted conciliation between the parties is not successful, or the department finds no reasonable cause to believe that the charge is valid, the department will issue a right-to-sue notice.[412]

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[402] DEL. CODE ANN. tit. 19, §§ 710-11.

[403] DEL. CODE ANN. tit. 19, § 710(7).

[404] *See, e.g.*, *Zechman v. Christiana Care Health Sys.*, 2007 WL 1891123, at *5 n.2 (D. Del. June 26, 2007); *Giles v. Family Ct. of Del.*, 411A.2d 599 (Del. 1980); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

[405] DEL. CODE ANN. tit. 19, § 712(c)(1).

[406] DEL. CODE ANN. tit. 19, § 712(c); *see also Cherkaoui v. HSBC Pay Servs.*, 2006 WL 571851, at *2 (D. Del. Mar. 9, 2006).

[407] DEL. CODE ANN. tit. 19, § 712(c)(1).

[408] DEL. CODE ANN. tit. 19, § 712(c)(1).

[409] DEL. CODE ANN. tit. 19, § 712(c)(2).

[410] DEL. CODE ANN. tit. 19, § 712(c)(3).

[411] DEL. CODE ANN. tit. 19, § 712(c)(4).

[412] DEL. CODE ANN. tit. 19, § 712(c)(5).

When a complainant receives a right-to-sue notice, the complainant may file a civil action in superior court or federal court within 90 days of its receipt.[413] The state attorney general may file a civil action in the Court of Chancery when there is reasonable cause to believe that any person or persons are engaged in a pattern or practice of resistance to the rights set forth in the DDEA.[414]

Delaware federal district courts are split over whether under Delaware law a plaintiff is permitted to bring claims under both a federal employment statute and the DDEA in a single federal forum. Multiple Delaware federal district court decisions originally narrowed the scope of "sole remedy" language of the DDEA in holding that "a plaintiff who files claims under Title VII is precluded from concomitantly pursuing state law claims under the DDEA."[415] More recently, however, numerous federal district court decisions have held that plaintiffs are permitted to bring concurrent claims under both federal employment statutes and the DDEA.[416]

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

Accommodations for Victims of Domestic Violence, Sexual Offense, or Stalking. Employers must make reasonable accommodations to the known limitations of employees and applicants related to domestic violence, a sexual offense, or stalking. These reasonable accommodations include:

- reasonable changes in the schedule or duties of the job to accommodate the victim; and
- allowing the victim to use accrued leave to address the domestic abuse, sexual offense, or stalking.[417]

Reproductive Health Decision. In Delaware, it is an unlawful employment practice for an employer of four or more employees to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of a reproductive health decision by the individual, the individual's spouse, or any dependent of the individual. *Reproductive health decision* means any decision related to the use or intended use of a particular drug, device, or medical service, including the use or intended use of contraception or fertility control or the planned or intended initiation or termination of a pregnancy.[418]

Garnishment orders. Delaware's wage garnishment law includes discrimination protections for employees whose wages are subject to garnishment orders.[419]

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[413] DEL. CODE ANN. tit. 19, § 714(a)-(c).

[414] DEL. CODE ANN. tit. 19, § 713.

[415] *Schlifke v. Trans World Entm't Corp.*, 479 F. Supp. 2d445, 450n.8 (D. Del. 2007) (holding plaintiff's sex and pregnancy discrimination claims under the DDEA were barred because of plaintiff's federal discrimination claims); *see also Blozis v. Mellon Trust of Del. Nat'l Ass'n*, 494 F. Supp. 2d 258, 270n.15 (D. Del. 2007) (holding plaintiff's age discrimination and retaliation claims under the DDEA were barred because of concurrent federal claims).

[416] *Brangman v. AstraZeneca, L.P.*, 952 F. Supp. 2d 710, 724 (E.D. Pa. 2013); *see also Hyland v. Smyrna Sch. Dist.*, 608 F. App'x79, n.4 (3rd Cir. 2015) (recognizing the split in authority).

[417] DEL. CODE ANN. tit.19, § 711(h).

[418] DEL. CODE ANN. tit.11, §4104.

[419] DEL. CODE ANN. tit.19, § 711(h).

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."[420] 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.[421]

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

Under the Delaware equal pay law, male and female employees in the same establishment must be paid equally for performing equal work on a job that requires equal skill, effort, and responsibility, and that is performed under similar working conditions.[422] Employers may vary wage rates based on a seniority system, a merit system, a system that measures earnings by quantity or quality, or any factor other than sex.[423] However, an employer may not reduce the wages of any employee in an effort to be in compliance with the equal pay provision.[424]

An employee alleging a violation of the equal pay statute may file a civil action within two years of the alleged violation.[425] If an employer is found to have violated this statute, it will be required to pay any amounts owing to any employee that has been withheld unlawfully.[426] Additionally, an employer may be liable for civil penalties of not less than $1,000 and not more than $5,000 for each violation of the equal pay law.[427]

As noted in **3.7(b)(v)**, under the DDEA, an employer cannot restrict employees from disclosing their wages or inquiring about other employees' wages.

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[420] 29 U.S.C. § 206(d)(1).

[421] 42 U.S.C. § 2000e-5.

[422] DEL. CODE ANN. tit. 19, § 1107A.

[423] DEL. CODE ANN. tit. 19, § 1107A(a)(1)-(4).

[424] DEL. CODE ANN. tit. 19, § 1107A(a)(4).

[425] DEL. CODE ANN. tit. 10, § 8111, tit.19, § 1113.

[426] DEL. CODE ANN. tit. 19, §§ 1107A(a)(4), 1113.

[427] DEL. CODE ANN. tit. 19, § 1112(a).

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.[428]

A *reasonable accommodation* is any change or adjustment to a job, work environment, or the way things are usually done that would allow an individual with a disability to apply for a job, perform job functions, or enjoy equal access to benefits available to other employees. Reasonable accommodation includes:

- modifications to the job application process that allow a qualified applicant with a known limitation under the PWFA to be considered for the position;
- modifications to the work environment, or to the circumstances under which the position is customarily performed;
- modifications that enable an employee to enjoy equal benefits and privileges of employment as are enjoyed by other similarly situated employees without known limitations; or
- temporary suspension of an employee's essential job function(s).[429]

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

[428] 42 U.S.C. § 2000gg-1. The regulations provide definitions of *pregnancy*, *childbirth*, and *related medical conditions*. 29 C.F.R. § 1636.3.

[429] 29 C.F.R. § 1636.3.

An employee seeking a reasonable accommodation must request an accommodation.[430] 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.[431] 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."[432]

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.[433]

The following modifications do not impose an undue hardship under the PWFA when they are requested as workplace accommodations by a pregnant employee:

- allowing an employee to carry or keep water near and drink, as needed;
- allowing an employee to take additional restroom breaks, as needed;
- allowing an employee whose work requires standing to sit and whose work requires sitting to stand, as needed; and

[430] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1636.3.

[431] 29 C.F.R. § 1636.3.

[432] 29 C.F.R. § 1636.4.

[433] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1630.2(p).

- allowing an employee to take breaks to eat and drink, as needed.[434]

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*

Employers covered under the DDEA must treat a pregnant employee or applicant the same as the employer treats or would treat any other employee or applicant not so affected but similar in the ability or inability to work, without regard to the source of any condition affecting the other employee's or applicant's ability or inability to work. Unless it would impose an undue hardship on business operations, employers are required to make reasonable accommodations to the known limitations related to the pregnancy of an applicant or employee.[435] These reasonable accommodations may include:

- acquisition of equipment for sitting;
- more frequent or longer breaks;
- periodic rest;
- assistance with manual labor;
- job restructuring;
- light duty assignments;
- modified work schedules;
- temporary transfers to less strenuous or hazardous work;
- time off to recover from childbirth; or
- break time and appropriate facilities for expressing breast milk.[436]

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.[437] Multiple decisions of the U.S. Supreme Court[438] and subsequent lower court decisions have

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[434] 29 C.F.R. § 1636.3.

[435] DEL. CODE ANN. tit.19, § 711(a)(3).

[436] DEL. CODE ANN. tit.19, § 710(19).

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

[438] *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).

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.[439] 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*

Employers of 50 or more employees must provide interactive training and education to employees regarding the prevention of sexual harassment. The training must be provided to employees as follows:

- to new employees within one year of the commencement of employment and thereafter every two years; and
- to existing employees within one year of the effective date of the law and thereafter every two years.[440]

The training must include all of the following:

- a statement of the illegality of sexual harassment;
- the statutory definition of sexual harassment using examples;
- the legal remedies and complaint process available to the employee;
- directions on how to contact the Department of Labor; and
- a statement of the legal prohibition against retaliation.[441]

The statute defines sexual harassment as an unlawful employment practice that occurs when an employee is subjected to conduct that includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

- submission to such conduct is made either explicitly or implicitly a term or condition of an employee's employment;
- submission to or rejection of such conduct is used as the basis for employment decisions affecting an employee; or
- such conduct has the purpose or effect of unreasonably interfering with an employee's work performance or creating an intimidating, hostile, or offensive working environment.[442]

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[439] 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.

[440] DEL. CODE ANN. tit.19, § 711A(g).

[441] DEL. CODE ANN. tit.19, § 711A(g).

[442] DEL. CODE ANN. tit.19, § 711A(c).

In addition to the training and education to be provided to all employees, an employer must provide supplemental interactive training to all supervisors as follows:

- to new supervisors within one year of the commencement of employment as a supervisor, and thereafter every two years; and
- to existing supervisors within one year of the effective date of the law, and thereafter every two years.[443]

Supervisor means an individual that is empowered by the employer to take an action to change the employment status of an employee or who directs an employee's daily work activities.[444] The training for supervisors must include the specific responsibilities of a supervisor regarding the prevention and correction of sexual harassment, as well as statement of the legal prohibition against retaliation.[445]

In calculating the 50-employee threshold, *employee* means an individual employed by an employer and includes unpaid interns, joint employees, and apprentices.[446] However, job applicants and independent contractors are not counted towards the threshold. Employers are not required to provide training to applicants, independent contractors, or employees employed less than six months continuously.[447]

Employment agencies are the only employers required to count and provide training to employees placed by employment agency. "Employee placed by employment agency" means an employee who performs services for an employer as a result of the employer's contractual agreement with an employment agency.[448]

The law also provides for an additional notification requirement. The Department of Labor has created an information sheet on sexual harassment that is available to employers on the Department's website. The information sheet provides notice to employees of the right to be free from sexual harassment in the workplace.[449]

Employers of four or more employees must distribute the information sheet to new employees at the commencement of employment.[450]

Failure to distribute the required information sheet does not in and of itself result in an employer's liability to any present or former employee in any action alleging sexual harassment. Likewise, an employer's compliance with the notice requirement does not insulate the employer from liability for sexual harassment of any current or former employee or applicant.[451]

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[443] DEL. CODE ANN. tit.19, § 711A(g).

[444] DEL. CODE ANN. tit.19, § 711A(b).

[445] DEL. CODE ANN. tit.19, § 711A(g).

[446] DEL. CODE ANN. tit.19, § 711A(b).

[447] DEL. CODE ANN. tit.19, § 711A(g).

[448] DEL. CODE ANN. tit.19, § 711A(b), (g).

[449] DEL. CODE ANN. tit.19, § 711A(f), *available at* https://labor.delaware.gov/divisions/industrial-affairs/discrimination/sexual-harassment/.

[450] DEL. CODE ANN. tit.19, § 711A(f).

[451] DEL. CODE ANN. tit.19, § 711A(f).

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 20whistleblower 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*

The Delaware Whistleblowers' Protection Act protects both private and public employees from reprisal if the employee discloses information that the employee reasonably believes is evidence of a violation of federal, state, school district, county, or municipal law.[452] Specifically, employers may not "discharge, threaten, or otherwise discriminate against an employee" who:

1. "reports or is about to report to a public body, verbally or in writing, a violation which the employee knows or reasonably believes has occurred or is about to occur;"
2. participates, or is asked to participate, in an investigation, hearing, inquiry, or court action concerning a violation;
3. refuses to commit or assist in the commission of a violation;
4. reports a violation to the employer or a supervisor, verbally or in writing; or
5. reports or is about to report, to the employer or a supervisor, "verbally or in writing any noncompliance or an infraction which the employee knows or reasonably believes has occurred or is about to occur" of the campaign contributions law or participates in any investigation, hearing, or inquiry under that law.[453]

Under the law, employers are also prohibited from reporting or threatening to report the employee's or employee's family member's suspected or actual citizenship or immigration status to a federal, state, or local agency.

For purposes of the whistleblower law, *violation* refers to "an act or omission by an employer, or an agent thereof that is . . . materially inconsistent with, and a serious deviation from" either: (1) established legal standards that are intended to "to protect employees or other persons from health, safety, or environmental hazards; or (2) "financial management or accounting standards" intended to "protect any person from fraud, deceit, or misappropriation of public or private funds or assets" within the employer's control.[454]

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[452] DEL. CODE ANN. tit.19, §§ 1701 *et seq*.

[453] DEL. CODE ANN. tit.19, § 1703; *see also* DEL. CODE ANN. tit.15, ch. 80 (law governing campaign contributions and expenditures).

[454] DEL. CODE ANN. tit.19, § 1702(6).

Aggrieved employees may file suit within three years of any alleged violation and may seek declaratory relief or actual damages. The court may also order, if appropriate, reinstatement, back pay, reinstatement of fringe benefits and other rights, expungement of any disciplinary records, actual damages, or a combination of any of these remedies. Attorneys' fees and costs may also be awarded.[455]

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)[456] and the Railway Labor Act (RLA)[457] 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*

Delaware has not passed any right-to-work laws or other notable laws pertaining to private-sector unions or union activities.

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 50or 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 50or 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

[455] DEL. CODE ANN. tit. 19, § 1704.

[456] 29 U.S.C. §§ 151 to 169.

[457] 45 U.S.C. §§ 151 *et seq*.

workforce they constitute).[458] 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.[459] 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*

The Delaware Workplace Adjustment and Retraining Notification Act (Delaware WARN) requires covered employers to provide at least 60 days' advance notice of mass layoffs, plant closings, or relocations.[460]

Delaware WARN covers any business enterprise that employs 100 or more employees, excluding part-time employees, or 100or more employees that in the aggregate work at least 2,000 hours per week. Part-time employees are employees who are employed for an average of fewer than 20 hours per week, or who have been employed for fewer than seven of the 12 months preceding the date notice is required.[461]

Triggering Events. The following triggering events require notice: mass layoffs, plant closings, or relocations. *Mass layoff* is defined as a reduction in workforce, during any 30-day period, that is not the result of a plant closing and that results in the loss of 500 or more employees; or an employment loss at a single employment site of 50or more employees if it is 33% of the employer's total workforce at the site (excluding part-time employees).[462] *Plant closing* means the permanent or temporary shutdown of a single employment site, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss of 50or more employees (excluding part-time employees) during any 30-day period.[463] *Relocation* means the removal of all or substantially all of the employer's industrial or commercial operations to a different location 50or more miles away.[464]

Under Delaware WARN*, employment loss* means: an employment termination, other than for cause, voluntary departure, or retirement; a mass layoff exceeding six months; or a reduction of work hours greater than 50% during each month of a consecutive six-month period.[465]

An employment loss does not result from a mass layoff or plant closing where the employer offers to transfer the employees to a different employment site within a reasonable commuting distance (and with no more than a six-month employment break). There is also no employment loss with a transfer offer, regardless of distance, if the employee accepts it within 30 days of the latter of the offer, mass layoff, or plant closing (and with no more than a six-month employment break).[466] Job losses within any 90-day

[458] 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.

[459] 20 C.F.R. §§ 639.4, 639.6.

[460] DEL. CODE ANN. tit.19, § 1901 *et seq*.

[461] DEL. CODE ANN. tit.19, § 1903(a)(5).

[462] DEL. CODE ANN. tit.19, § 1903(a)(6).

[463] DEL. CODE ANN. tit.19, § 1903(a)(8).

[464] DEL. CODE ANN. tit.19, § 1903(a)(10).

[465] DEL. CODE ANN. tit.19, § 1903(a)(4).

[466] DEL. CODE ANN. tit.19, § 1903(a)(4).

period will count toward WARN threshold levels unless the employer demonstrates that the employment losses during the 90-day period are the result of separate and distinct actions and causes.[467]

In the case of a sale of part or all of an employer's business, the seller is responsible for providing notice of the triggering event up to and including the effective date of the sale. After the effective date of the sale, the purchaser is responsible for providing notice. Notwithstanding any other provision, any person who is an employee of the seller as of the effective date of the sale will be considered an employee of the purchaser immediately after the effective date of the sale.[468]

Notice Requirements. Employers may not order a mass layoff, plant closing or relocation that causes an employment loss unless the employer gives written notice at least 60 days in advance of the order's effect to the following individuals and agencies:

- affected employees and their representatives;
- the Delaware Department of Labor Division of Employment and Training, WARN Act Administrator; and
- the Delaware Workforce Development Board for the locality where the triggering event will occur.[469]

The required notice must include the elements required by the federal Worker Adjustment and Retraining Notification (WARN) Act. It must include the name, job title, home address, telephone number, and email of each planned dislocated worker.[470] The notice must also include general information regarding any payouts, severance packages, job relocation opportunities and retirement options offered to the dislocated workers, as well as whether the employer is self-insured under the Delaware workers' compensation statutes.[471]

Delaware WARN provides exceptions to the notice requirements. Employers are not required to provide notice:

- if a triggering event is necessitated by a physical calamity or an act of terrorism or war;
- if, at the time the notice would have been required, the employer was actively seeking capital or business that would enable the employer to avoid or postpone the relocation or termination and the employer had a reasonable, good faith belief that giving notice would keep it from obtaining the needed capital or business;
- if the mass layoff or plant closing is caused by business circumstances that are not reasonably foreseeable (examples include a principal client's sudden, unexpected termination of a major contract, a strike at a major supplier, an unexpected dramatic major economic downtown, or a government shutdown of the site without prior notice);

[467] DEL. CODE ANN. tit.19, § 1907.

[468] DEL. CODE ANN. tit.19, § 1904(e).

[469] DEL. CODE ANN. tit.19, § 1904(a).

[470] DEL. CODE ANN. tit.19, § 1904(b).

[471] DEL. CODE ANN. tit.19, § 1904(b).

- if the plant closing is the result of a particular project and the employees knew their employment was limited to the duration of the project;
- if the mass layoff or plant closing is due to a natural disaster, such as a flood, earthquake, or drought; or
- if the mass layoff or plant closing is due to a lockout or strike.[472]

Employers unable to provide notice due to one of these instances must provide as much notice as practicable with a brief statement of the basis for the reduced notification period.[473] Also, reemployment assistance and severance are not required under Delaware WARN. However, if reemployment assistance or severance is provided, then information about it must be included in the required notice.[474]

Liability and Penalties. Delaware WARN provides liability and penalties for violations of the law. Employers that fail to give the required notice are liable for:

- back pay at the higher of the average regular rate for the last three years of employment or at the employee's final rate (for the lesser of 60 days, or 1/2 the number of days the employee was employed by the employer); and
- the value of the cost of any benefits had employment not been lost (including the cost of any medical expenses incurred by the employee that would have been covered under an employee benefit plan).

Any payment made under federal WARN satisfies payment under Delaware WARN. Payments for failure to provide advance notice of a triggering event will not be construed as wages. Unemployment insurance benefits may not be denied or reduced because of the receipt of payments related to a violation of Delaware WARN or of federal WARN.[475] Employers may also be subject to a civil penalty of the greater of $1,000 per day of violation or $100 per day of violation per dislocated worker.[476] Liability and penalties may be reduced at the discretion of the Secretary of the Delaware Department of Labor under certain conditions.[477]

4.1(c) *State Mass Layoff Notification Requirements*

Under Delaware unemployment insurance law, employers conducting a mass temporary layoff of 100or more employees must submit a report to the Division of Unemployment Insurance "as soon as possible but not later than seven (7) days prior to the last day of work" for the affected group.[478]

Temporary mass layoff is defined as a "temporary layoff by an employer because of lack of work of 100or more employees at or about the same time for a period not exceeding 45consecutive calendar days

[472] DEL. CODE ANN. tit.19, § 1905.

[473] DEL. CODE ANN. tit.19, § 1905.

[474] DEL. CODE ANN. tit.19, § 1904.

[475] DEL. CODE ANN. tit.19, § 1909.

[476] DEL. CODE ANN. tit.19, § 1910.

[477] DEL. CODE ANN. tit.19, §§ 1909, 1910.

[478] 19-1000-1202 DEL. ADMIN. CODE § 9.2.

following the last day of work or 63consecutive calendar days following the last day of work for 100 or more employees temporarily laid off for a model change or retooling."[479]

The employer's report to the Division of Unemployment Insurance must include:

- the last day of work;
- the reason for the layoff;
- the scheduled date for the affected employees' return to work; and
- when practical, the names and Social Security numbers of affected employees.[480]

If the department finds that the layoff constitutes a temporary mass layoff within the meaning of the statute, employees are then eligible to seek benefits. In that event, employers must post conspicuous notice, furnished by the department (UC-101-T, "Notice of Temporary Mass Layoff"), instructing employees how to seek benefits during the layoff period.[481] This form should not be issued to employees who are on scheduled paid vacation or on leave for illness or disability at the time the layoff commences. In that event, employers must issue the notices only after the period of leave or paid vacation ends.[482]

Anyone who willfully violates the temporary mass layoff notification requirements may be fined (no less than $23 and no more than $230, per day the violation continues) or imprisoned not more than 60 days, or both.[483]

4.2 Documentation to Provide When Employment Ends

4.2(a) *Federal Guidelines on Documentation at End of Employment*

Table 10 lists the documents that must be provided when employment ends under federal law.

Table 10. Federal Documents to Provide at End of Employment

Category	Notes
Health Benefits: Consolidated Omnibus Budget Reconciliation Act (COBRA)	Under COBRA, the administrator of a covered group health plan must provide written notice to each covered employee and spouse of the covered employee (if any) of the right to continuation coverage provided under the plan.[484] 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

[479] 19-1000-1202 DEL. ADMIN. CODE § 9.1.

[480] 19-1000-1202 DEL. ADMIN. CODE § 9.2.

[481] 19-1000-1202 DEL. ADMIN. CODE § 9.3.

[482] 19-1000-1202 DEL. ADMIN. CODE § 9.3.

[483] DEL. CODE ANN. tit.19, § 3383.

[484] 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.

Table 10. Federal Documents to Provide at End of Employment	
Category	**Notes**
	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.[485]

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.	The employer of a covered employee under a group policy must notify the administrator or its designee, the covered employee, and the insurer, of a qualifying event within 30 days of the qualifying event. Notice to covered employees must inform them of their rights to continuation coverage.[486]
Unemployment Notice	An employer must deliver to each employee separated from its employ (permanently, for an indefinite period or for an expected duration of seven days or more) at the time of such separation, or, if in person delivery is impossible or impracticable, shall mail to such employee's last known address, within 24 hours, a copy of Form UC-300, which instructs the former employee on how to file a claim for unemployment benefits and how to contact the Delaware Division of Unemployment Insurance with questions about unemployment benefits.[487] Employers must also post and maintain summaries of the unemployment regulations (Form UC-6), in places readily accessible to employees and must make available to an employee—at the time the

[485] 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.

[486] DEL. CODE ANN. tit.18, § 3571F(4).

[487] 19 DE ADMIN. CODE 1202-5.0.

Table 11. State Documents to Provide at End of Employment	
Category	**Notes**
	individual becomes unemployed—a printed statement of the regulations.[488] **Multistate Workers.** Delaware 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*

Service Letter Obligations. Delaware requires employers hiring for certain positions in health care facilities or childcare facilities to obtain service letters from the applicant's previous employers. An employer that receives a written request must provide a service letter within 10 days from the date the request is received.[489]

Job Reference Immunity. Delaware law provides that an employer or any person employed by the employer that discloses information about a current or former employee's job performance to a prospective employer is presumed to be acting in good faith. Unless a lack of good faith is shown, the employer is immune from civil liability for such disclosure or its consequences. The presumption of good faith may be rebutted upon a showing that the information disclosed was knowingly false, was deliberately misleading, or was rendered with malicious purpose. Immunity is also waived if the disclosure is in violation of a nondisclosure agreement, or was otherwise confidential according to applicable federal, state, or local statute, rule, or regulation.[490]

Information within the meaning of this provision includes:

1. information about an employee's or former employee's job performance or work-related characteristics;
2. any act committed by such employee which would constitute a violation of federal, state or local law; or

[488] DEL. CODE ANN. tit.19, § 3317. More information about the unemployment insurance system in Delaware is available at https://laborfiles.delaware.gov/main/dui/handbook/UI%20Employer%20Handbook.pdf (Unemployment Insurance Employer Handbook).

[489] DEL. CODE ANN. tit.19, § 708.

[490] DEL. CODE ANN. tit.19, § 709(a).

3. an evaluation of the ability or lack of ability of such employee . . . to accomplish or comply with the duties or standards of the position.[491]

[491] DEL. CODE ANN. tit.19, § 709(b).