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STATE

Littler on

District of Columbia 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 District of Columbia 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.

ACKNOWLEDGEMENTS

Erin M. Reid-Eriksen, Susie Papreck Wine, and Deanne Meyer would like to gratefully acknowledge the contributions of the attorneys who make this publication possible:

- Geetika Antani;
- Vincent Bates;
- Sebastian Chilco;
- Brittney Gibson;
- Maureen H. Lavery;
- Christine McDaniel Novak;
- Lilanthi Ravishankar;
- Rachel Simek;
- Mike Skidgel;
- Hannah Stilley; and
- Christine Sellers Sullivan.

Additional research and editing assistance was also rendered by Barb Olson.

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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) *District Guidelines on Classifying Workers*

In the District of Columbia, 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 District law (see Table 1).

The Workplace Fraud Amendment Act. While there is no statute on independent contractor status applicable to all industries, the District of Columbia has a statute concerning employee classification in the construction services industry, the Workplace Fraud Amendment Act ("Workplace Act").[5] Specifically, the Workplace Act presumes an employer-employee relationship exists, unless an employer demonstrates the worker is an exempt person or an independent contractor.[6] A worker is an independent contractor if the following criteria are met:

> (A) The individual who performs the work is free from control and direction over the performance of services, subject only to the right of the person or entity for whom services are provided to specify the desired result; (B) The individual is customarily engaged in an independently established trade, occupation, profession, or business; and (C) The work is outside of the usual course of business of the employer for whom the work is performed.[7]

Employers are required to maintain records of the following for at least three years: names, addresses, occupations, and classifications of employees, exempt persons, or independent contractors; each individual's pay rate and method of payment; each individual's classification (*i.e.*, employee, exempt, independent contractor); amount paid to each individual; hours worked by each individual per day and work week; and, for individuals not classified as employees, evidence they were exempt or independent contractors (or employees thereof).[8] Moreover, employers must provide a written notice to each individual who is hired as either exempt or as an independent contractor. The notice must contain: (1)

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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.3d 103, 105 (8th Cir. 1994). Because the hybrid test focuses on traditional agency notions of control, as a general rule, it results in a narrower definition of employee than under a pure economic realities test. *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 347 (5th Cir. 2008).

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

[5] D.C. CODE §§ 32-1331.01 *et seq*.

[6] D.C. CODE § 32-1331.04.

[7] D.C. CODE § 32-1331.04(c).

[8] D.C. CODE § 32-1331.12.

their classification at the time of hiring, as either exempt or independent contractor; (2) an explanation of the implications of the classification as either an independent contractor or exempt person, versus an employee; and (3) the D.C. mayor's contact information.[9]

Finally, the Workplace Act imposes penalties for violations, as well as a possible stop-work order and requirement to pay restitution.[10]

Table 1. District Tests for Classifying Workers

Purpose of Determining Employee Status	District Agency	Test to Apply
Fair Employment Practices Laws	D.C. Office of Human Rights	Courts have applied the "right to control" test in the discrimination context.[11]
Income Taxes	D.C. Office of Tax and Revenue	*Employer* is defined in the D.C. income and franchise tax law as that term is defined in the Internal Revenue Code.[12] There is no case law identifying a test for independent contractor status in this context.
Wage & Hour Laws	D.C. Department of Employment Services (DOES), Office of Wage-Hour Compliance	"Economic realities" test under the Fair Labor Standards Act.[13]

[9] D.C. CODE § 32-1331.12(b).

[10] D.C. CODE § 32-1331.07.

[11] *See Adams v. Hitt Contracting, Inc*., 2005 WL 1903547, at *4 (D.D.C. July 11, 2005) ("Courts have determined that an independent contractor is an "employee" only if the employer retains the right to control and direct the day-to-day activities of the employee.") (citation omitted); *see also Safeway Stores, Inc. v. Kelly*, 448 A.2d 856, 860 (D.C. 1982) (In determining whether a "master-servant" relationship exists, the crucial question "is whether the employer has the *right to control and direct the servant in the performance of his work and the manner in which the work is to be done*.") (emphasis in original) (citations omitted).

[12] D.C. CODE § 47-1801.04(18); D.C. MUN. REGS. tit. 9, § 130.1.

[13] There is no statutory definition of independent contractor in the wage and hour laws. The District's Court of Appeals (the equivalent of a state supreme court), observed, "We have not established a WPCL-specific test for distinguishing employees from independent contractors, but because of the similarity between the employer-liability provisions of the WPCL and those of the federal Fair Labor Standards Act (the 'FLSA'), our sister federal courts have looked to the FLSA test for 'employee' status to assist in such a determination under the WPCL." *Steinke v. P5 Sols., Inc.*, 282 A.3d 1076 (D.C. 2022). Similarly,, the U.S. District Court for the District of Columbia has held that "determinations of employer or employee status under the FLSA apply equally under the District of Columbia wage laws." *Thompson v. Linda & A., Inc.*, 779 F. Supp. 2d 139, 146 (D.D.C. 2011). Accordingly, the court in *Thompson* applied the "economic realities" test used to assess employee status under the FLSA. 779 F. Supp. 2d at 147-51.

Table 1. District Tests for Classifying Workers		
Purpose of Determining Employee Status	**District Agency**	**Test to Apply**
Unemployment	DOES, Unemployment Compensation Program	The unemployment statute defines *employment*, in pertinent part, as service performed by: "[a]ny individual who, under the *usual common-law rules* applicable in determining the employer-employee relationship, has the status of an employee."[14] In applying common-law rules to determine whether an employer-employee relationship exists, courts consider the following factors: "(1) the selection and engagement of the individual hired, (2) the payment of wages, (3) the power of the one who hires over the other whom he has hired, and (4) whether the service performed by the person hired is a part of the regular business of the one who hired."[15]
Workers' Compensation	DOES, Office of Workers' Compensation	The "relative nature of the work" test. This test has two parts.

[14] D.C. CODE § 51-101(2)(A)(i)(II) (emphasis added).

[15] *Spackman v. District of Columbia Dep't of Emp't Servs.*, 590 A.2d 515, 516 (D.C. 1991); *see also Hickey v. Bomers*, 28 A.3d 1119, 1123 (D.C. 2011) (noting that no single factor is controlling, but that a crucial consideration is whether the employer has the *right* to control and direct the individual as to the performance and manner of work, not the actual exercise of the control). The burden is on an alleged employer to prove a worker is an independent contractor rather than an employee. *Caison v. Project Support Servs.*, 99 A.3d 243, 250 (D.C. 2014). DOES provides the following additional guidance on its website:

- The ordinary rules of common law relative to "master and servant" apply in defining employers and employees. In determining who is an employee and who is an independent contractor, the Department of Employment Services considers the following:
- Who has the right to supervise regarding the means by which the intermediate work should be done?
- What is the method of compensation?
- Is the individual providing service engaged in an independent trade, occupation, profession or business?

D.C. Dep't of Emp't Servs., Unemployment Compensation: Liability Questions, Are independent contractors covered under District of Columbia unemployment insurance law?, available at https://does.dc.gov/service/liability-questions.

Table 1. District Tests for Classifying Workers		
Purpose of Determining Employee Status	**District Agency**	**Test to Apply**
		The first part of the test examines the nature and character of the claimant's work or business and considers the following factors: 1. the degree of skill involved; 2. the degree to which it is a separate calling or business; and 3. the extent to which it can be expected to carry its own accident burden. The second part focuses on the relationship of the claimant's work to the alleged employer's business and considers the following factors: 1. the extent to which claimant's work is a regular part of the employer's regular work; 2. whether the work is continuous or intermittent; and 3. whether the duration of the work is sufficient to amount to the hiring of continuing services, as distinguished from contracting for the completion of a particular job.[16]
Workplace Safety	Not applicable	There are no relevant statutory definitions or case law identifying a test for independent contractor status in this context. The District of Columbia does not have an approved state plan under the federal Occupational Safety and Health Act.

[16] *Gross v. District of Columbia Dep't of Emp't Servs.*, 826 A.2d 393, 396 (D.C. 2003). Additionally, the workers' compensation law defines *employer* as "every person, including a minor, in the service of another under any contract of hire or apprenticeship, written or implied, in the District of Columbia." D.C. CODE § 32-1501(9). In *Gross*, the D.C. Court of Appeals emphasized that only after determining if an express or implied contract of hire is present per the statute, should a determination be made as to whether that contract creates an independent contractor or an employer-employee relationship by applying the relative nature of the work test. 826 A.2d at 396.

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.[17]

Federal legislative attempts to address illegal immigration have been largely unsuccessful, leading some states to enact their own immigration initiatives. Whether states have the constitutional power to enact immigration-related laws or burden interstate commerce with requirements in addition to those imposed by IRCA largely depends on how a state law intends to use an individual's immigration status. Accordingly, state and local immigration laws have faced legal challenges.[18] 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.[19]

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

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

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

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[17] 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.

[18] *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).

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

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").[20] While there is uncertainty about the level of deference courts will afford the EEOC's guidance, employers should consider the EEOC's guidance related to arrest and conviction records when designing screening policies and practices. The EEOC provides employers with its view of "best practices" for implementing arrest or conviction screening policies in its guidance. In general, the EEOC's positions are:

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

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

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

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

The District of Columbia has a "ban-the-box" law, the Fair Criminal Record Screening Amendment Act ("Fair Screening Act"), which restricts private employers operating in the District of Columbia in their ability to rely on criminal history information, including criminal background information, for employment purposes.[21] Covered employers with more than 10 employees in the District of Columbia are prohibited from inquiring about or requiring an applicant to disclose or reveal: (1) an arrest; or (2) a criminal accusation made against an applicant that is not pending against the applicant or which did not result in a conviction.[22]

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[20] 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.

[21] D.C. CODE §§ 32-1341 *et seq*.

[22] D.C. CODE §§ 32-1341(6), 32-1342.

The law defines an *inquiry* as "any direct or indirect conduct intended to gather criminal history information from or about the applicant, candidate or employee, using any method, including application forms, interviews, and criminal history checks."[23]

Exceptions. The prohibitions against inquiring into an applicant's criminal history do not apply:

- where any federal or D.C. law or regulation requires consideration of an applicant's criminal history for purposes of employment;
- to any job position designated by the employer as part of a federal or D.C. government program designed to increase employment opportunities for those with criminal histories; or
- to any facility or employer that provides programs, services, or direct care to minors or vulnerable adults.[24]

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

Under the Fair Screening Act, employers are prohibited from inquiring about or requiring an applicant to disclose or reveal a criminal conviction until *after* making a conditional offer of employment.[25] Once made, the conditional offer can only be withdrawn or adverse action taken against the applicant, if the employer has a legitimate business reason for doing so.[26] The employer's determination of a legitimate business reason must be reasonable in light of the following six factors:

1. the specific duties and responsibilities necessarily related to the employment sought or held by the applicant;
2. the bearing, if any, of the criminal offense for which the applicant was previously convicted will have on their fitness or ability to perform one or more such duties or responsibilities;
3. the time elapsed since the offense occurred;
4. the age of the applicant at the time of the offense;
5. the frequency and seriousness of the offense; and
6. any information produced by the applicant, or produced on the applicant's behalf, regarding their rehabilitation and good conduct since the offense occurred.[27]

If an applicant believes that the employer withdrew a conditional offer or took other adverse action on the basis of a criminal conviction, the applicant may request, within 30 days of the withdrawal or adverse action, that the employer provide the applicant with: (1) a copy of all documents and records, including criminal records, procured by the employer during its consideration of the applicant for the job position; and (2) a notice advising the applicant of the applicant's right to file an administrative complaint with the D.C. Office of Human Rights.[28]

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[23] D.C. CODE § 32-1341(8).

[24] D.C. CODE § 32-1342(c).

[25] D.C. CODE § 32-1342(b).

[26] D.C. CODE § 32-1342(d).

[27] D.C. CODE § 32-1342(d).

[28] D.C. CODE § 32-1342(e).

Exceptions. The exceptions set forth in **1.3(a)(ii)** also cover conviction records.

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

In the District of Columbia, a person arrested for or charged with the commission of a criminal offense pursuant to the D.C. Official Code or the D.C. Municipal Regulations whose prosecution has been terminated without conviction may file a motion with the clerk at any time to seal all of the records of the arrest and related court proceedings on grounds of actual innocence. No person who has successfully petitioned to have criminal records sealed on the grounds of actual innocence may be found guilty of perjury or otherwise giving a false statement by reason of a failure to recite or acknowledge their arrest, charge, or trial in response to any inquiry made of them for any purpose.[29]

Likewise, a person arrested for or charged with the commission of an eligible misdemeanor whose prosecution has been terminated without conviction may file a motion to seal the publicly-available records of the arrest and related court proceedings if it has been at least two years since the termination of the case and the individual does not have a disqualifying arrest or conviction.[30] Under these circumstances, no person may be found guilty of perjury or otherwise giving a false statement by reason of failure to recite or acknowledge their arrest, charge, trial, or conviction in response to any inquiry made of him/her, except that the sealing of the records does not relieve a person of the obligation to disclose the sealed arrest or conviction in response to any direct question contained in any questionnaire or application for a position with certain statutorily-defined persons, agencies, organizations, or entities.[31]

Exceptions. Certain employers (some public employers, schools and childcare facilities, and professional licensing boards) may use sealed records to make employment decisions.[32] This does not include records sealed on the grounds of actual innocence.[33]

1.3(a)(v) *District Enforcement, Remedies & Penalties*

Under the Fair Screening Act, an applicant may file an administrative complaint with the D.C. Office of Human Rights. The Commissioner of Human Rights may impose fines based on the employer's size, half of which will be awarded to the complainant. The law does not afford a private right of action, however.[34]

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[35] governs an employer's acquisition and use of virtually any type of information gathered by a "consumer reporting agency"[36] regarding job applicants for use in

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[29] D.C. CODE § 16-802.

[30] D.C. CODE § 16-803.

[31] D.C. CODE §§ 16-803(m), 16-801(11) (listing the statutorily defined persons, agencies, organizations, and entities).

[32] D.C. CODE § 16-806(b)(4).

[33] D.C. CODE § 16-806(a).

[34] D.C. CODE §§ 32-1343, 32-1344.

[35] 15 U.S.C. §§ 1681 *et seq*.

[36] 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,

hiring decisions or regarding employees for use in decisions concerning retention, promotion, or termination. Preemployment reports created by a consumer reporting agency (such as credit reports, criminal record reports, and department of motor vehicle reports) are subject to the FCRA, along with any other consumer report used for employment purposes.

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

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

Discrimination Concerns. While federal law does not prevent employers from asking about financial information provided they follow the FCRA, as noted above, federal antidiscrimination law prohibits employers from applying a financial requirement differently based on an individual's protected status—*e.g.*, race, national origin, religion, sex, disability, age, or genetic information. The EEOC also cautions that an employer must not have a financial requirement "if it *does not help the employer to accurately identify* responsible and reliable employees, and if, at the same time, the requirement significantly disadvantages people of a particular [protected category]."[37]

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

The District of Columbia prohibits, with limited exceptions, an employer's request for and use of a job applicant's or employee's credit information for employment purposes. The Fair Credit in Employment Act amended the D.C. Human Rights Act of 1977 to make it unlawful for an employer to "directly or indirectly require, request, suggest, or cause any employee to submit credit information, or use, accept, refer to, or inquire into an employee's credit information."[38] Further, employers, employment agencies, and labor organizations are prohibited from taking discriminatory action against prospective and current employees based on that prospective or current employee's credit information. Note that the statutory definition of employee in D.C. Human Rights Act includes unpaid interns.[39]

Under the Fair Credit in Employment Act, credit information is defined as "any written, oral, or other communication of information bearing on an employee's creditworthiness, credit standing, credit

character, general reputation, personal characteristics or mode of living" that is used for employment purposes. 15 U.S.C. § 1681a(d).

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

[38] D.C. CODE § 2-1402.11.

[39] D.C. CODE § 2-1401.02(9).

capacity, or credit history."[40] *Inquire* is defined as "any direct or indirect conduct intended to gather credit information *using any method, including application forms, interviews, and credit history checks*."[41]

Exceptions. Few exceptions apply to private employers. Generally, the prohibitions do not apply:

- where an employer is otherwise required by District law to require, request, suggest, or cause any employee to submit credit information, or use, accept, refer to, or inquire into an employee's credit information;
- where the individual is applying for certain law enforcement positions;
- to the Office of the Chief Financial Officer of the District;
- where the individual will work in a position that requires possession of a security clearance under District law;
- to disclosures by District government employees of their credit information to the Board of Ethics and Government Accountability or the Office of the Inspector General, or to the use of such disclosures by those agencies;
- to financial institutions where the position will involve access to personal financial information; and
- where an employer requests or receives credit information pursuant to a lawful subpoena, court order, or law enforcement investigation.[42]

1.3(b)(iii) *District Enforcement, Remedies & Penalties*

The D.C. Office of Human Rights will enforce the Fair Credit in Employment Act, and employers that violate the provisions will face civil penalties of $1,000 for the first offense, $2,500 for the second violation, and $5,000 for each subsequent violation.[43] The law is unclear, however, as to whether an aggrieved applicant or employee can pursue a private right of action against a covered employer.

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

[40] D.C. CODE § 2-1402.11.

[41] D.C. CODE § 2-1402.11(e).

[42] D.C. CODE § 2-1402.11.

[43] D.C. CODE § 2-1403.13.

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) *District Guidelines on Access to Applicants' Social Media Accounts*

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

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

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

The federal Employee Polygraph Protection Act (EPPA) imposes severe restrictions on using lie detector tests.[44] 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) *District Guidelines on Polygraph Examinations*

In the District of Columbia, employers are prohibited from administering, accepting, or using the results of a lie detector test in connection with the employment, application, or consideration of an individual. Further, employers cannot administer a lie detector test to any employee inside the District of Columbia,

[44] 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.

including during any hiring procedure, to any person whose employment, as contemplated at the time of administration of the test, would take place in whole or in part in District of Columbia.[45] A contract or arbitration decision cannot contain any provision that violates these prohibitions.[46]

Lie detector test "means any polygraph, lie detector, or other test which by any mechanical, electrical, chemical, or physiological means attempts to determine whether a person is telling the truth, or the truth to the best of the person's knowledge."[47]

Exceptions. These prohibitions do not apply to any criminal or internal disciplinary investigations.[48] Moreover, the law does not apply to agencies or authorities of the federal government, employees of any foreign government, or employees of certain international organizations, nor to certain investigations conducted by the D.C. Metropolitan Police, Fire Department, or Department of Corrections.[49]

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

Violation of the prohibition on polygraph examinations constitutes an unwarranted invasion of privacy in the District of Columbia. A court can award civil damages, plus reasonable attorneys' fees. Additionally, a violation is a misdemeanor, punishable by a fine, imprisonment, or both.[50]

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.[51] 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.[52] 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.

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[45] D.C. CODE § 32-902.

[46] D.C. CODE § 32-903(b).

[47] D.C. CODE § 32-901(4).

[48] D.C. CODE § 32-902(b).

[49] D.C. CODE §§ 32-901(1)-(2), 32-902(b).

[50] D.C. CODE § 32-903.

[51] 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.

[52] 41 U.S.C. §§ 8101 *et seq*.; *see also* 48 C.F.R. §§ 23.500 *et seq*.

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

Generally, D.C. law contains no express provisions regarding drug testing of applicants or employees by private-sector employers. However, the District of Columbia regulates marijuana testing of prospective employees. An employer may only test a prospective employee for marijuana use after a conditional offer of employment has been extended, unless otherwise required by law.[53] For more information about marijuana guidelines, see 3.2(c)(ii).

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

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

The District amended its pay discrimination provisions to limit the information available to an employer regarding a job applicant's pay history.[54] Beginning in July 2024, an employer is prohibited from:

- screening applicants based on their wage history, including by requiring that an applicant's wage history satisfy minimum or maximum criteria;
- requesting or requiring as a condition of being interviewed, or as a condition of continuing to be considered for an offer of employment, that an applicant disclose their wage history; or
- seeking an applicant's wage history from a previous employer.[55]

Wage history means information related to compensation an employee has received from other or previous employment.[56]

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

[53] D.C. CODE § 32-931(a).

[54] D.C. B25-0194 (2024).

[55] D.C. CODE § 32-1452.

[56] D.C. CODE § 32-1451.

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	36B of the Internal Revenue Code of 1986[57] and a cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act[58] if the employee purchases a qualified health plan through the exchange; and • that if the employee purchases a qualified health plan through the exchange, the employee may lose the employer contribution (if any) to any health benefits plan offered by the employer and that all or a portion of such contribution may be excludable from income for federal income tax purposes.[59] 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.[60]
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.[61] 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.[62]
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

[57] 26 U.S.C. § 36B.

[58] 42 U.S.C. § 18071.

[59] 29 U.S.C. § 218b.

[60] 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.

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

[62] 29 C.F.R. § 2590.606-1.

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	general notice to each new employee upon hiring.[63] In either case, distribution may be accomplished electronically. Employers may use a format other than the FMLA poster as a model notice, if the information provided includes, at a minimum, all of the information contained in that poster.[64] 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.[65]
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.[66] 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.[67]
Uniformed Services Employment and Reemployment Rights	Employers must provide to persons covered under USERRA a notice of employee and employer rights, benefits, and obligations. Employers

[63] 29 C.F.R. § 825.300(a).

[64] 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.

[65] 29 C.F.R. § 825.300(a).

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

[67] 26 C.F.R. § 31.3402(f)(2)-1. The IRS provides this form at https://www.irs.gov/pub/irs-pdf/fw4.pdf.

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
Act (USERRA) Documents	may meet the notice requirement by posting notice where employers customarily place notices for employees.[68]
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.[69]

2.1(b) *District Guidelines on Hire Documentation*

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

Table 3. District Documents to Provide at Hire	
Category	**Notes**
Benefits & Leave Documents: DC FMLA	The District of Columbia has enacted a Family and Medical Leave Act (D.C. FMLA), and covered employers (those with 20 or more employees) are obligated to give written and verbal notice to employees, summarizing the law, and to answer employee questions.[70] If an employer does not maintain a handbook or manual, it must disclose information about the D.C. FMLA to new employees another way, *i.e.*, by handout or email.[71] Employers must provide accommodation, set forth in the law, to employees with limited English proficiency to ensure they understand notice concerning the D.C. FMLA.[72]
Benefits & Leave Documents: Universal Paid Leave, Paid Family Leave	Each covered employer must provide a notice to covered employees at the time of hiring and annually thereafter. As well, when an employer receives direct notice of an employee's need for leave for an event that could qualify for paid family leave benefits, the employer must provide the notice to the employee. A covered employer must also post and maintain the notice in English and in all languages in which the notice has been published. The notice explains:

[68] 38 U.S.C. § 4334. This notice is available at https://www.dol.gov/sites/dolgov/files/VETS/legacy/files/USERRA_Private.pdf.

[69] 29 C.F.R. § 531.59.

[70] D.C. CODE §§ 32-501 *et seq.*; D.C. MUN. REGS. tit. 4, § 1613.

[71] D.C. MUN. REGS. tit. 4, § 1613.2. This notice is available at https://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/DCFMLA_Poster_March2016.pdf.

[72] D.C. MUN. REGS. tit. 4, § 1613.8; *see* D.C. CODE §§ 2-1931 *et seq*.

Table 3. District Documents to Provide at Hire	
Category	**Notes**
	• an employee's right to paid leave benefits under the Act and the terms under which such leave may be used; • that retaliation is prohibited with regard to an employee requesting, applying for, or using paid leave benefits is prohibited; • that an employee who works for a covered employer with under 20employees will not be entitled to job protection if he or she takes paid leave under the Act; and, • that the covered employee has a right to file a complaint and the procedures established by the Mayor for filing a complaint. A *covered employer* means any individual, partnership, general contractor, subcontractor, association, corporation, business trust, or any group of persons who directly or indirectly or through an agent or any other person, including through the services of a temporary services or staffing agency or similar entity, employs or exercises control over the wages, hours, or working conditions of an employee and is required to pay unemployment insurance on behalf of its employees pursuant to the District of Columbia Unemployment Compensation Act. "Covered employer" does not include the United States, the District of Columbia, or any employer that the District of Columbia is not authorized to tax under federal law or treaty. A *covered employee* means an employee of a covered employer: who spends more than 50% of his or her work time for that employer working in the District of Columbia; or, whose employment for the covered employer is based in the District of Columbia and who regularly spends a substantial amount of his or her work time for that covered employer in the District of Columbia and not more than 50% of his or her work time for that covered employer in another jurisdiction.[73]
Fair Employment Practices Documents: Pregnant Workers	All employers must give notice to new employees, in English and Spanish, about the Protecting Pregnant Workers Fairness Act. The notice summaries an employee's right to a needed reasonable accommodation related to pregnancy, childbirth, related medical conditions, or breast feeding under the law.[74]

[73] D.C. CODE § 32-541.06. The notice is available online from the D.C. Department of Employment Services at https://dcpaidfamilyleave.dc.gov/download/2024-employee-worksite-notice/.

[74] D.C. CODE § 32-1231.04. Notices in English and Spanish are available at https://ohr.dc.gov/page/pregnantworkers.

Table 3. District Documents to Provide at Hire	
Category	**Notes**
Fair Employment Practices Documents: Tipped Wage Workers Fairness Act	Employers with tipped employees must create and implement a written sexual harassment prevention policy, and distribute it as follows: (1) provide a copy of the policy to employees; (2) post a copy of the policy in a conspicuous location accessible to all employees; and (3) file a copy of the policy with the DC Office of Human Rights (OHR). The policy must outline how employees may report an incident of harassment to the employer and to the OHR.[75]
Prohibition of Non-Compete Agreements	Employers that have a policy that includes an exception to the law's definition of a non-compete provision must provide a written copy of the provisions to an employee within 30 days after the employee accepts employment and any time the policy changes. There are additional notice requirements for highly-compensated employees.[76]
Tax Documents	All employees must, prior to commencement of employment, furnish their employers with a signed withholding exemption certificate for tax purposes.[77]
Wage & Hour Documents: General	Pursuant to the D.C. Wage Theft Prevention Amendment Act, all employers (except the United States or the District of Columbia) must provide written notice ("Notice of Hire") to each employee at the time of hiring, with the following information: • employer's name and any "doing business as" names the employer uses; • physical address of the employer's main office or principal place of business, and mailing address, if different; • employer's telephone number; • employee's pay rate and basis thereof, including: ▪ by the hour, shift, day, week; ▪ salary, piece, commission; ▪ any allowances claimed as part of the minimum wage, including tip, meal, or lodging allowances; ▪ overtime pay rate or exemptions from overtime pay; ▪ living wage or exemptions from the living wage; and ▪ applicable prevailing wages. • employee's regular payday designated by the employer; • the employer's tip-sharing policy, including: ▪ if tips are not shared, that the tipped employee will retain all tips received; ▪ if tips are shared, the employer's tip-sharing policy; and,

[75] D.C. CODE § 2-1411.05a.

[76] D.C. CODE § 32-581.03a.

[77] D.C. CODE § 47-1812.08. Withholding forms, including D.C. Form D-4, are available at https://otr.cfo.dc.gov/node/398382.

Table 3. District Documents to Provide at Hire	
Category	**Notes**
	▪ the percentage by which tips paid via credit card will be reduced by credit card fees; and, • any other information the mayor considers material and necessary.[78] Notice must be provided in English as well as in any other language that the employer knows is the employee's primary language, if the D.C. labor agency has provided a model notice in that language. Model notices are currently available in English and Spanish.[79]
Wage & Hour Documents: Tipped Employees	A tip credit may only be taken if an employer informs employees of: (1) the minimum tipped wage; (2) if tips are not shared, that the tipped employee will retain all tips received; (3) if tips are shared, the employer's tip-sharing policy; and, (4) the percentage by which tips paid via credit card will be reduced by credit card fees. These provisions must be included in the Wage Theft Prevention Act notice, as set forth above. Additionally, if an employer uses tip sharing, the employer must post the tip-sharing policy.[80]
Workplace Safety Documents: Cannabis Employment Protections Amendment Act of 2022 Notice	Enacted on July 13, 2022 and expected to take effect following approval by the Mayor, a 60-day period of Congressional review, and publication in the DC Register, under this Act, employers must provide employees with a notice of rights under the Act along with the protocols for any testing for alcohol or drugs that the employer performs. An employer must also notify an employee if the employer has designated the employee's position as safety sensitive. The notice must be provided upon hire to new employees. [81]
Workplace Safety Documents: Smoking Policy	Generally speaking, all places of employment and public places, including restaurants and nightclubs, must be smoke free under

[78] D.C. CODE § 32-1008.

[79] Template notices as well as other resources are available at https://does.dc.gov/page/office-wage-hour-employers. The template *Notice for Hire* is available in English at https://does.dc.gov/sites/default/files/dc/sites/does/publication/attachments/2021%20Notice%20of%20Hire-English_OWH%20.pdf and in Spanish at https://does.dc.gov/sites/default/files/dc/sites/does/page_content/attachments/Notice%20Hire-SP%20Final%20REVISED%202018.pdf. Employers may ask the agency for templates in additional languages.

[80] D.C. CODE § 32-1003(g); D.C. MUN. REGS. tit. 7, § 903.1.

[81] B. 109. The Office of Human Rights ("OHR") is expected to publish a sample notice within 45 days of the effective date.

Table 3. District Documents to Provide at Hire	
Category	**Notes**
	D.C. law.[82] Employers must adopt policies consistent with D.C. law and notify new employees, both orally and in writing, of the workplace smoking policy.[83]

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.[84] 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).[85]

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

[82] D.C. CODE § 7-741.02.

[83] D.C. MUN. REGS tit. 20, § 2101; *see* D.C. CODE § 7-1703.02.

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

[85] 42 U.S.C. § 653a.

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;
- 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.[86] 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) *District Guidelines on New Hire Reporting*

The following is a summary of the key elements of the District of Columbia's new hire reporting law.

Who Must Be Reported. All employees for which any employer is required to complete a new federal Form W-4 must be reported.[87]

Report Timeframe. All new hires must be reported within 20 days of hiring. If reporting is submitted magnetically or electronically, the reports can be submitted twice per month, not less than 12 days or more than 16 days apart.[88]

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

[87] D.C. CODE § 46-226.06(l)(3).

[88] D.C. CODE § 46-226.06(b), (e).

Information Required. The report must contain the employee's name, address, Social Security number, and start date, as well as, the employer's name, address, and federal employer identification number.[89]

Form & Submission of Report. Employers may submit the employee's federal Form W-4 or an equivalent form by first-class mail, magnetically, or electronically.[90]

Location to Send Information.

District of Columbia
Directory of New Hire Registry
P.O. Box 366
Holbrook, MA 02343
(877) 846-9523
(877) 892-6388 (fax)
https://dc-newhire.com/

Multistate Employers. An employer that has employees in the District and in at least one other state and transmits reports magnetically or electronically may comply with this section by designating either the District of Columbia or a state in which the employer has employees and transmitting reports on new hires only to the District of Columbia or that state. Any employer transmitting reports pursuant to this subsection shall provide the federal HHS with written notice of the jurisdiction the employer has designated.[91]

2.3 Restrictive Covenants, Trade Secrets & Protection of Business Information

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

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

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

Protections against trade secret misappropriation are also available to employers. Until 2016, trade secrets were the only form of intellectual property (*i.e.*, copyrights, patents, trademarks) not

[89] D.C. CODE § 46-226.06(b).

[90] D.C. CODE § 46-226.06(d)(1), (2).

[91] D.C. CODE § 46-226.06(g).

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.[92] As such, the DTSA provides trade secret owners a uniform federal law under which to pursue such claims. The DTSA operates alongside more limited existing protections under the federal Economic Espionage Act of 1996 and the Computer Fraud and Abuse Act, as well as through state laws adopting the Uniform Trade Secrets Act (UTSA).

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

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

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

On October 1, 2022, Non-Compete Clarification Act of 2022 became enforceable. The Amendment Act prohibits non-competition agreements with employees:

- who are not "highly compensated"; and
- who spend more than 50% of their work time for employers working in the district or whose employment is based in the District and the employee regularly spends a substantial amount of their work time for the employer in the District and not more than 50% of their work time in another jurisdiction.

A "highly compensated employee" is someone, other than a broadcast employee, who is reasonably expected to earn or has earned in the preceding 12 month more than the "minimum qualifying annual compensation" of $154,650 or, if the employee is a medical specialist, $257,750. These amounts are set to change beginning January 1, 2025, based on increases in the Consumer Price Index for All Urban Consumers in the Washington Metropolitan Statistical Area.

In order to enter into an enforceable noncompete agreement with a highly-compensated employee, the agreement must:

- specify the "functional scope" of the limitation (identifying what "services, roles, industry, or competing entities" are off-limits);
- specify the restriction's geographic scope; and
- not impose a restriction in excess of 365 days from the date of the employee's separation from employment.

Employers must present the noncompete provision to the highly compensated employee in writing at least 14 days before the person commences employment, or if the person is already employed, at least 14 days before the employee must sign the agreement. Further, an employer must provide a specific notice laid out in the Amendment Act whenever it proposes a non-compete provision to a highly compensated employee.[93]

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[92] 18 U.S.C. §§ 1832 *et seq.*

[93] D.C. CODE §§ 32-581.01 *et seq.*

The District of Columbia has a long-standing statutory prohibition against unreasonable restraint of trade.[94] For agreements entered into prior to October 1, 2022, the statute provides that any contract that is a restraint of trade or commerce within the District of Columbia is illegal. However, courts have found that a covenant not to compete that is ancillary to a valid agreement or transaction is not a *per se* a violation of public policy. Noncompetition agreement may be enforced if:

- the restriction is reasonable as to time and area;
- the restriction is only what is necessary to protect the employer's legitimate business interest; and;
- the agreement does not contravene public policy. The promisee's need for protection must outweigh the promisor's hardship and the likely injury to the public.[95]

To prove the existence of an enforceable covenant not to compete, the employer must show that the restriction is reasonable as to time and area.[96] D.C. courts will consider the following factors:

1. the nature of the business;
2. the character of the service performed by, and the job position held by, the employee in relation to the area in which the former employer seeks to be protected;
3. the existence of bad faith; and
4. whether the employer has a legitimate interest in protecting its business in a particular area.[97]

D.C. courts generally are more willing to enforce agreements with limited time and geographical restrictions. Restrictive covenants also may be drafted to include a customer restriction, in lieu of a geographic restriction.[98]

Enforceability Following Employee Discharge. In the District of Columbia, courts have not directly addressed whether noncompetes entered into prior to October 1, 2022 are enforceable following employee discharge. However, in *Saul v. Thalis*, the District Court for the District of Columbia held that where an employment agreement provides for a fixed term during which the covenant will restrict the employee from engaging in a competing business, the validity of the covenant cannot be questioned while the employee continues to be employed by the employer. However, once the employer-employee relationship ceases, the covenant not to compete cannot legally survive.[99] In *Saul v. Thalis*, it was the employee who severed the relationship with the employee.[100] In *Ellis v. James V. Hurson Associates*, the District of Columbia Court of Appeals held that an employer was entitled to a preliminary injunction to

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[94] D.C. CODE § 28-4502.

[95] *See Deutsch v. Barsky*, 795 A. 2d 669, 674-77 (D.C. 2002); *Ellis v. James V. Hurson Assocs*., 565 A.2d 615 (D.C. 1989) (adopting the RESTATEMENT (SECOND) OF CONTRACTS §§ 186-188); *see also Chemical Fireproofing Corp. v. Krouse*, 155 F.2d 422, 423 (D.C. Cir. 1946).

[96] *National Chemsearch Corp. of N.Y. v. Hanker*, 309 F. Supp. 1278, 1280 (D.D.C. 1970).

[97] *See Deutsch v. Barsky*, 795 A.2d 669, 674-77 (D.C. 2002); *Ellis v. James V. Hurson Assocs*., 565 A.2d 615 (D.C. 1989); *see also Chemical Fireproofing Corp. v. Krouse*, 155 F.2d 422, 423 (D.C. Cir. 1946); *National Chemsearch Corp. of N.Y. v. Hanker*, 309 F. Supp. 1278, 1280 (D.D.C. 1970).

[98] *Ellis v. James V. Hurson Assocs.*, 565 A.2d 615, 620 (D.C. 1989).

[99] 156 F.Supp. 408, 411-13 (D.D.C. 1957).

[100] 156 F.Supp. 408, 411-13 (D.D.C. 1957).

enforce a noncompete that applied whether the employee's employment was terminated for any reason whatsoever, either voluntarily or involuntarily. However, in this case, the employee resigned his position voluntarily so the issue of enforcement against a terminated employee was not actually before the court.[101]

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.

For agreements entered into prior to October 1, 2022, the D.C. courts have held that adequate consideration exists if employment continues for a substantial period of time.[102]

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

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

In 1989, the D.C. Court of Appeals addressed the issue of whether the court could apply only certain sections of an existing covenant or reshape a contract to provide parameters that are reasonable and enforceable (the blue-pencil rule). In *Ellis v. James V. Hurson Associates*, the court rejected the view that restrictive covenants could only be enforced "in whole or not at all."[103] However, the court also declined to decide at that point "whether or not to adopt a 'blue pencil' rule."[104] Despite the court's ambiguous ruling, it held in that case that the trial court had committed no abuse of discretion by entering a preliminary injunction that did not enforce the entire covenant.

Similarly, at least one court in the District of Columbia has allowed judicial rewriting when a geographic restriction was considered too broad. In *Burton, Parsons & Co. v. Parsons*, the U.S. District Court for the

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[101] 565 A.2d 615 (D.C. 1989).

[102] *Ellis v. James V. Hurson Assocs.*, 565 A.2d 615, 619-20 (D.C. 1989); *see also Meyer v. Wineburgh*, 110 F. Supp. 957 (D.D.C. 1953).

[103] *Ellis*, 565 A.2d at 617-18.

[104] 565 A.2d at 617-18.

District of Columbia held that a covenant that did not contain a geographic limitation could nonetheless be interpreted as applying only to the area serviced by the employer.[105]

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

The District of Columbia has adopted a version of the Uniform Trade Secret Act to "make uniform the law with respect to trade secrets."[106] The D.C. Uniform Trade Secrets Act defines *trade secret* as any:

> Information, including a formula, pattern, compilation, program, device, method, technique, or process that:
>
> A. derives actual or potential independent economic value, from not being generally known to, and not being readily ascertainable by, proper means by another who can obtain economic value from its disclosure or use; and
>
> B. is the subject of reasonable efforts to maintain its secrecy.[107]

An employer may have a cause of action if a trade secret is misappropriated. Under the D.C. law, *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 the disclosure or use, knew or had reason to know that his 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
    c. before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.[108]

An employer is entitled to recover damages for misappropriation of a trade secret, "unless a material and prejudicial change of position prior to acquiring knowledge or reason to know of the misappropriation

[105] *Burton, Parsons & Co. v. Parsons*, 146 F. Supp. 114, 116 (D.D.C. 1956).

[106] D.C. CODE § 36-408.

[107] D.C. CODE § 36-401(4).

[108] D.C. CODE § 36-401(2).

renders a monetary recovery inequitable."[109] Damages may constitute both the actual loss caused by the misappropriation, any unjust enrichment resulting from the misappropriation, and reasonable fees.[110]

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

The District of Columbia has no statutory guidelines addressing the ownership of employee inventions and ideas.

3. DURING EMPLOYMENT

3.1 Posting, Notice & Record-Keeping Requirements

3.1(a) *Posting & Notification Requirements*

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

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

Table 5. Federal Posting & Notice Requirements

Poster or Notice	Notes
Employee Polygraph Protection Act (EPPA)	Employers must post and keep posted on their premises a notice explaining the EPPA.[111]
Equal Employment Opportunity (EEO) Act ("EEO is the Law" Poster)	Employers must post and keep posted in conspicuous places upon their premises, in an accessible format, a notice that describes the federal laws prohibiting discrimination in employment.[112]
Fair Labor Standards Act (FLSA)	Employers must post and keep posted a notice, summarizing employee rights under the FLSA, in conspicuous places in every establishment where employees subject to the FLSA are employed.[113]

[109] D.C. CODE § 36-403(a).

[110] D.C. CODE § 36-403(a).

[111] 29 C.F.R. § 801.6. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/eppa.htm.

[112] 29 C.F.R. §§ 1601.30 (Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act), 1627.10 (Age Discrimination in Employment Act). This poster is available in English, Spanish, Arabic, and Chinese at https://www1.eeoc.gov/employers/poster.cfm.

[113] 29 C.F.R. § 516.4. This poster is available in English, Spanish, Chinese, Russian, Thai, Hmong, Vietnamese, Korean, Polish, and Haitian Creole at http://www.dol.gov/whd/regs/compliance/posters/flsa.htm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
Family & Medical Leave Act (FMLA)	Employers must conspicuously post, where employees are employed, a notice explaining the FMLA's provisions and providing information on filing complaints of violations.[114]
Migrant and Seasonal Agricultural Worker Protection Act (MSPA)	Farm labor contractors, agricultural employers, and agricultural associations that employ or house any migrant or seasonal agricultural worker must conspicuously post at the place of employment a poster setting forth the MSPA's rights and protections, including the right to request a written statement of the information described in 29 U.S.C. § 1821(a). The poster must be provided in Spanish or other language common to migrant or seasonal agricultural workers who are not fluent or literate in English.[115]
Notice to Workers with Disabilities/Special Minimum Wage Poster	Employers of workers with disabilities under special minimum wage certificates must at all times display and make available to employees a poster explaining the conditions under which the special wage rate applies. Where an employer finds it inappropriate to post notice, directly providing the poster to its employees is sufficient.[116]
Occupational Safety and Health Act ("the Fed-OSH Act")	Employers must post a notice or notices informing employees of the Fed-OSH Act's protections and obligations, and that for assistance and information employees should contact the employer or nearest U.S. Department of Labor office.[117]
Uniformed Service Employment and Reemployment Rights Act (USERRA)	Employers must provide notice about USERRA's rights, benefits, and obligations to all individuals entitled to such rights and benefits. Employers may provide notice by posting or by other means, such as by distributing or mailing the notice.[118]
In addition to the federal posters required for all employers, government contractors may be required to post the following posters.	
"EEO is the Law" Poster with the EEO is the Law Supplement	Employers subject to Executive Order No. 11246 must prominently post notice, where it can be readily seen by employees and applicants, explaining that discrimination in employment is prohibited on

[114] 29 C.F.R. § 825.300. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/fmla.htm.

[115] 29 C.F.R. §§ 500.75, 500.76. This poster is available in English, Spanish, Haitian Creole, Vietnamese, and Hmong at http://www.dol.gov/whd/regs/compliance/posters/mspaensp.htm.

[116] 29 C.F.R. § 525.14. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/disab.htm.

[117] 29 C.F.R § 1903.2. This poster is available in English, Spanish, Arabic, Chinese, Russian, Nepali, Thai, Hmong, Vietnamese, Korean, Polish, Portuguese, and Haitian Creole at https://www.osha.gov/Publications/poster.html.

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

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	numerous grounds.[119] The second page includes reference to government contractors.
Annual EEO, Affirmative Action Statement	Government contractors covered by the Affirmative Action Program (AAP) requirements are required to post a separate EEO/AA Policy Statement (in addition to the required "EEO is the Law" Poster), which indicates the support of the employer's top U.S. official. This statement should be reaffirmed annually with the employer's AAP.[120]
Employee Rights Under the Davis-Bacon Act Poster	Employers performing work covered by the labor standards of the Davis-Bacon and Related Acts must prominently post notice, where accessible to employees, summarizing the protections of the law.[121]
Employee Rights Under the Service Contract or Walsh-Healey Public Contracts Acts Poster	Employers performing work covered by the McNamara-O'Hara Service Contract Act ("Service Contract Act") or the Walsh-Healey Public Contracts Act ("Walsh-Healey Act") must prominently post notice, where accessible to employees, summarizing all required compensation and other entitlements. To comply, employers may notify employees by attaching a notice to the contract, or may post the notice at the worksite.[122]
E-Verify Participation & Right to Work Posters	The Department of Homeland Security requires certain government contractors, under Executive Order Nos. 12989, 13286, and 13465, to post notice informing current and prospective employees of their rights and protections. Notices must be posted in a prominent place that is visible to prospective employees and all employees who are verified through the system.[123]
Notice to Workers with Disabilities/Special Minimum Wage Poster	Employers of workers with disabilities under special minimum wage certificates authorized by the Service Contract Act or the Walsh-Healey Public Contracts Act must post notice, explaining the conditions under which the special minimum wages may be paid. Where an employer

[119] 41 C.F.R. § 60-1.42; *see also* 41 C.F.R. § 60-741.5(a) (requiring all agencies and contractors to include an equal opportunity clause in contracts, in which the contractor agrees to post this notice). This poster is available at https://www.dol.gov/ofccp/regs/compliance/posters/ofccpost.htm.

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

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

[122] 29 C.F.R. § 4.6(e); 29 C.F.R. § 4.184. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/sca.htm.

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

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	finds it inappropriate to post this notice, directly providing the poster to its employees is sufficient.[124]
Notification of Employee Rights Under Federal Labor Laws	Government contractors are required under Executive Order No. 13496 to post this notice in conspicuous locations and, if the employer posts notices to employees electronically, it must also make this poster available where it customarily places other electronic notices to employees about their jobs. Electronic posting cannot be used as a substitute for physical posting. Where a significant portion of the workforce is not proficient in English, the notice must be provided in the languages spoken by employees.[125]
Office of the Inspector General's Fraud Hotline Poster	Certain government contractors must prominently post notice, where accessible to employees, addressing fraud and how to report such misconduct.[126]
Paid Sick Leave Under Executive Order No. 13706	Certain government contractors must prominently post notice, where accessible to employees at the worksite, informing employees of their right to earn and use paid sick leave. Notice may be provided electronically if customary to the employer.[127] **Pay Period or Monthly Notice.** A contractor must inform an employee in writing of the amount of accrued paid sick leave no less than once each pay period or each month, whichever is shorter. Additionally, this information must be provided when employment ends and when an employee's accrued but unused paid sick leave is reinstated. Providing these notifications via a pay stub meets the compliance requirements of the executive order. **Pay Stub / Electronic.** A contractor's existing procedure for informing employees of available leave, such as notification accompanying each paycheck or an online system an employee can check at any time, may be used to satisfy or partially satisfy these requirements if it is written (including electronically, if the contractor customarily corresponds with or makes information available to its employees by electronic means).[128]

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

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

[126] 48 C.F.R. §§ 3.1000 *et seq*. This poster is available at https://oig.hhs.gov/documents/root/243/OIG_Hotline_Ops_Poster_-_Grant__Contract_Fraud.pdf.

[127] 29 C.F.R. § 13.26. This poster is available at https://www.dol.gov/whd/govcontracts/eo13706/index.htm. Additional resources on the sick leave requirement are available at https://www.dol.gov/whd/govcontracts/eo13706/index.htm.

[128] 29 C.F.R. § 13.5.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
Pay Transparency Nondiscrimination Provision	Employers covered by Executive Order No. 11246 must either post a copy of this nondiscrimination provision in conspicuous places available to employees and applicants for employment, or post the provision electronically. Additionally, employers must distribute the nondiscrimination provision to their employees by incorporating it into their existing handbooks or manuals.[129]
Worker Rights Under Executive Order Nos. 13658 (contracts entered into on or after January 1, 2015), 14026 (contracts entered into on or after January 30, 2022)	Employers that contract with the federal government under Executive Order Nos. 13658 or 14026 must prominently post notice, where accessible to employees, summarizing the applicable minimum wage rate and other required information.[130]

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

Table 6 details the District's 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. District Posting & Notice Requirements	
Poster or Notice	**Notes**
Benefits & Leave: Sick & Safe Leave	All employers must post and maintain conspicuous notice summarizing the Accrued Sick and Safe Leave Act of 2008 and how to file a complaint or obtain additional information. The notice includes the necessary information in English and Spanish. The District of Columbia is also required to publish notice in all languages spoken by 3% of or 500individuals in the D.C. population, whichever is less.[131]
Benefits & Leave: D.C. Family Medical Leave	The District of Columbia has enacted a Family and Medical Leave Act (D.C. FMLA), and covered employers (those with 20 or more employees) are obligated to post conspicuous notice summarizing the D.C. FMLA. This requirement may also be fulfilled by electronically posting on the

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

[130] 29 C.F.R. §§ 10.29, 23.290. The poster, referencing both Executive Orders, is available at https://www.dol.gov/whd/regs/compliance/posters/mw-contractors.htm.

[131] D.C. CODE § 32-131.09. This poster is available at https://does.dc.gov/sites/default/files/dc/sites/does/page_content/attachments/ASSLA%20Poster%20-%20English%20Spanish%20Combo%20-%20FINAL.pdf.

Table 6. District Posting & Notice Requirements	
Poster or Notice	**Notes**
	employer's website.[132] Employers must provide accommodation, set forth in the law, to employees with limited English proficiency to ensure they understand notice concerning the D.C. FMLA.[133]
Benefits & Leave: Universal Paid Leave Act	Covered employers must post and maintain notice of the law in a conspicuous place in English and in all languages in which the mayor has published the notice.[134]
Benefits & Leave: Parental Leave	All employers must post and maintain conspicuous notice informing employees about the leave available to parents and guardians to attend school-related activities under the D.C. Parental Leave Act.[135]
Benefits & Leave: Right to Breastfeed	Each employer must create a policy for breastfeeding mothers and that the policy must not contain rules which dictate whether the breast is uncovered during or incidental to the breastfeeding. The *policy* must be posted along with "The Right to Breastfeed" poster.[136]
Child Labor	Employers that employ minors must keep and maintain conspicuous notice, near where any minor works, summarizing the restrictions on child labor.[137]
Fair Employment Practices: Equal Opportunity	All employers must conspicuously post, where business or activity is normally conducted, notice informing employees about the D.C. Human Rights Act, as well as the family and parental leave laws.[138]
Fair Employment Practices: LGBTQ Diversity in the Workplace (Optional)	The D.C. Office of Human Rights encourages employers to display a poster concerning best practices for interacting with LGBTQ colleagues.

[132] D.C. CODE §§ 32-501 *et seq*.; D.C. MUN. REGS. tit. 4, § 1613. This notice is available in English at https://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/DCFMLA_Poster_March2016.pdf and in Spanish at http://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/DCFMLA_Poster_2015_Spanish.pdf.

[133] D.C. MUN. REGS. tit. 4, § 1613.8; *see* D.C. CODE §§ 2-1931 *et seq*.

[134] D.C. CODE § 32-541.06.

[135] D.C. CODE § 32-521.06. This poster is available at https://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/ParentalLeave_Poster_2015_1.pdf.

[136] D.C. MUN. REGS tit. 4, §§ 518.2, 518.3. This poster is available at http://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/Breastfeeding%20DCHOR%20Work%20PlacePosters.pdf.

[137] D.C. CODE § 32-202. This poster is available by calling the D.C. Public Schools at (202) 422-5708.

[138] D.C. CODE § 2-1402.51. This poster is available at https://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/EEO_Poster_2015.pdf.

Table 6. District Posting & Notice Requirements	
Poster or Notice	**Notes**
Fair Employment Practices: Public Accommodations (Optional)	The D.C. Office of Human Rights encourages employers to display a poster concerning the illegality of sexual harassment and various forms of discrimination in public accommodations.[139]
Fair Employment Practices: Pregnant Workers Fairness Act	All employers are required to post and maintain in a conspicuous place a notice of rights, in both English and Spanish, regarding employees' right to needed reasonable accommodations related to pregnancy, childbirth, related medical conditions, or breast feeding under the law.[140]
Fair Employment Practices Documents: Tipped Wage Workers Fairness Act	An employer shall post the Tipped Wage Workers Fairness Act poster in a conspicuous place accessible to all employees in or about the premises of the employer. If there are one or more breakrooms or time clocks on the premises, an employer shall post the poster at each such location. The information must be provided in each non-English language spoken by a limited or no-English proficient population that constitutes 3% or 500 individuals, whichever is less. The poster, to be provided by the mayor, must contain: • the address of the Mayor's Internet website covering the rights protected under this Act; • a list of all applicable D.C. employment and antidiscrimination laws; • notice that an employee may access information and obtain a description of his or her rights under the District of Columbia laws listed on the poster; • current hourly minimum wage; and • current hourly tipped minimum wage. An employer must post the below text in large font and for maximum readability, including the use of bullet points to call out each specific right on a separate line: "EMPLOYEE RIGHTS IN THE DISTRICT OF COLUMBIA: Do you know your rights as an employee working in Washington, D.C.? Employees have the right: • to be paid at least the minimum wage; • to be paid on time; • to receive a detailed pay stub; • to accrue and use paid sick and safe leave;

[139] This poster is available at http://ohr.dc.gov/sites/default/files/dc/sites/dcforms/publication/attachments/DCGovPublicAccomodationsNotice_July2015.pdf.

[140] D.C. CODE § 32-1231.04. Notices in English and Spanish are available at https://ohr.dc.gov/page/workplaceposters.

Table 6. District Posting & Notice Requirements	
Poster or Notice	**Notes**
	• to request time off to attend a child's school-related activities; • to qualify for unpaid family and medical leave; • to be compensated for work-related illness or injury; • to remain free from discrimination; • to be accommodated in the workplace during pregnancy; • to remain free from employer retaliation for discussing or exercising any of these rights; • to file a complaint for violation of workplace rights with the Department of Employment Services (DOES) or the Office of Human Rights (OHR); and • to learn about these and other workplace rights, visit the website below. This notice does not create, expand, or limit rights under District or federal law." The above text also must contain an electronic or digital link (such as a QR code) that provides access to the Internet website.[141]
Fair Employment Practices Documents: Tipped Wage Workers Fairness Act Sexual Harassment Policy	Employers with tipped employees must distribute the employer's sexual harassment policy to employees and post the policy in a conspicuous place accessible to all employees.[142]
Human Trafficking Hotline	Certain employers are obligated to post, in clear view of all employees and the public, a conspicuous notice about human trafficking and the hotline to call for assistance. Notice is required for properties found to be a prostitution-related nuisance, intercity rail and bus stations, nude performance establishments, massage establishments, and hotels where conduct resulting in a conviction of a human trafficking-related offense has occurred (in some circumstances).[143]
Leave to Vote Amendment Act of 2020	Each employer must post a notice in a conspicuous place that includes an easily understood description of the new law. The poster will be developed by the D.C. Board of Elections.[144]
Unemployment Compensation	All employers must post and maintain, where readily accessible, notice concerning the availability of unemployment compensation and how to

[141] D.C. Code § 32-161. The *Tipped Wage Workers Fairness Act: Know Your Rights in the District of Columbia* is available at https://ohr.dc.gov/page/office-human-rights-fact-sheets.

[142] D.C. CODE § 2-1411.05a.

[143] D.C. CODE § 22-1843. Various posters are available at https://www.dhs.gov/blue-campaign/library.

[144] D.C. CODE § 23-301.

Table 6. District Posting & Notice Requirements	
Poster or Notice	**Notes**
	file for benefits. The notice includes the necessary information in English and Spanish.[145]
Wages, Hours & Payroll: Minimum Wage	All employers (except the federal government and the District of Columbia) must post, in accessible locations, conspicuous notice summarizing the D.C. wage laws.[146]
Wages, Hours & Payroll: Wage Theft Prevention Act	All employers (except the federal government and the District of Columbia) must post, in accessible locations, conspicuous notice summarizing the requirements of the wage theft prevention law.[147]
Wages, Hours & Payroll: Wage Transparency Omnibus Amendment Act of 2023	Enacted on January 12, 2024 and expected to take effect following approval by the mayor, a 30-day period of Congressional review, and publication in the DC Register, the Act requires all employers to post a notice in their workplaces notifying employees of their rights under this Act. The notice must be posted in a conspicuous place in at least one location where employees congregate.[148]
Workers' Compensation	All employers must post conspicuously, in and about places of business, notice informing employees about the workers' compensation law and each party's rights and responsibilities and identifying the employer's carrier.[149]
Workplace Safety Documents: Cannabis Employment Protections Amendment Act of 2022 Notice	Employers must provide employees with a notice of rights under the Act along with the protocols for any testing for alcohol or drugs that the employer performs. An employer must also notify an employee if the employer has designated the employee's position as safety sensitive. The notice must be provided within 60 days after the Act's effective date and on an annual basis thereafter to all current employees. [150]
Workplace Safety: Smoking Area & No Smoking Signs	Employers must post signs, clearly visible to the public at all entrances as well as inside the building, notifying employees and the public of any smoking restrictions. Where smoking is prohibited, signs must state:

[145] D.C. CODE § 51-111. This poster is available at https://does.dc.gov/sites/default/files/dc/sites/does/page_content/attachments/UI%20Notice%20to%20Employees-2015.pdf.

[146] D.C. CODE § 32-1009; D.C. MUN. REGS. tit. 7, § 912.1. This poster is available in English and Spanish at https://does.dc.gov/sites/default/files/dc/sites/does/publication/attachments/2024 Minimum Wage Poster.pdf.

[147] D.C. CODE § 32-1009. Along with other resources, this poster is available in English and Spanish at https://does.dc.gov/page/office-wage-hour-employers.

[148] D.C. CODE § 32-1453.

[149] D.C. CODE § 32-1536. This poster is available at https://does.dc.gov/sites/default/files/dc/sites/does/publication/attachments/OWC-Notice of Compliance_Form 1.pdf.

[150] D.C. CODE § 32-951.04.

Table 6. District Posting & Notice Requirements	
Poster or Notice	**Notes**
	"No Smoking Under Penalty of Law," "No Smoking Except in Smoking Areas," or "Smoking in Accordance With Employer's Smoking Policy Only." Where smoking is otherwise restricted, signs must state: "Smoking causes lung cancer, heart disease, emphysema, and may cause fetal injury, premature birth, and low birth weight in pregnant women." Signs should also include the internationally-recognized symbols associated with the restriction or prohibition.[151]
Workplace Safety: Smoking Policy	Generally speaking, all places of employment and public places, including restaurants and nightclubs, must be smoke free under D.C. law.[152] Employers must adopt policies consistent with D.C. law and post conspicuous notice informing employees of the workplace smoking policy.[153]

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.[154]	At least 3 years from the date of entry.
Age Discrimination in Employment Act (ADEA): Personnel Records	*Employers that maintain the following personnel records in the course of business are required by the ADEA to keep them for the specified period of time:* • job applications, resumes, or other forms of employment inquiry, including records pertaining to the refusal to hire any individual;	At least 1 year from the date of the personnel action to which any records relate.

[151] D.C. CODE §§ 7-1703, 7-1704.

[152] D.C. CODE § 7-741.02.

[153] D.C. MUN. REGS tit. 20, § 2101; *see* D.C. CODE § 7-1703.02.

[154] 29 U.S.C. § 626; 29 C.F.R. § 1627.3(a).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• 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.[155]	
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.[156]	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.[157]	At least 1 year from the date the records were made, or from the date of the personnel action involved, whichever is later.
Title VII & the Americans with Disabilities Act (ADA): Complaints of Discrimination	*When a charge of discrimination has been filed or an action brought against the employer, it must:* • make and keep such records relevant to the determination of whether unlawful employment practices have been or are being committed, including personnel or employment records relating to the aggrieved person and to all other employees holding	Until final disposition of the charge or action (*i.e.*, until the statutory period for bringing an action has

[155] 29 C.F.R. § 1627.3(b).

[156] 29 C.F.R. § 1627.3(b).

[157] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	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.[158]	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).[159]	Most recent form must be retained for 1 year.
Employee Polygraph Protection Act (EPPA)	*Records pertaining to a polygraph test must be maintained for the specified time period including, but not limited to, the following:* • a copy of the statement given to the examinee regarding the time and place of the examination and the examinee's right to consult with an attorney; • the notice to the examiner identifying the person to be examined; • copies of opinions, reports, or other records given to the employer by the examiner; • where the test is conducted in connection with an ongoing investigation involving economic loss or injury, a statement setting forth the specific incident or activity under investigation and the basis for testing the particular employee; and • where the test is conducted in connection with an ongoing investigation of criminal or other misconduct involving loss or injury to the manufacture, distribution, or dispensing of a controlled substance, records specifically identifying the loss or injury in question and the nature of the employee's access to the person or property that is the subject of the investigation.[160]	At least 3 years following the date on which the polygraph examination was conducted.
Employee Retirement Income Security Act (ERISA)	Employers that sponsor an ERISA-qualified plan must maintain records that provide in sufficient detail the information from which any plan description, report, or certified information filed under ERISA can be verified, explained, or checked for accuracy and completeness. This	At least 6 years after documents are filed or would have been filed but

[158] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[159] 29 C.F.R. § 1602.7.

[160] 29 U.S.C. §§ 2001 *et seq.*; 29 C.F.R. § 801.30.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	includes vouchers, worksheets, receipts, and applicable resolutions.[161]	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).[162]	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.[163]	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); • 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;	3 years from the last day of entry.

[161] 29 U.S.C. § 1027.

[162] 29 C.F.R. § 1620.32(a).

[163] 29 C.F.R. § 1620.32(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• 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).[164] The record should also indicate for each week whether the employee adhered to the schedule and, if not, show the exact number of hours worked each day each week.	
Fair Labor Standards Act (FLSA): Tipped Employees	*Employers must maintain and preserve all Payroll Records noted above as well as:* • a symbol, letter, or other notation on the pay records identifying each employee whose wage is determined in part by tips; • weekly or monthly amounts reported by the employee to the employer of tips received (*e.g.*, information reported on Internal Revenue Service Form 4070); • amount by which the wages of each tipped employee have been deemed to be increased by tips as determined by the employer (not in excess of the difference between $2.13 and the applicable federal minimum wage); • hours worked each workday in which an employee does not receive tips, and total daily or weekly straight-time payment made by the employer for such hours; and • hours worked each workday in occupations in which the employee receives tips, and total daily or weekly straight-time earnings for such hours.[165]	

[164] 29 C.F.R. §§ 516.2, 516.5.

[165] 29 C.F.R. § 516.28.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
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.[166]	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.[167]	At least 3 years from the last effective date.
Fair Labor Standards Act (FLSA): Other Records	*In addition to other FLSA requirements, employers must preserve supplemental records, including:* • basic time and earning cards or sheets; • wage rate tables; • order, shipping, and billing records; and • records of additions to or deductions from wages.[168]	At least 2 years from the date of last entry.

[166] 29 C.F.R. §§ 516.2, 516.3. Presumably the regulation's reference to "prerequisites" is an error and should refer to "perquisites."

[167] 29 C.F.R. § 516.5.

[168] 29 C.F.R. § 516.6.

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

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	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.[169]	
Federal Insurance Contributions Act (FICA)	*Employers must keep FICA records, including:* • copies of any return, schedule, or other document relating to the tax; • records of all remuneration (cash or otherwise) paid to employees for employment services. The records must show with respect to each employee receiving such remuneration:	At least 4 years after the date the tax is due or paid, whichever is later.

[169] 29 U.S.C. § 2616; 29 C.F.R. § 825.500.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	▪ 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).[170]	
Immigration	Employers must retain all completed Form I-9s.[171]	3 years after the date of hire or 1 year following the termination of employment, whichever is later.
Income Tax: Accounting Records	*Any taxpayer required to file an income tax return must maintain accounting records that will enable the filing of tax returns correctly stating taxable income each year, including:* • regular books of account or records, including inventories, sufficient to establish the amount of gross income, deductions, credits, or other matters required	Required to be maintained for "so long as the contents [of the records] may become material in the

[170] 26 C.F.R. §§ 31.6001-1, 31.6001-2.

[171] 8 C.F.R. § 274a.2.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	to be shown by such person in any return of such tax or information.[172]	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.[173]	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.[174]	As long as it is in effect and at least 4 years thereafter.
Unemployment Insurance	*Employers are required to maintain all relevant records under the Federal Unemployment Tax Act, including:* • total amount of remuneration paid to employees during the calendar year for services performed; • amount of such remuneration which constitutes wages subject to taxation; • amount of contributions paid into state unemployment funds, showing separately the payments made and not deducted from the remuneration of its employees, and	At least 4 years after the later of the date the tax is due or paid for the period covered by the return.

[172] 26 U.S.C. § 3402; 26 C.F.R. § 1.6001-1.

[173] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

[174] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	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.[175]	
Workplace Safety / the Fed-OSH Act: Exposure Records	*Employers must preserve and retain employee exposure records, including:* • environmental monitoring or measuring of a toxic substance or harmful physical agent, including personal, area, grab, wipe, or other form of sampling, as well as related collection and analytical methodologies, calculations, and other background data relevant to an interpretation of the results obtained; • biological monitoring results which directly assess the absorption of a toxic substances or harmful physical agent by body specimens; and • Material Safety Data Sheets (MSDSs), or in the absence of these documents, a chemical inventory or other record reveling the identity of a toxic substances or harmful physical agent and where and when the substance or agent was used. *Exceptions to this requirement include:* • background data to workplace monitoring need only be retained for 1 year provided that the sampling results, collection methodology, analytic methods used, and a summary of other background data is maintained for 30 years; • MSDSs need not be retained for any specified time so long as some record of the identity of the substance, where it was used and when it was used is retained for at least 30 years; and	At least 30 years.

[175] 26 C.F.R. § 31.6001-4.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• biological monitoring results designated as exposure records by a specific Fed-OSH Act standard should be retained as required by the specific standard.[176]	
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.[177]	Duration of employment plus 30 years.
Workplace Safety: Analyses Using Medical and Exposure Records	*Employers must preserve and retain analyses using medical and exposure records*, including any compilation of data, or other study based on information collected from individual employee exposure or medical records, or information collected from health insurance claim records, provided that the analysis has been provided to the employer or no further work is being done on the analysis.[178]	At least 30 years.

[176] 29 C.F.R. § 1910.1020(d).

[177] 29 C.F.R. § 1910.1020(d).

[178] 29 C.F.R. § 1910.1020(d).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Workplace Safety: Injuries and Illnesses	*Employers must preserve and retain records of employee injuries and illnesses, including:* • OSHA 300 Log; • the privacy case list (if one exists); • the Annual Summary; • OSHA 301 Incident Report; and • old 200 and 101 Forms.[179]	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.[180]	Immediately preceding AAP year.
Equal Employment Opportunity: Personnel & Employment Records	*Government contractors covered by Executive Order No. 11246 and those required to provide affirmative action to persons with disabilities and/or disabled veterans and veterans of the Vietnam Era must retain the following records:* • records pertaining to hiring, assignment, promotion, demotion, transfer, lay off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship; • other records having to do with requests for reasonable accommodation, the results of any physical examination, job advertisements and postings, applications, resumes; and • any and all expressions of interest through the internet or related electronic data technologies as to which the contractor considered the individual for a particular position, such as on-line resumes or internal resume databases, records identifying job seekers contacted regarding their interest in a particular position, regardless of whether the individual qualifies as an internet applicant under 41 C.F.R. § 60–1.3, tests and test results, and interview notes;	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 of at least $150,000, the minimum retention period is one year from

[179] 29 C.F.R. §§ 1904.33, 1904.44.

[180] 41 C.F.R. § 60-1.12(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	▪ for purposes of record keeping with respect to 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.[181]	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.[182]	Until final disposition of the complaint, compliance review or action.
Minimum Wage Under Executive Orders Nos. 13658 (contracts	*Covered contractors and subcontractors performing work must maintain for each worker:* • name, address, and Social Security number; • occupation(s) or classification(s);	3 years.

[181] 41 C.F.R. §§ 60-1.12, 60-300.80, and 60-741.80.

[182] 41 C.F.R. §§ 60-1.12, 60-741.80.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
entered into on or after January 1, 2015), 14026 (contracts entered into on or after January 30, 2022)	• 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.[183]	
Paid Sick Leave Under Executive Order No. 13706	*Contractors and subcontractors performing work subject to Executive Order No. 13706 must keep the following records:* • employee's name, address, and Social Security number; • employee's occupation(s) or classification(s); • rate(s) of wages paid (including all pay and benefits provided); • number of daily and weekly hours worked; • any deductions made; • total wages paid (including all pay and benefits provided) each pay period; • a copy of notifications to employees of the amount of accrued paid sick leave; • a copy of employees' requests to use paid sick leave (if in writing) or (if not in writing) any other records reflecting such employee requests; • dates and amounts of paid sick leave used by employees (unless a contractor's paid time off policy satisfies the EO's requirements, leave must be designated in records as paid sick leave pursuant to the EO); • a copy of any written responses to employees' requests to use paid sick leave, including explanations for any denials of such requests; • any records relating to the certification and documentation a contractor may require an employee to provide, including copies of any certification or documentation provided by an employee;	During the course of the covered contract as well as after the end of the contract.

[183] 29 C.F.R. § 23.260.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• 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.[184]	
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.[185]	At least 3 years after the work.
Service Contract Act	*Service Contract Act contractors or subcontractors must maintain the following records with respect to each employee:* • name, address, and Social Security number; • work classification; • rates of wage; • fringe benefits; • total daily and weekly compensation;	At least 3 years from the completion of the work records containing the information.

[184] 29 C.F.R. § 13.25.

[185] 29 C.F.R. § 5.5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• 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.[186]	
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.[187]	At least 3 years from the last date of entry.

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

Table 8 summarizes the District's record-keeping requirements.

Table 8. District Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Benefits and Leave: D.C. Family & Medical Leave	*Employers covered by the D.C. Family and Medical Leave Act (D.C. FMLA) (those with 20or more employees) must keep and maintain records, on an annual basis, including:* • total number of employees who have taken leave under the D.C. FMLA; • annual additional cost to the employer for expenses incurred to replace employees on leave;	None specified.

[186] 29 C.F.R. § 4.6.

[187] 41 C.F.R. § 50-201.501.

Table 8. District Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• annual additional cost incurred to pay employee's health insurance while on leave; • length and reason for each leave taken by each employee; • salary, hourly wage, or grade level of employees who have taken leave; • employee's request for leave and supporting documents; and • employer's disposition of the request for leave.[188]	
Benefits & Leave: Sick & Safe Leave	Employers must maintain records showing the accrual, granting, and denial of leave under the Accrued Sick and Safe Leave Act.[189]	3 years.
Fair Employment Practices: Personnel Records	*Employers must maintain any regularly kept business records, including:* • applications submitted; • sales and rental records; • credit and reference reports; • personnel records; and • any other record pertaining to the status of an individual's enjoyment of rights protected by the Human Rights Law.[190] *Where a charge of discrimination has been filed, an employer must keep all relevant records, including the above, until final disposition of the charge.*	Generally, 6 months from the date of the record or from the date of the action which is the subject of the record, whichever is longer. If a charge of discrimination has been filed, until final disposition of the charge.
Income Tax	*Each employer must maintain accurate and complete records, for each employee, including:* • sums required to be withheld from each employee; • sums actually withheld from each employee; • residence address, including any change in address and the date of the change;	None specified.

[188] D.C. MUN. REGS. tit. 4, §§ 1606, 1617.5.

[189] D.C. MUN. REGS. tit. 7, § 3216.

[190] D.C. CODE § 2-1402.52.

Table 8. District Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• amount of and date of any adjustment or refund of withholding tax; and • employee Withholding Exemption Certificates (Forms D-4).[191]	
Unemployment Compensation	*All employers must maintain true and accurate work records for each employee, including payroll sheets, cards, or other forms containing:* • name and Social Security number; and • beginning and ending dates for each pay period; • wages paid for each pay period, including the value of any nonmonetary remuneration; and • dates of employment and separation.[192]	None specified by statute or regulation. The Department of Employment Services recommends retention for 7 years, however.[193]
Wages, Hours & Payroll: General	*Every employer must keep and preserve accurate payroll records for each employee, including:* • full name including last, first, and middle initial; • Social Security number; • occupation; • address of employee including zip code; • date of birth; • regular hourly rate of pay; • precise time worked each day and workweek by each nonexempt employee; • time of day and day of week that the workweek begins; • basis on which wages are paid; • daily record of hours of beginning and stopping work; hours of beginning and ending the meal recess if the employee works a split shift; • total daily or weekly straight-time earnings and excess overtime earnings for the workweek or total earnings for nonovertime and overtime hours worked during the workweek; • total gross and net wages paid each period as well as deductions and/or additions to wages;	Not less than 3 years.

[191] D.C. MUN. REGS. tit. 9, §§ 131, 134.

[192] D.C. CODE § 51-117; D.C. MUN. REGS. tit. 7, § 319.

[193] D.C. Dep't of Emp't Servs., *Unemployment Compensation: Reporting Questions*, *What records should I keep to comply with unemployment tax requirements?*, *available at* https://does.dc.gov/service/reporting-questions.

Table 8. District Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• date of payment and pay period covered; • application of tips to minimum wages; and • any other records or information prescribed by the mayor.[194] *Additional requirements apply with respect to employees paid by commission. Such records must include:* • a notation identifying which employees receive commissions; • an indication for each workweek of whether the employee's regular rate of pay is more than 1.5 times the minimum wage; • a copy of the agreement or written summary of the terms of the commission payments (including the applicable representative period, the date it was entered into and the period for which it remains in effect); and • total compensation paid each pay period showing separately the amount of commissions and of noncommission straight time earnings.[195]	
Wages, Hours & Payroll: Wage Theft Prevention	Employers must keep copies of written notices given to employees pursuant to the D.C. wage theft prevention law, including notices provided due to changes to pay rate, etc.[196]	Not less than 3 years.
Workers' Compensation	*All employers must maintain records of all employee injuries, including:* • name, address, phone number, and business of the employer; • name, address, phone number, and occupation of the employee; • date, time, and place of injury; • nature and cause of the injury; • whether injury is expected to result in lost time; • name of any known witness or other relevant circumstance; and • name and address of the employer's insurer.[197]	None specified.

[194] D.C. CODE § 32-1008; D.C. MUN. REGS. tit. 7, § 911.

[195] D.C. MUN. REGS. tit. 7, § 911.1(m).

[196] D.C. CODE § 32-1008(c)-(d).

[197] D.C. CODE § 32-1531; D.C. MUN. REGS. tit. 7, §§ 203, 204.

Table 8. District Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Workplace Safety	*All employers must keep and preserve accurate records related to workplace safety, including:* • records regarding each employee; • records on work-related deaths, injuries, exposures to any potentially toxic materials or harmful physical agents as required by section 32-1108 or illnesses; and • records required to be maintained under the Fed-OSH Act.[198]	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) *District Guidelines on Personnel Files*

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

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) *District Guidelines on Background Screening of Current Employees*

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

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

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

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

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

The District of Columbia does not regulate drug testing of employees by statute.

3.2(c) *Marijuana Laws*

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

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

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[198] D.C. CODE §§ 32-803, 32-808(d), and 32-1113.

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

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

In the District of Columbia, marijuana use has been decriminalized. However, this does not change the rights of employers to drug-test employees and establish rules for employees regarding marijuana use.[200] Employers are not required to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growing of marijuana in the workplace. Further, employers may establish and enforce policies restricting recreational marijuana use.[201]

The District of Columbia also allows for the use of medicinal marijuana. The D.C. statute regarding medical marijuana does not contain any guidelines on workplace accommodation. However, a D.C. court held in 2016 that:

> District law does not 'provide a clear mandate of public policy' that employers must accommodate such legal marijuana use by their employees. . . . [T]he District here can at most be said to maintain a public policy that decriminalizes and allows the consumption of marijuana for private medical reasons. That is a far cry from prohibiting employers from terminating such users.[202]

The D.C. law does not currently contain operative or enforceable provisions regarding discrimination because of marijuana usage.[203]

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 the individual's gross income the value of the identity protection services.

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[200] D.C. Office of the Att'y Gen., *Office of the Attorney General Releases Frequently Asked Questions Document on District's Marijuana Laws*, available at https://oag.dc.gov/release/office-attorney-general-releases-frequently-asked.

[201] D.C. CODE § 408-904.01.

[202] *Coles v. Harris Teeter, L.L.C.*, 217 F.Supp.3d 185 (D.D.C. 2016).

[203] The District of Columbia has enacted the Cannabis Employment Protections Amendment Act of 2022 that prohibits employers from taking adverse employment action against an individual for the use of cannabis, participation in a medical cannabis program, or failure to pass a cannabis drug test. In addition, the Act clarifies that employers must treat the use of medical cannabis to treat a disability in the same manner as it would treat the legal use of a controlled substance. However, these provisions will not become operative and enforceable until their fiscal effect is included in an approved District budget. *See* D.C. LAW 24-190 (2022) (to be codified at D.C. CODE §§ § 2-1402.11(b-10, (d-1); 32-951.01 to 32-951.08).

- 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.[204]

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.[205]

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

D.C. law requires that a covered entity provide notice to affected individuals after it becomes aware of the unauthorized acquisition of computerized data that compromises personal information maintained by the business.

Covered Entities & Information. Any person who conducts business in the District of Columbia and maintains computerized data in a system that includes personal information is covered under this statute, except those who are covered under the Gramm-Leach-Bliley Act and those who maintain and comply with a notification procedure as part of an information security policy for the treatment of personal information.[206]

Under the D.C. statute, *personal information* means:

1. an individual's first name or first initial and last name, or phone number, or address, and any one or more of the following data elements:
    a. Social Security number, individual taxpayer identification number, passport number, driver's license number, District of Columbia identification card number, military identification number, or other unique identification number issued on a government document commonly used to verify the identity of a specific individual;
    b. account number, credit card number or debit card number, or any other number or code or combination of numbers or codes, such as an identification number, security code, access code, or password, that allows access to or use of an individual's financial or credit account;
    c. medical information such as information about a consumer's dental, medical, or mental health treatment or diagnosis by a health-care professional;
    d. genetic information and DNA profile;

[204] 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.

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

[206] D.C. CODE § 28-3852(a), (c).

e. health insurance information, including a policy number, subscriber information number, or any unique identifier used by a health insurer to identify the person that permits access to an individual's health and billing information;

f. biometric data generated by automatic measurements of an individual's biological characteristics, such as a fingerprint, voice print, genetic print, retina or iris image, or other unique biological characteristic, that is used to uniquely authenticate the individual's identity when the individual accesses a system or account;

g. any combination of data elements that would enable a person to commit identity theft without reference to a person's first name or first initial and last name or other independent personal identifier; or

2. a username or email address in combination with a password, security question and answer, or other means of authentication, or any combination of data elements that permits access to an individual's email account.[207]

Personal information does not include information that is publicly available.[208]

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

- written 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 $50,000;
  - the affected class of persons to be notified exceeds 100,000; or
  - the covered entity does not have sufficient contact information.[209]

Substitute notice must consist of all of the following:

- email notice when the covered entity has an electronic mail address for the subject persons;
- conspicuous posting of the notice on the website of the covered entity if the covered entity maintains a website; and
- notification by statewide media.[210]

The notification must include:

- to the extent possible, a description of the categories of information that were, or are reasonably believed to have been, acquired by an unauthorized person, including the elements of personal information that were, or are reasonably believed to have been, acquired;

[207] D.C. CODE § 28-3851(3)(A).

[208] D.C. CODE § 28-3851(3)(B).

[209] D.C. CODE § 28-3851(2).

[210] D.C. CODE § 28-3851(2)(c)(ii).

- contact information for the entity making the notification, including the business address, telephone number, and toll-free telephone number if one is maintained;
- the toll-free telephone numbers and addresses for the major consumer reporting agencies, including a statement notifying the resident of the right to obtain a security freeze free of charge and information how a resident may request a security freeze; and
- the toll-free telephone numbers, addresses, and website addresses for the Federal Trade Commission and the Attorney General, including a statement that an individual can obtain information from these sources about steps to take to avoid identity theft.

If the breach only involved an individual's login credentials, the entity may comply with the requirement by providing the notification in electronic format or another form that directs the person to change their password and security question or answer, as applicable, or to take other steps appropriate to protect their email account and other online accounts.[211]

Timing of Notice. The notification must be made in the most expedient time possible and without unreasonable delay. Notification may be delayed if law enforcement determines that the notification will impede a criminal investigation.[212]

Notification to the Attorney General. The amendment requires that the entity promptly provide written notice of the breach to the Attorney General if the breach affects 50or more District residents. This notice must be made in the most expedient manner possible, without unreasonable delay, and in no event later than when notice is provided to those affected by the breach. The written notice must include:

- name and contact information of the entity reporting the breach;
- name and contact information of the entity that experienced the breach;
- nature of the breach of the security of the system, including the name of the entity that experienced the breach;
- types of personal information compromised by the breach;
- number of District residents affected by the breach;
- cause of the breach, including the relationship between the entity that experienced the breach and the person responsible for the breach, if known;
- remedial action taken by the entity to include steps taken to assist District residents affected by the breach;
- date and time frame of the breach, if known;
- address and location of corporate headquarters, if outside of the District;
- any knowledge of foreign country involvement; and
- sample of the notice to be provided to District residents.

[211] D.C. CODE § 28-3851.

[212] D.C. CODE § 28-3852.

Notification to the Attorney General must not be delayed based on the ground that the total number of residents affected has not yet been determined.

Notification to Consumer Reporting Agencies. If more than 1,000 persons at a single time will be notified, then the covered entity must also notify all nationwide consumer reporting agencies of the timing, distribution, and content of the notices.[213]

When an entity experiences a breach that requires notification and such breach includes or is reasonably believed to include a Social Security number or taxpayer identification number, the entity must offer identity theft protection services to each affected District resident at no cost to the resident for a period of not less than 18 months. The entity that experienced will provide all information necessary for residents to enroll in identity theft protection services.[214]

Security Requirements. D.C. law requires any entity that owns, licenses, maintains, handles, or otherwise possesses personal information to implement and maintain reasonable security safeguards, including procedures and practices that are appropriate to the nature of the personal information and the nature and size of the entity or operation.

An entity that uses a nonaffiliated third party as a service provider to perform services for the entity and discloses personal information about an individual residing in the District under a written agreement with the third party must require by the agreement that the third party implement and maintain reasonable security procedures and practices that are appropriate to the nature of the personal information disclosed to the nonaffiliated third party, and are reasonably designed to protect the personal information from unauthorized access, use, modification, and disclosure.

When an entity is destroying records, including computerized or electronic records and devices containing computerized or electronic records, that contain personal information of a consumer, employee, or former employee of the person or entity, the entity must take reasonable steps to protect against unauthorized access to or use of the personal information, taking into account:

- the sensitivity of the records;
- the nature and size of the business and its operations;
- the costs and benefits of different destruction and sanitation methods; and
- available technology.[215]

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

[213] D.C. CODE § 28-3852(c).

[214] D.C. CODE § 28-3852.

[215] D.C. CODE § 28-3852.

on goods or material that have been moved in or produced for commerce. For more information on this topic, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

As a general rule, federal wage and hour laws do not preempt state laws.[216] 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.[217]

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.[218]

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.[219]

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.[220] For more information on exemptions to the federal minimum wage and/or overtime obligations, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

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

The D.C. Minimum Wage Act applies to all individuals employed in the District. Individuals are considered employed in the District when:

- more than 50% of their working hours are spent in the District; or
- their employment is based in the District, they regularly spend a substantial amount of their working time in the District and not more than 50% of their working time is spent in any other state.[221]

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[216] 29 U.S.C. § 218(a).

[217] 29 U.S.C. § 206.

[218] 29 U.S.C. §§ 203, 206.

[219] 29 U.S.C. § 3(m)(2)(B).

[220] 29 U.S.C. § 207.

[221] D.C. CODE § 32-1003(b).

Employees must be paid at least the District's minimum wage for each hour they spend working in the District when they perform at least two hours of work in the District, for the same employer, within one workweek.[222]

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

The minimum wage in the District of Columbia is currently $17.50 per hour for most nonexempt employees.[223] Annually, on July 1, the minimum wage and minimum cash wage will increase based on changes to the consumer price index.[224]

3.3(b)(ii) *Tipped Employees*

Tipped employees may be paid differently, until July 1, 2027, when, due to a November 2022 ballot measure, Initiative 82 tipped employees must be paid the full minimum wage. Until July 1, 2027, an employer may consider tips as part of their wages, but the minimum cash wage an employer directly pays a tipped employee cannot be less than $5.35 per hour, and the maximum tip credit cannot exceed $10.75 per hour. Due to Initiative 82 these numbers will change in future years as the District phases out the tip credit, see Table 9**.** If tipped employees do not receive at least the minimum wage when direct wages and tips are combined, an employer must pay the employee the difference.[225] Importantly, an employer is not permitted to take a tip credit unless:

- the employer has notified its tipped employees that it will take a tip credit; and
- tipped employees retain all gratuities they receive.[226]

Table 9. Minimum Wage for Tipped Employees

Date	Minimum Wage	Minimum Cash Wage	Maximum Tip Credit
Currently	$17.50	$10.00	$7.50
July 1, 2025	TBD	$12.00	TBD
July 1, 2026	TBD	$14.00	TBD
July 1, 2027	TBD	TBD	Prohibited

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

The District of Columbia's minimum wage provisions do not apply to:

- employees of the U.S. government or the D.C. government;[227]

[222] D.C. CODE § 32-1003(b-1).

[223] D.C. CODE § 32-1003(a)(5).

[224] D.C. CODE § 32-1003(a)(6).

[225] D.C. CODE § 32-1003(f).

[226] D.C. CODE § 32-1003(g).

[227] D.C. CODE § 32-1002(2).

- unpaid volunteers for educational, charitable, religious, or nonprofit organizations (including lay members engaged in religious activities within religious organizations);[228]
- casual babysitters;[229]
- individuals employed in executive, administrative, or professional positions, and persons employed as outside salespersons;[230]
- individuals who deliver newspapers directly to the homes of subscribers;[231]
- employees with a disability holding a certificate issued by the U.S. Department of Labor that authorizes specific wage payments under section 214(c) of the FLSA;[232]
- adult learners during the first 90 days of employment;[233]
- students employed by institutions of higher learning;[234] and
- minors under the age of 18.[235]

3.3(c) *District Guidelines on Overtime Obligations*

Like federal law, in the District of Columbia, employers must pay nonexempt employees one-and-one-half times their regular rate for all hours worked over 40 in a workweek.[236]

3.3(d) *District Guidelines on Overtime Exemptions*

The District of Columbia's overtime provisions do not apply to the following employee classifications:

- individuals employed in executive, administrative, or professional positions, and persons employed as outside salespersons;[237]
- individuals who deliver newspapers directly to the homes of subscribers;[238]
- employees with a disability holding a certificate issued by the U.S. Department of Labor that authorizes specific wage payments under section 214(c) of the FLSA;[239]
- individuals employed as seamen;
- individuals employed by a railroad;

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[228] D.C. CODE § 32-1002(2).

[229] D.C. CODE § 32-1002(2).

[230] D.C. CODE § 32-1004(a)(1).

[231] D.C. CODE § 32-1004(a)(2).

[232] D.C. CODE § 32-1003(d).

[233] D.C. MUN. REGS. tit. 7, § 902.4.

[234] D.C. MUN. REGS. tit. 7, § 902.4.

[235] D.C. MUN. REGS. tit. 7, § 902.4.

[236] D.C. CODE § 32-1003(c).

[237] D.C. CODE § 32-1004(a)(1).

[238] D.C. CODE § 32-1004(a)(2).

[239] D.C. CODE § 32-1003(d).

- any salesperson, partsperson, or mechanic primarily engaged in selling or servicing automobiles, trailers, or trucks if employed by a nonmanufacturing establishment primarily engaged in the business of selling these vehicles to ultimate purchasers;
- individuals employed primarily to wash automobiles by an employer for whom more than 50% of the annual dollar volume of sales is derived from washing automobiles, and employment in excess of 160 hours over a period of four consecutive workweeks is compensated at one-and-one-half times the regular rate of pay;
- individuals employed as an attendant at a parking lot or parking garage;
- individuals employed by an air carrier, who may voluntarily exchange workdays with another employee for the primary purpose of utilizing air travel benefits available to these employees;[240]
- individuals employed by a retail or service establishment where the regular rate of pay of the employee is in excess of one-and-one-half times the minimum hourly rate of the employee; and more than half of the employee's compensation for a representative period (not less than one month) represents commissions on goods or services;[241] and
- individuals employed as private household workers who live on the employer's premises and individuals employed as companions for the aged or infirm.[242]

The District of Columbia has adopted the executive, administrative, professional, and outside sales exemptions as set forth under federal law.[243] In addition, D.C. law establishes overtime exemptions for computer professional employees and commissioned salespeople as discussed below.

Before turning to the computer professional and commissioned sales exemptions, it is important to reiterate that federal wage and hour laws do not preempt state laws[244] and that the law most beneficial to the employee will apply. Therefore, even if an employee meets one of the exemptions discussed below under state law, if the individual does not meet the requirements of the federal exemption, including the salary thresholds, or vice versa, then the employee will not qualify as exempt.

3.3(d)(i) *Computer Professional Employees*

The FLSA's hourly computer employee exemption likely applies to employees in the District of Columbia. Although regulations provide that an individual employed in a "professional capacity" must be paid on a salary or fee basis, the regulations also provide that interpretation of the term "professional capacity" will be made in accordance with 29 C.F.R. pt. 541which includes the hourly computer employee exemption. Moreover, the statutory exemption for *bona fide* professional employees specifies that the term is defined according to the FLSA and contains no salary or fee basis requirement.[245]

[240] D.C. CODE § 32-1004(b).

[241] D.C. CODE § 32-1003(e).

[242] D.C. MUN. REGS. tit. 7, § 902.5.

[243] D.C. CODE § 32-1004(a)(1).

[244] 29 U.S.C. § 218(a).

[245] D.C. CODE § 32-1004; D.C. MUN. REGS. tit. 7, § 999.1.

3.3(d)(ii) *Commissioned Sales Employees*

The District of Columbia's overtime provisions do not apply to an employee of a retail or service employer if:

- the employee's regular pay rate is greater than the D.C. minimum wage; and
- more than half of the employee's compensation for a representative period of at least one month is made up of commissions.[246]

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.[247] Employees must be completely relieved from duty for the purpose of eating regular meals. Employees are *not* relieved if they are required to perform any duties—active or inactive—while eating. It is not necessary that employees be permitted to leave the premises if they are otherwise completely freed from duties during meal periods.

Federal law contains no generally applicable rest period requirements for adults. Under the FLSA, rest periods of short duration, running from five to 20 minutes, must be counted as "hours worked" and must be paid.[248]

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.[249] 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.[250] 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,

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[246] D.C. CODE § 32-1003(e).

[247] 29 C.F.R. § 785.19.

[248] 29 C.F.R. § 785.18.

[249] 29 U.S.C. § 218d.

[250] 29 U.S.C. § 218d(b)(2).

which may be used by an employee to express breast milk.[251] Exemptions apply for smaller employers and air carriers.[252]

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.[253] Lactation is considered a related medical condition.[254] 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.[255] For more information on these topics, see **LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES**.

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

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

There are no generally applicable meal or rest period requirements for adults in the District of Columbia.

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

There are no generally applicable meal or rest period requirements for minors in the District of Columbia.

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

An individual has the right to breast feed her child in any public or private location where she has the right to be with her child.[256] In the employment context, a D.C. employer must make reasonable efforts to provide a sanitary room or other location in close proximity to the work area (other than a bathroom or toilet stall) where an employee can express breast milk with privacy and security. The location may include a childcare facility in close proximity to the employee's work location. Additionally, an employee must be permitted to bring a small refrigerator or freezer to store breast milk.[257]

An employer must also provide reasonable daily unpaid break periods for an employee to express breast milk, as required by the employee. The break period is to run concurrently with any paid or unpaid break period already provided to the employee. However, an employer is not required to provide break periods if doing so would create an undue hardship on its business operations.

Employers must conspicuously post and maintain a notice concerning the law, and also create and post a breast-feeding employee policy. In addition, employers must provide written notification of an employee's right to lactation accommodation to new employees upon hire and again to current employees within 10 days of the date a current employee notifies the employer that she is pregnant or nursing.

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[251] 29 U.S.C. § 218d(a).

[252] 29 U.S.C. § 218d(c), (d).

[253] 42 U.S.C. § 2000gg–1.

[254] 29 C.F.R. § 1636.3.

[255] 29 C.F.R. § 1636.3.

[256] D.C. CODE § 2-1402.82.

[257] D.C. CODE §§ 2-1402.82, 32-1231; D.C. MUN. REGS. tit. 4, §§ 518.1 *et seq*.

Discrimination and harassment against breast-feeding employees is prohibited.[258]

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.[259] 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."[260]

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

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

Under D.C. law, *working time* means: (1) all time that the employee is required to be on the employer's premises, on duty or at a prescribed place; (2) is permitted to work; (3) is required to travel in connection with the business of the employer; and (4) waits on the employer's premises for work.[261] D.C. law also specifically addresses reporting time, on-call time, travel time, and split shifts in terms of compensable time.

Reporting Time. An employee who reports for work under general or specific instructions but is given no work or is given less than four hours of work, must be paid for a minimum of four hours at the employee's minimum daily wage. The minimum daily wage is calculated using the employee's regular rate for hours actually worked, but the minimum wage can be used for hours not worked. However, the reporting time pay requirement does not apply to employees who are regularly scheduled for fewer than four hours of work per day.[262]

On-Call Time. The District of Columbia follows federal law to determine when on-call time is compensable as hours worked.[263]

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[258] D.C. CODE §§ 2-1402.82, 32-1231; D.C. MUN. REGS. tit. 4, §§ 518.1 *et seq*.

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

[260] *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").

[261] D.C. CODE § 32-1002(10).

[262] D.C. MUN. REGS. tit. 7, § 907.1.

[263] D.C. CODE § 32-1002(10).

Travel Time. Time that an employee is required to travel in connection with the employer's business is considered compensable.[264] Additionally, the cost of travel expenses incurred by an employee performing business for an employer is compensable.[265] Aside from these requirements, the District of Columbia interprets "hours worked" in accordance with federal law.[266] Accordingly, it is reasonable to assume the District of Columbia will generally determine whether travel time is compensable in accordance with federal law.

Split Shifts. Employees must be paid an additional hour at the minimum wage for each day they work a split shift. Employees are not deemed to work a split-shift if their meal periods do not exceed one hour. The split-shift provision does not apply to employees who reside at the employer's premises.[267]

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.[268] 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.[269] For more information on the FLSA's child labor restrictions, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

3.6(b) *District Guidelines on Child Labor*

The District of Columbia'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. In general, minors under the age of 18 years cannot work in any place of employment or in any activity that is dangerous or is prejudicial to their life, health, safety, or welfare.[270]

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

General Restrictions. The District of Columbia places restrictions on the types of jobs and hours that minors may work (see Table 10).

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[264] D.C. CODE § 32-1002(10).

[265] D.C. MUN. REGS. tit. 7, § 909.1.

[266] D.C. CODE § 32-1002(10).

[267] D.C. MUN. REGS. tit. 7, § 906.1.

[268] 29 C.F.R. §§ 570.36, 570.50.

[269] 29 C.F.R. § 570.6.

[270] D.C. CODE § 32-203.

Table 10. District Restrictions on Type of Employment by Age	
Age Range	**Restrictions**
Under Age 18	*Minors under 18cannot work:* • at places of employment or in jobs dangerous or prejudicial to a minor's life, health, safety, or welfare; • operating a freight or nonautomatic elevator; or • in any quarry, tunnel, or excavation.[271]
Under Age 16	*In addition to the restrictions for minors under the age of 18 minors under age 16cannot work:* • oiling, wiping, or cleaning machinery, or assisting in such activities; or • in the operation of any machinery operated by power other than hand or foot power.[272] These restrictions do not apply to minors enrolled in an approved vocational education program or training.[273]
Under Age 14	Minors under age 14cannot be employed in the District of Columbia, subject to limited exceptions.[274]

Restrictions on Selling or Serving Alcohol. In the District of Columbia, persons under age 18 may not sell, give, furnish, or distribute alcoholic beverages, and cannot serve as bartenders. However, employees who are at least age 18 may sell, serve, or deliver an alcoholic beverage on a premises licensed under the alcoholic beverage law.[275]

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

Minors Under 18 All minors under 18are prohibited from working more than six consecutive days in one week, more than 48 hours in one week, or more than eight hours in a day.[276] Special rules apply to minors engaged in radio, motion picture, television and dance productions, modeling, professional sports activities, a circus, agricultural work, housework, the sale or distribution of newspapers, and newspaper stuffing.[277]

Minors Aged 16-17. Minors aged 16 and 17 also cannot work between the hours of 10:00 P.M. to 6:00 A.M.[278]

[271] D.C. CODE §§ 32-203, 32-205.

[272] D.C. CODE § 32-204.

[273] D.C. CODE § 32-204.

[274] D.C. CODE § 32-201.

[275] D.C. CODE § 25-784.

[276] D.C. CODE § 32-202.

[277] D.C. CODE §§ 32-202, 32-206, and 32-215.

[278] D.C. CODE § 32-202.

Minors Under 16 Minors under age 16 cannot work between the hours of 7:00 P.M. and 7:00 A.M. However, from June 1 through Labor Day, these minors can work until 9:00 P.M.[279]

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

The child labor restrictions generally provide exceptions for minors engaged in agricultural work, performing household chores, or distributing or selling newspapers.[280]

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

The employer must obtain a work or vacation permit from the minor prior to employment.[281] Vacation permits are issued by the Board of Education to minors between the age of 14 and 16 years if they want to work during their summer vacation.[282] Permits must be kept on file with the employer.[283]

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

The D.C. Board of Education enforces the child labor laws.[284] Employers found guilty of violating the child labor laws will be fined between $1,000 and $3,000 for the first offense, or imprisoned for not less than 10 days nor more than 30 days, or both. A person convicted of a second or subsequent offense will be fined between $3,000 and $5,000, or imprisoned for not less than 30 days nor more than 90 days, or both. Each day during which a violation occurs constitutes a separate offense.[285] The District of Columbia has refused to recognize any kind of good-faith defense offered on behalf of an employer found to be in violation of child-labor laws.[286]

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).[287]

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:

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[279] D.C. CODE § 32-202.

[280] D.C. CODE §§ 32-202, 32-206, and 32-215.

[281] D.C. CODE § 32-207.

[282] D.C. CODE § 32-211.

[283] D.C. CODE § 32-207.

[284] D.C. CODE § 32-224.

[285] D.C. CODE § 32-213.

[286] *See Club 99, Inc. v. District of Columbia Alcohol Beverage Control Bd.*, 457 A.2d 773 (D.C. 1982).

[287] 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").

> 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.[288]

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.[289]

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.[290] The "prepaid rule" regulation defines a *payroll card account* as an account that is directly or indirectly established through an employer and to which electronic fund transfers of the consumer's wages, salary, or other employee compensation such as commissions are made on a recurring basis, whether the account is operated or managed by the employer, a third-party payroll processor, a depository institution, or any other person.[291]

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.[292] As part of the

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

[289] 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.

[290] 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/.

[291] 12 C.F.R. § 1005.2(b)(3)(i)(A).

[292] 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;

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.[293]

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.[294]

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

Federal law does not specify the timing of wage payment and does not prohibit payment on a semi-monthly or monthly basis. However, all wages that are required by the FLSA are generally considered to be due on the payday for the pay period in which the wages were earned. FLSA regulations state that if an employer cannot calculate how much it owes an employee in overtime by payday, it must pay that employee overtime as soon as possible and no later than the next payday.[295]

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

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Prepaid Disclosures (Apr. 1, 2019), *available at* https://files.consumerfinance.gov/f/documents/102016_cfpb_PrepaidDisclosures.pdf.

[293] 12 C.F.R. § 1005.18.

[294] *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.

[295] 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.

below the highest applicable minimum wage rate or cuts into overtime premium pay.[296] 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.[297] Accordingly, among other items, an employer may be required to reimburse an employee for expenses related to work uniforms,[298] tools and equipment,[299] and business transportation and travel.[300] 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.[301]

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;[302]
- 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);[303]
- 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);[304]
- 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

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[296] *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).

[297] 29 C.F.R. §§ 531.35, 531.36, and 531.37.

[298] 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.

[299] 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).

[300] 29 C.F.R. § 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c04.

[301] 29 C.F.R. § 778.217.

[302] 29 C.F.R. § 531.38.

[303] 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*.

[304] 29 C.F.R. § 531.40.

  - 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;[305]

- 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;[306] 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.[307]

Additionally, while the FLSA contains no express provisions concerning deductions relating to overpayments made to an employee, loans and advances, or negative vacation balance, informal guidance from the DOL suggests such deductions may nonetheless be permissible. While this informal guidance may be interpreted to permit a deduction for loans to employees, employers should consult with counsel before deducting from an employee's wages. An employer can deduct the principal of a loan or wage advance, even if the deduction cuts into the minimum wage or overtime owed. However, deductions for interest or administrative costs on the loan or advance are illegal to the extent that they cut into the minimum wage or overtime pay. Loans or advances must be verified.[308]

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.[309] 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.[310]

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

[305] 29 C.F.R. § 531.40.

[306] 29 U.S.C. § 203. However, the cost cannot be treated as wages if prohibited under a collective bargaining agreement.

[307] 29 C.F.R. § 825.213.

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

[309] 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.

[310] 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.

in non-overtime workweeks if, after the deduction, the employee is paid at least the federal minimum wage.[311]

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.[312]

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.[313]

3.7(b) *District Guidelines on Wage Payment*

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

In the District of Columbia, wages may be paid by cash or check. Paychecks must be payable upon demand at the bank upon which they were drawn.[314] D.C. law does not address the use of wage payment via direct deposit or payroll debit card.

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

Although an employer may choose any dates or day of the week on which to pay its employees, D.C. law requires that employees must be paid at least twice during each calendar month, on regular paydays designated in advance by the employer. All *bona fide* administrative, executive, and professional employees, however, must be paid at least once per month.[315]

If an employer has been paying its employees monthly either by custom or contract since before August 1958 (*i.e.*, the enactment of the D.C. Wage Payment and Wage Collection Law), the employer can continue paying wages once each month.[316]

Paydays must occur no later than 10 working days after the end of the pay periods, unless a collective bargaining agreement provides otherwise.[317]

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

An employer must pay final wages to a discharged employee no later than one working day (any day, except Saturdays, Sundays, or holidays) after the date of discharge. However, discharged employees who were responsible for money belonging to the employer may be paid within four days (not working days)

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311 29 C.F.R. § 531.36.

312 29 C.F.R. § 531.37.

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

314 D.C. CODE ANN. § 32-1302.

315 D.C. CODE ANN. § 32-1302.

316 D.C. CODE ANN. § 32-1302.

317 D.C. CODE ANN. § 32-1302.

from the date of discharge.[318] Further, employees who are suspended because of a labor dispute must be paid no later than the next regular payday.[319]

Employees who resign from employment must be paid either by the next regular payday or within seven days from the date of resignation, whichever is earlier.[320]

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

The District of Columbia Wage Theft Prevention Act imposes significant wage-related notification and record-keeping requirements on employers. All wage notices, including notices of changes in pay rate or payday, as described in **3.7(b)(vi)**, must be provided in English and, if D.C. labor officials provide a template in a second language the employer knows to be the employee's primary language or that the employee requests, also in that second language.[321] Employers must keep copies of written notices given to employees, which must be signed and dated by the employer and by the employee acknowledging receipt of the notice.[322] Note that special requirements apply to temporary staffing firms.[323]

At Hire. The District of Columbia Wage Theft Prevention Act requires employers to provide a notice of wage rate and other information to new employees upon hire. The notice at hire requirements are discussed in **0**.

During Employment. At the time of each wage payment, the Wage Theft Prevention Act requires employers to provide each employee an itemized statement showing:

- the date of the wage payment;
- gross wages paid (showing the earnings for overtime and non-overtime hours worked separately);
- an itemization of allowances and deductions from and additions to wages, including a separate line for gratuities;
- the net wages paid and hours worked during the pay period; and
- employee's tip declaration form for the pay period, delineating cash tips and credit-card tips.[324]

For an employee who is paid commissions, the statement must separately show the amount of commissions and the amount of noncommission, straight-time earnings.[325] The law does not specify whether an employer may provide wage statements electronically.

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[318] D.C. CODE ANN. § 32-1303.

[319] D.C. CODE ANN. § 32-1303.

[320] D.C. CODE ANN. § 32-1303.

[321] D.C. CODE § 32-1008.

[322] D.C. CODE § 32-1008.

[323] *See* D.C. CODE § 32-1008.01.

[324] D.C. CODE § 32-1008(b); D.C. MUN. REGS. tit. 7, § 911.2.

[325] D.C. MUN. REGS. tit. 7, § 911.2.

3.7(b)(v) *Wage Transparency*

The District of Columbia's equal pay statute prohibits an employer from:

- requiring, as a condition of employment, that an employee refrain from inquiring about, disclosing, comparing, or otherwise discussing the employee's wages or the wages of another employee; or
- discharging, disciplining, interfering with, or otherwise retaliating against an employee who inquires about, discloses, compares, or otherwise discusses the employee's wages or the wages of another employee or is believed by the employer to have done so.[326]

The wage transparency provision does not afford a private right of action to enforce its terms. The D.C. Mayor's office is empowered to assess civil fines against an employer that violates the statute.[327]

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

Employers must give each employee written notice of any changes to the rate of pay and the basis thereof, including any change in the regular payday designated by the employer.[328]

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

In the District of Columbia, there is no general obligation to indemnify an employee for business expenses, though D.C. law does include specific work expense provisions related to travel, uniforms, and tools and equipment.

Travel Expenses. In addition to paying employees the state minimum wage, an employer must pay the cost of travel expenses incurred by employees performing the employer's business.[329]

Uniforms & Protective Clothing. An employer must pay the cost of purchase, maintenance, and cleaning of uniforms and protective clothing (including hats and shoes) required by the employer or by law. However, in lieu of purchasing, maintaining, and cleaning plain and washable uniforms an employer may pay 15 cents per hour toward its minimum wage obligations, with the weekly maximum payment required being $6. However, the 15 cents per hour payment is not applicable concerning protective clothing. When an employer purchases plain and washable uniforms, but an employee maintains and cleans the uniforms, the payment is 10 cents per hour, in addition to the employee's wage, which must exceed the minimum wage. When an employer cleans and maintains, but an employee purchases, plain and washable uniforms, the payment is 8 cents per hour, in addition to the employee's wage, which must exceed the minimum wage.[330]

Tools & Equipment. In addition to paying employees the state minimum wage, an employer must pay the cost of purchasing and maintaining tools the employee is required to use to perform the employer's business.[331]

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[326] D.C. CODE § 32-1452.

[327] D.C. CODE § 32-1455.

[328] D.C. CODE § 32-1008.

[329] D.C. MUN. REGS. tit. 7, § 909.1.

[330] D.C. MUN. REGS. tit. 7, §§ 908.1, 908.2, and 908.3.

[331] D.C. MUN. REGS. tit. 7, § 910.1.

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

D.C. law does not include a generally applicable wage deduction statute. However, the regulations set forth provisions to guide employers regarding permissible and prohibited deductions.

Permissible Deductions. Under certain circumstances, an employer is permitted to deduct from an employee's wages for meals and lodging.[332] If an employer provides lodging to an employee, it may take an allowance (to be applied toward meeting its minimum wage obligation) up to 80% of the rental value. An employer may take an allowance up to $2.12 for each meal it makes available to an employee. An employer can only take one allowance for periods of work of four hours or less; two meal allowances may be taken for over four hours of work. The daily allowance for meals cannot exceed $6.36 per day for an employee living at the place of employment.[333]

Prohibited Deductions. An employer cannot charge employees or require or permit an employee to pay an employer directly or indirectly for breakages, walkouts, mistakes on customer checks, and similar charges, or to pay fines, assessments, or charges if the payment would reduce the employee's wages below the minimum wage.[334] An employer also cannot deduct money from an employee's final wages if the employee does not return company property such as an identification tag, cell phone, tools, etc.[335]

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

Orders of Support. A D.C. court may issue a garnishment order requiring an employer to pay a portion of an employee's wages to someone else as a child support or alimony payment.[336] The employer must begin withholding the employee's earnings no later than the first pay period occurring 10 days after the date the order to withhold was issued.[337] The employer must transmit the payments to the D.C. child support agency within seven days of each payday.[338] The maximum amount that may be subject to garnishment generally is either: (1) 25% of post tax income for that week; or (2) the amount by which the employee's post tax income exceeds 40times the federal minimum wage.[339] In addition, the employer may deduct a $2 processing fee for costs incurred in withholding the garnished amounts.[340]

An employer is prohibited from discharging, refusing to employ, taking disciplinary action, or otherwise discriminating against an employee due to the fact that a party has subjected or attempted to subject the employee's unpaid earnings to withholding for the purposes of paying support. An employer that violates this provision may be subject to a civil penalty of up to $10,000.[341]

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[332] D.C. MUN. REGS. tit. 7, § 904.

[333] D.C. MUN. REGS. tit. 7, § 904.

[334] D.C. MUN. REGS. tit. 7, § 915.

[335] D.C. Dep't of Emp. Servs., Office of Wage-Hour, *Frequently Asked Questions*, *available at* https://does.dc.gov/sites/default/files/dc/sites/does/page_content/attachments/FAQs%20for%20OWH-Final.pdf.

[336] D.C. CODE §§ 46-207.01, 46-211.

[337] D.C. CODE § 46-212.

[338] D.C. CODE § 46-212.

[339] D.C. CODE §§ 46-208; 16-572.

[340] D.C. CODE § 46-212.

[341] D.C. CODE § 46-219.

Debt Collection. An employer is required to comply with a court order to garnish an employee's wage in fulfillment of a judgment or debt.[342] While the general rule is that the first-served garnishment order takes priority over subsequent orders, garnishment orders for child or spousal support take priority over other garnishments.[343] As with an order of support, the maximum amount that may be subject to garnishment generally is either: (1) 25% of post tax income for that week; or (2) the amount by which the employee's post tax income exceeds 40times the federal minimum wage.[344] In addition, the employer may deduct a $2 processing fee for costs incurred in withholding the garnished amounts.[345]

Employers are prohibited from discharging employees because a creditor of the employee subjected or attempted to subject unpaid earnings of the employee to garnishment or like proceedings. When such proceedings are directed at the employer for the purpose of paying a judgment, the employer cannot terminate the employee based on this action.[346]

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

Minimum Wage Act. The D.C. Corporation Counsel prosecutes violations under the D.C. Minimum Wage Act in the D.C. Superior Court.[347] In addition, a legal action to recover damages under the District's minimum wage laws can be filed in any court of competent jurisdiction in the District.[348] In addition, like the FLSA, the District's minimum wage laws permit individuals to file collective actions whereby plaintiffs may assert a violation of the minimum wage laws on behalf of themselves and other similarly-situated employees.[349] A cause of action for unpaid wages or liquidated damages based on the District's minimum wage laws must be brought within three years after the cause of action accrued.[350]

The successful party may be able to recover unpaid wages, liquidated damages, and reasonable attorneys' fees.[351] Upon determination that an employer willfully violated the D.C. Minimum Wage Act, the employer may be subjected to a fine of not more than $10,000, imprisonment of not more than six months, or both.[352] Imprisonment, however, will not result from a first offense under the law.[353]

The mayor's office may also assess and collect administrative penalties as follows:

- for the first violation of the minimum wage and overtime provisions, $50 for each employee or person whose rights are violated for each day that the violation occurred or continued;

[342] D.C. CODE § 16-573.

[343] D.C. CODE §§ 16-571.01, 16-572.

[344] D.C. CODE § 16-572.

[345] D.C. CODE § 16-583.

[346] D.C. CODE § 16-584.

[347] D.C. CODE § 32-1011(c).

[348] D.C. CODE § 32-1012(b).

[349] D.C. CODE §§ 32-1012(a), 32-1308(a).

[350] D.C. CODE § 32-1308.

[351] D.C. CODE § 32-1012(a).

[352] D.C. CODE § 32-1011(a).

[353] D.C. CODE § 32-1011(b).

- for any subsequent violation, $100 for each employee or person whose rights are violated for each day that the violation occurred or continued;
- $500 for each failure to maintain payroll records or to retain payroll records for the greater of three years or the prevailing federal record-keeping requirement;
- $500 for each failure to allow the mayor's office to inspect payroll records or perform other investigations;
- $500 for each failure to provide each employee an itemized wage statement or written wage notice;
- $500 for each failure to timely submit the quarterly wage report, unless the employer proves that it used a third-party payroll business to process payroll; and
- $100 for each day the employer fails to post the required notice.[354]

Wage Payment. When there is a *bona fide* dispute as to the amount of wages due, the employer must give written notice to the employee of the amount of wages that the employer concedes is due.[355] The conceded amount must be paid by the employer unconditionally and in accordance with the District's wage payment procedures.[356] The employee's acceptance of any payment under these circumstances does not constitute a release as to the balance of the disputed amount.[357] The employee or the mayor's office will be able to pursue any remaining balance of unpaid wages and related damages, interest, costs, and penalties.[358]

An aggrieved employee may bring a civil action against the employer and, upon prevailing, may recover attorneys' fees and costs, back pay, reinstatement in employment, and injunctive relief.[359] An employee may also proceed on behalf of all employees similarly situated as a class action.[360] The statute of limitations for filing a civil action is three years.[361] Alternatively, the employee may file a wage claim with the mayor's office, which will then investigate and resolve the claim. Appropriate relief may include all unpaid wages, reasonable attorneys' fees and costs, and liquidated damages.[362]

With respect to penalties, any employer that negligently fails to comply with the wage payment provisions is guilty of misdemeanor and, upon conviction, shall be fined not more than $2,500 per affected employee for the first offense, and not more than $5,000 per affected employee for subsequent offenses.[363] An employer that willfully fails to comply with the wage payment provisions is guilty of misdemeanor and, upon conviction, will be fined not more than $5,000 and imprisoned for not more than 30 days or both,

[354] D.C. CODE § 32-1011(d).

[355] D.C. CODE § 32-1304.

[356] D.C. CODE § 32-1304.

[357] D.C. CODE § 32-1304.

[358] D.C. CODE § 32-1304.

[359] D.C. CODE § 32-1308.

[360] D.C. CODE § 32-1308.

[361] D.C. CODE § 32-1308.

[362] D.C. CODE § 32-1308.01.

[363] D.C. CODE § 32-1307.

for the first offense, and not more than $10,000 and imprisoned for not more than 90 days, or both, for subsequent offenses.[364]

In addition to and apart from any other penalties or remedies provided for in the wage payment provisions, the mayor can assess and collect administrative penalties as follows:

- for the first offense, $50 for each employee or person whose rights are violated for each day the violation occurred or continued; and
- for each subsequent offense, $100 for each employee or person whose rights are violated for each day the violation occurred or continued.[365]

If an employer fails to pay an employee their final wages as required by the wage payment statute, the employer must pay the employee, as liquidated damages, 10% of the unpaid wages for each working day the failure to pay occurs after the day payment is due, or an amount equal to the treble the unpaid wages, whichever is smaller.[366]

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).[367] 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.[368] Further, the U.S. Supreme Court, in *Massachusetts v. Morash*, noted that extensive state regulation of vesting, funding, and participation rights of vacation benefits may provide greater protections for employees than ERISA and, as a result, the court was reluctant to have ERISA preempt state law in situations where it was not clearly indicated.[369]

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

The District of Columbia does not require an employer to offer employees other benefit compensation such as vacation pay, holiday pay, personal time off, bonuses, severance pay, or pensions. 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. It is important

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[364] D.C. CODE § 32-1307.

[365] D.C. CODE § 32-1307.

[366] D.C. CODE § 32-1303.

[367] 29 U.S.C. § 1002.

[368] 29 C.F.R. § 2510.3-1; *see also* U.S. Dep't of Labor, *Advisory Opinion 2004-10A* (Dec. 30, 2004), *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2004-10a; U.S. Dep't of Labor, *Advisory Opinion 2004-08A* (July 2, 2004), *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2004-08a; U.S. Dep't of Labor, *Advisory Opinion 2004-03A* (Apr. 30, 2004), *available at* https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/2004-03a.

[369] 490 U.S. 107, 119 (1989).

to 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.

Because vacation pay is a matter of contract or employer policy, a D.C. employer may include a forfeiture provision in its policy. However, if a policy does not contain a forfeiture provision, payout is required when employment ends.[370] The employer bears the burden of establishing that its vacation policy required forfeiture.[371] Note that, unlike vacation pay provided via an employer's policy, paid sick leave that an employee accrues under the District of Columbia Earned Sick and Safe Leave Act (see **3.9(b)(ii)**) is not required to be paid out upon termination.

3.8(b) *Holidays & Days of Rest*

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

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

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

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

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

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

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

Whether such state laws apply to an employer's benefit plans depends on whether the benefits are subject to ERISA. Most state and local laws that relate to an employer's provision of health benefit plans for employees are preempted by ERISA. Self-insured plans, for example, are preempted by ERISA. If the plan is preempted by ERISA, employers may not be required to comply with the states' directives on requiring coverage for domestic partners or parties to a civil union.[372] 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).[373] However, under COBRA, only an employee and the employee's spouse

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[370] *See Jones v. District Parking Mgmt. Co.*, 268 A.2d 860 (D.C. 1970).

[371] *See National Rifle Assoc. v. Ailes*, 428 A.2d 816, 820 (D.C. 1981).

[372] 29 U.S.C. § 1144.

[373] 29 U.S.C. § 1161.

and dependent children are considered "qualified beneficiaries."[374] 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) *District Guidelines on Domestic Partnerships & Civil Unions*

Couples may register as domestic partners in the District of Columbia.[375] In addition, relationships other than marriages that are established in accordance with the laws of other jurisdictions and are substantially similar to domestic partnerships, will be recognized as domestic partnerships in the District.[376] If one or both partners are an employee of the District, such employees are permitted to purchase health insurance coverage for their domestic partner and a dependent child of a domestic partner.[377]

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;[378]
- to care for an immediate family member (spouse, child, or parent) with a serious health condition;[379]
- to take medical leave when the employee is unable to work because of a serious health condition;[380]
- 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.[381] A *covered*

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[374] 29 U.S.C. § 1167(3).

[375] D.C. CODE § 32-702.

[376] D.C. CODE § 32-702.

[377] D.C. CODE §§ 32-704 to 32-706.

[378] 29 C.F.R. §§ 825.102, 825.112, 825.113, 825.120, and 826.121.

[379] 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).

[380] 29 C.F.R. §§ 825.112, 825.113.

[381] 29 U.S.C. § 2611(4); 29 C.F.R. §§ 825.104 to 825.109.

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.[382] For information on the FMLA, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

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

The District of Columbia Family and Medical Leave Act of 1990 ("D.C. FMLA") provides eligible employees with the right to take 16 weeks of family leave and 16 weeks of medical leave in any 24-month period.[383]

Coverage & Eligibility. A private employer is covered if it employs 20 or more employees in the District of Columbia during 20 or more weeks in the current or preceding calendar year.[384] Employers include any individual, firm, association or corporation, any receiver or trustee of any individual, firm, association, or corporation, or the legal representative of a deceased employer, including the District of Columbia government, which uses the services of another individual for pay in the District.[385]

Individuals employed by the same covered employer for a minimum of 12 consecutive or nonconsecutive months, including paid or unpaid leaves in the seven years preceding the date on which the leave commences, and who have worked at least 1,000 hours during the 12-month period immediately preceding the request for family or medical leave, are eligible for FMLA leave.[386]

Purpose & Length of Leave. The medical leave provisions of the D.C. FMLA apply to employees who are unable to perform the functions of their position due to a serious health condition.[387] Under the family leave provisions, an employee is also entitled to 16workweeks of family leave during any 24-month period for:

1. the birth of a child of the employee;
2. the placement of a child with the employee for adoption or foster care;
3. the placement of a child with the employee for whom the employee permanently assumes and discharges parental responsibility; or
4. the care of a family member of the employee who has a serious health condition.[388]

When the leave is taken for birth or placement of a child as described in (1)-(3) above, the entitlement to leave expires 12 months following the leave event.[389]

The D.C. FMLA defines a *family member* as: (1) a person to whom the employee is related by blood, legal custody, or marriage; (2) a child who lives with an employee and for whom the employee permanently assumes and discharges parental responsibility; or (3) a person with whom the employee shares or has

[382] 29 U.S.C. § 2611(2); 29 C.F.R. §§ 825.110 to 825.111.

[383] D.C. CODE §§ 32-501 *et seq.*

[384] D.C. CODE § 32-516; D.C. MUN. REGS. tit. 4, § 1602.

[385] D.C. CODE § 32-501(2).

[386] D.C. CODE § 32-501(1).

[387] D.C. CODE § 32-503(a).

[388] D.C. CODE § 32-502(a).

[389] D.C. CODE § 32-502(b).

shared, within the past year, a mutual residence and with whom the employee maintains a committed relationship.[390]

If two family members are employed by the same employer, the employer may limit their allowable family leave to an aggregate of 16 workweeks in a 24-month period, and/or limit their simultaneous leave to four weeks.[391]

Intermittent Leave & Reduced Schedule. When an employee's family member has a serious health condition, family leave may be taken intermittently or on a reduced schedule when medically necessary.[392] According to the D.C. FMLA, a *serious health condition* is a physical or mental illness, injury, or impairment that involves either inpatient care in a hospital, hospice, or residential health care facility, or continuing treatment or supervision at home by a health care provider or other competent person.[393] *Continuing care* is defined in the regulations and includes periods of incapacity necessitated by pregnancy, prenatal care, and other conditions requiring ongoing treatment.[394]

When an employee requests intermittent family leave for the birth, adoption, or foster care or other placement of a child, leave may be taken on a reduced-leave schedule so that the 16 workweeks of family leave are taken over a period not to exceed 24 consecutive workweeks. However, such a reduced leave schedule is contingent on agreement between the employee and the employer.[395]

Employer Obligations. Upon return from family or medical leave, employers must restore the employee to the employment position held by the employee when the leave commenced, or to an equivalent position with equivalent benefits, pay, seniority, and other terms and conditions of employment.[396]

An employer may, however, have the right to decline to restore a salaried employee if: (1) the employee is among the five highest paid employees of an employer that employs fewer than 50 people; or (2) the employee is among the highest paid 10% of employees of an employer that employs 50 or more people. If the employee falls under one of the aforementioned classifications, the employer must also be able to show:

1. restoring the employee to their prior position would cause substantial economic injury to the employer's operations;
2. the substantial economic injury is not directly related to the leave that the employee took; and

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[390] D.C. CODE § 32-501(4).

[391] D.C. CODE § 32-502(h).

[392] D.C. CODE § 32-502(c).

[393] D.C. CODE § 32-501(9).

[394] D.C. MUN. REGS. tit 4, § 1605.3.

[395] D.C. MUN. REGS. tit. 4, § 1606.4.

[396] D.C. CODE § 32-505(d); *see also Chang v. Institute for Public-Private P'ships Inc.*, 846 A.2d 318, 326 (D.C. 2004) (stating that "to the extent employment benefits were provided prior to the temporary leave period, an employer is required to continue providing those benefits after an employee takes protected leave").

3. the employee was notified of the employer's intent not to return the employee to their prior position and the basis for its decision.[397]

Leave must not cause the loss of any employment benefit or seniority accrued before the leave commenced.[398] Employees, however, are not entitled to accrue seniority or employment benefits (other than continued health care benefits) during the covered leave.[399] During any period of family or medical leave, the employer must maintain the employee's coverage under any group health plan.[400] Coverage under the health plan for the duration of the family or medical leave is to be maintained at the same level and under the same conditions as if the employee did not have a break in service.

The D.C. FMLA does not require employers to provide paid family or medical leave.[401] Therefore, family and medical leave generally is unpaid, unless another employer program allows the employee to be paid.

Employers must post a city-created notice that sets forth relevant information under the law. Notice must be given in an employee handbook or manual also, or, if the employer does not maintain one, it must be distributed to every new employee. It must also be given to employees when they request leave or when the employer acquires knowledge that an employee's leave may be eligible under the law.[402]

Employee Rights & Obligations. An employer may require certification of the illness triggering a request for family or medical leave from the health care provider and should establish a regular policy or process for doing so.[403] It is possible for an employer to inadvertently waive the certification requirement by failing to properly maintain policies requiring the production of appropriate medical documentation.[404] Certification forms should incorporate the following:

- the date on which the serious health condition commenced;
- the probable duration of the condition;
- the appropriate medical facts within the knowledge of the health care provider that would entitle the employee to take leave under the D.C. FMLA; and
- for purposes of medical leave, the certification must include an explanation of the extent to which the employee is unable to fulfill the duties of their position; for purposes of family leave, there must be an estimation of the amount of time that the employee will need to care for the family member.[405]

If an employer has reason to doubt the validity of the certification, the employer may, at its own expense, require that the employee obtain a second medical opinion of a health care provider approved by the

[397] D.C. CODE § 32-505(f).

[398] D.C. CODE § 32-505(a).

[399] D.C. CODE § 32-505(e).

[400] D.C. CODE § 32-505(b).

[401] D.C. CODE § 32-502(e)(4).

[402] D.C. CODE § 32-511; D.C. MUN. REG. tit. 4, § 1613.

[403] D.C. CODE § 32-504.

[404] *Pendarvis v. Xerox Corp.*, 3 F. Supp. 2d 53 (D.D.C. 1998).

[405] D.C. CODE § 32-504(b).

employer.[406] Medical opinions secondary to an original certification cannot be provided by health care providers who are retained on a regular basis by the employee or the employer. Likewise, the health care providers cannot bear a close relationship to the employee or employer so as to taint the certification process with the appearance of bias.[407] If the second opinion differs from the original certification, the employee may obtain the opinion of a third health care provider mutually agreed upon by the employer and employee.[408] The cost of the third medical opinion will be paid by the employer. The opinion of the third health care provider is final and binding.[409] The employer may require that the employee provide subsequent recertification of illness on a reasonable basis.[410]

Employer use of certification information requested for family or medical leave is limited to making decisions about the employee's eligibility for D.C. FMLA leave.[411] Employers must take measures to preserve the confidentiality of information relating to the circumstances and the particular reasons for an employee's D.C. FMLA request for leave. To that end, all forms and supporting medical certifications must be maintained in a segregated and locked file, separate from the employee's personnel file.[412] Also, only individuals with a demonstrated "need to know" an employee's D.C. FMLA status—including supervisors or managers—can be provided such information.[413] Any employer that willfully violates the certification requirements of the D.C. FMLA will be assessed a civil penalty of $1,000 for each offense.

An employee may be required to continue to make any contributions to a group health plan that the employee would have made if the employee had not taken leave.[414] If the employee is unable or refuses to make the proper contributions to the group health plan, the employee forfeits the health plan benefit until the employee returns from leave and the employee's regular payments to the plan are resumed.

Antiretaliation Provisions. Retaliation against any employee for exercising the rights granted under the D.C. FMLA is unlawful. Retaliatory actions include those that interfere with or deny the individual any right provided by the D.C. FMLA or those taken against any individual who has participated in or facilitated legal proceedings to enforce the D.C. FMLA.[415]

Additional Provisions. There are also notice, posting, and record-keeping requirements under the D.C. FMLA, discussed in **2.1(b)**, **3.1(a)(ii)**, and **3.1(b)(ii)**, respectively.

3.9(a)(iii) *District Guidelines on the Universal Paid Leave Act*

The D.C. Universal Paid Leave Act provides for paid leave in several situations and runs concurrently with leave taken under the federal FMLA or the D.C. FMLA, where applicable.[416] Covered employers contribute an amount equal to 0.26% of the wages of each of its covered employees to the Universal Paid Leave

[406] D.C. CODE § 32-504(d).

[407] D.C. CODE § 32-504(e).

[408] D.C. CODE § 32-504(d)(2)(A).

[409] D.C. CODE § 32-504(d)(2)(B).

[410] D.C. CODE § 32-504(f).

[411] D.C. CODE § 32-504(g).

[412] D.C. MUN. REGS. tit. 4, § 1617.8.

[413] D.C. MUN. REGS. tit. 4, § 1617.7.

[414] D.C. CODE § 32-505(b)(2).

[415] D.C. CODE § 32-507.

[416] D.C. Code §§ 32-541.01 *et seq*.

Implementation Fund, and employees must file a claim for paid leave benefits with the Office of the Mayor of the District of Columbia, which administers the paid leave program.

Coverage & Eligibility. The law covers employers of all sizes that are required to pay unemployment insurance on behalf of their employees. An eligible employee is one who spends more than 50% of the employee's work time for that employer working in the District of Columbia; or whose employment for the covered employer is based in the District and who regularly spends a substantial amount of the employee's worktime for that covered employer in the District, and not more than 50% of the employee's work time for that covered employer in another jurisdiction.[417]

Permitted Uses, Notice & Documentation. Eligible employees may take leave in three different situations:

- up to 12 weeks of paid parental leave in a 52-workweek period, which may be taken within one year following the birth of a child, the placement of a child for adoption or foster care, or the placement of a child where the eligible individual legally assumes and discharges parental responsibility;
- up to 12 weeks of paid family leave in a 52-workweek period to provide care or companionship to a family member who has a diagnosis or occurrence of a serious health condition;
- up to 12 weeks of paid medical leave in a 52-workweek period for an eligible individual following the employee's diagnosis or occurrence of a serious health condition; and
- up to two weeks of paid pre-natal leave. [418]

Under the law, a *family member* includes: a biological, adopted, or foster son or daughter, a stepson or stepdaughter, a legal ward, a son or daughter of a domestic partner, or a person whom an eligible individual stands in *loco parentis*; a biological, foster, or adoptive parent, a parent-in-law, a stepparent, a legal guardian, or other person who stood in *loco parentis* to an eligible individual when the eligible individual was a child; a person whom an eligible individual is related by domestic partnership or marriage; a grandparent of an eligible individual; or a sibling of an eligible individual.

To the extent practicable, an eligible individual must provide written notice to the individual's employer of the need for the use of paid leave benefits before taking leave. The written notice shall include a reason for the absence involved, within the parameters of the federal Health Insurance Portability and Accountability Act, and the expected duration of the leave. If the paid leave is foreseeable, the employee must provide written notice at least 10 days, or as early as possible, in advance of the paid leave. If the paid leave is unforeseeable, a notification, either oral or written, must be provided before the start of the work shift for which the paid leave is being used. In the case of an emergency, the employee, or another individual on the employee's behalf, must notify the employer, either orally or in writing, within 48 hours of the emergency occurring.

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[417] In order to be eligible for benefits, an individual must have earned income as a covered employee during at least one of the past five completed quarters immediately before the qualifying event, or, during at least one of the past 10 completed quarters if the claim is submitted between October 1, 2021 and July 25, 2022. D.C. Mun. Regs. tit.7, § 3500.1.

[418] D.C. CODE § 32-541.04.

The Act does not require a covered employer to provide job protection to any eligible individual beyond that to which the individual is entitled under the D.C. FMLA statute. In addition, job protection is not guaranteed for individuals who work for employers with fewer than 20employees.

Antiretaliation Provisions. An employer is prohibited from interfering with, restraining, or denying the exercise of or the attempt to exercise any right provided by the D.C. Universal Paid Leave Act. It is unlawful for an employer to retaliate in any manner against any person because the person opposes any practice made unlawful by the Act; files or attempts to file a charge; institutes or attempts to institute a proceeding; facilitates the institution of a proceeding; or requests, applies for, or uses paid-leave benefits; or gives any information or testimony in connection with an inquiry or proceeding related to the Act.

Additional Provisions. The mayor's office will provide to covered employers a notice explaining:

- an employee's right to paid leave benefits under the Act and the terms under which such leave may be used;
- that retaliation is prohibited with regard to an employee requesting, applying for, or using paid leave benefits is prohibited;
- that an employee who works for a covered employer with under 20employees will not be entitled to job protection if the employee takes paid leave under the Act; and
- that the covered employee has a right to file a complaint and the procedures established by the mayor for filing a complaint.

Each covered employer must provide this notice to covered employees at the time of hiring and annually thereafter, and at the time the covered employer is aware that an individual needs to take leave. A covered employer must also post and maintain the notice in English and in all languages in which the notice has been published.

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.[419] 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) *District Guidelines on Paid Sick Leave*

The D.C. Accrued Sick and Safe Leave Act[420] mandates that even the smallest employers must provide some paid sick leave to their employees. If an employer has a "paid-time off" program or "universal leave" policy that provides accrued paid leave that is at least equivalent if not more generous than the law's

[419] 80 Fed. Reg. 54,697-54,700 (Sept. 10, 2015).

[420] D.C. CODE §§ 32-531.01 *et seq.*

minimum requirements, and can be used for the same qualifying reasons, the employer does not need to modify its existing practice.[421] Employees are eligible to access paid leave after 90 days of service.[422]

Coverage & Eligibility. The law covers all size employers but with varying accrual rates based on the size of the employer. *Employer* means a legal entity or any receiver or trustee of an entity, who directly or indirectly or through an agent or any other person, including through the services of a temporary services or staffing agency or similar entity, employs or exercises control over the wages, hours, or working conditions of an employee.[423] The law's regulations specify that the number of employees employed by the employer is calculated by taking the average number of monthly full-time equivalent employees employed in the preceding calendar year.[424]

Permitted Uses, Notice & Documentation. Employees may take leave to care for their own or a family member's illness or medical condition or to seek medical diagnosis. The law also allows for leave needed if an employee or an employee's family member is a victim of stalking, domestic violence, or sexual abuse.

Specifically, accrued paid leave can be used by an employee for the following reasons:

- an absence resulting from a physical or mental illness, injury, or medical condition of the employee;
- an absence resulting from obtaining professional medical diagnosis, or care for the employee;
- an absence for the medical care of a family member; or
- an absence related to seeking treatment, care, or legal services if the employee or the employee's family member is the victim of stalking, domestic violence, or sexual abuse.[425]

Family member is broadly defined to include: a spouse (including the person identified by an employee as their domestic partner); the parents of a spouse; children (including step-children, foster children, and grandchildren); the spouses of children; parents (including step-parents); brothers and sisters (including step- and half-brothers and sisters); the spouses of brothers and sisters (including step- and half-brothers and sisters); a child who lives with an employee and for whom the employee permanently assumes and discharges parental responsibility; and a person with whom the employee shares or has shared, for not less than the preceding 12 months, a mutual residence and with whom the employee maintains a committed relationship.[426]

If the requested leave is foreseeable, employees should provide a written request for leave at least 10 days in advance of the paid leave.[427] If the leave is unforeseeable, the employee must make an oral request prior to the start of the work shift for which leave is to be taken. In an emergency situation, the employee

[421] D.C. CODE § 32-531.05.

[422] D.C. CODE § 32-531.02(c).

[423] D.C. CODE § 32-531.01(3)(A).

[424] D.C. MUN. REGS. tit.7, § 3201.5.

[425] D.C. CODE § 32-531.02(b).

[426] D.C. CODE § 32-531.01(4).

[427] D.C. CODE § 32-531.03.

must notify the employer prior to the start of the next work shift or within 24 hours of the onset of the emergency, whichever occurs sooner.[428]

An employer can require that an employee provide a reasonable certification for paid leave that lasts for three or more consecutive days.[429] A *reasonable certification* can include: (1) a medical certification; (2) a police report indicating the employee was the victim of stalking, domestic violence, or sexual assault; (3) a court order; or (4) a signed witness statement supporting the reason for the leave.[430]

Employers may create and enforce a policy that prohibits the improper use of paid leave or that requires more frequent certifications from an employee if there is evidence of a pattern of abuse of paid leave.[431] The regulations contemplate that a pattern of abuse may be evidenced by:

- consistent taking of paid leave without advance notice when there is no emergency requiring it;
- consistent taking of leave on days for which vacation or annual leave have been denied;
- a pattern of taking paid leave on days where the employee is scheduled to work a shift or perform duties perceived as undesirable, including high customer volume days; and
- a pattern of taking paid leave on Mondays, Fridays or the day immediately preceding or following holidays.[432]

Accrual, Caps, Carry-Over, Cash Value, Cash-Out & Negative Balance. Paid leave begins to accrue at the start of employment.[433] Under the law, employers must provide the following amount of accrued paid leave to their employees:

- an employer with 100 or more employees must provide one hour of paid leave for every 37 hours an employee works, not to exceed seven days a year;
- an employer with 25 to 99 employees must provide one hour of paid leave for every 43 hours an employee works, not to exceed five days a year; and
- an employer with 24 or fewer employees must provide one hour of paid leave for every 87 hours an employee works, not to exceed three days a year.[434]

An employee's unused paid leave accrued during a 12-month period must carry over annually.[435] However, in one year an employee can only use the maximum amount of hours that can be accrued, regardless of how many hours that have been carried over, unless permitted by the employer.[436]

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[428] D.C. CODE § 32-531.03.

[429] D.C. CODE § 32-531.04(a)(1).

[430] D.C. CODE § 32-531.04(a)(2).

[431] D.C. CODE § 32-531.08(c).

[432] D.C. MUN. REGS. tit.7, § 3215.3.

[433] D.C. CODE § 32-531.02(c)(1).

[434] D.C. CODE § 32-531.02.

[435] D.C. MUN. REGS. tit.7, § 3210.1.

[436] D.C. MUN. REGS. tit.7, § 3210.2.

Moreover, the law states that employers do not have to compensate employees for unused, accrued paid leave when the employee leaves their employment.[437]

Antiretaliation Provisions. Interference, restraint, or denial of the exercise of the rights granted under the Sick and Safe Leave Act is unlawful.[438] Furthermore, an employer cannot discharge or discriminate in any manner against an employee because the employee: (1) opposes any practice by an employer made unlawful under the law; (2) files or attempts to file a charge; (3) institutes or attempts to institute a proceeding; (4) facilitates the institution of a proceeding; (5) gives any information or testimony in connection to an inquiry or proceeding; or (6) uses paid leave as provided by the law.[439]

An employer that willfully violates the requirements of the statute can receive a civil penalty in the amount of $500 for the first violation, $750 for the second violation, and $1,000 for the third and any subsequent violations.[440]

Posting & Record Keeping. An employer must conspicuously post and maintain a notice that sets forth excerpts from or summaries of the pertinent provisions of the paid leave law and information that pertains to filing of a complaint under the law. The notice must be published by the D.C. Department of Employment Services in all languages spoken by 3% of or 500individuals in the D.C. population, whichever is less. An employer must post the notice in English and all languages spoken by employees with limited or no-English proficiency. The civil penalty for failure to post the notice is up to $100 per day, not to exceed $500, unless the ongoing violation is willful.[441]

Employers must retain records documenting hours worked by employees and paid leave taken by employees for a period of three years. When an issue arises as to an employee's entitlement to paid leave under the law, if an employer does not maintain or retain adequate records documenting hours worked by the employee and paid leave taken by the employee, or does not allow enforcement officials reasonable access to the records, there is a rebuttable presumption that the employer has violated the law.[442]

3.9(c) *Pregnancy Leave*

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

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

Pregnancy Discrimination Act (PDA). Under the PDA, which as part of Title VII applies to employers with 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

[437] D.C. MUN. REGS. tit.7, § 3211.1.

[438] D.C. CODE § 32-531.08(a).

[439] D.C. CODE § 32-531.08(b).

[440] D.C. CODE § 32-531.12.

[441] D.C. CODE § 32-531.09; D.C. MUN. REGS. tit.7, § 3213.

[442] D.C. CODE § 32-531.10b.

under an employer's health or disability insurance or sick leave plan.[443] 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.[444] 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.[445] 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) *District Guidelines on Pregnancy Leave*

As described in **3.11(c)(ii)**, the District of Columbia requires all to make reasonable accommodations to a known condition related to pregnancy, childbirth, related medical conditions, or breast feeding. Among the reasonable accommodations described in the statute time off due to pre-birth complications and to recover from childbirth.[446]

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[443] 42 U.S.C. § 2000e(k); *see also* 29 C.F.R. § 1604.10.

[444] 29 C.F.R. § 825.202.

[445] 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.

[446] D.C. CODE §§ 32-1231.01, 32-1231.02.

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) *District 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 D.C. FMLA. For more information about the D.C. FMLA., see 3.9(a)(ii).

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) *District Guidelines on School Activities Leave*

Qualified employees are entitled to take a total of 24 hours of leave during any 12-month period to attend or participate in school-related events for their children.[447] The leave may be unpaid unless the employee elects to use paid leave that has been provided by the employer.[448]

Coverage & Eligibility. Covered employers include any individual, firm, association, corporation, the D.C. government, any receiver or trustee of any individual, firm, association, or corporation, or the legal representative of a deceased employer.[449]

To be eligible, employees must satisfy at least *one* of the following conditions:

1. be the natural mother or father of a child;
2. be a person who has legal custody of a child;
3. be a person who acts as a guardian of a child regardless of legal appointment;
4. be an aunt, uncle, or grandparent of a child; or
5. be a person who is married to someone listed in categories (1)-(4).[450]

Permitted Uses & Notice. School-related events include activities sponsored by either a school or an associated organization such as a parent-teacher association.[451] Examples of events for which leave may be taken include: school concerts, plays, or rehearsals; sporting games or practices for a school team; meetings with teachers and counselors; or any similar type of activity. The event must involve the qualifying employee's child either as a direct participant or subject (not as a spectator).[452]

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[447] D.C. CODE § 32-521.02(a).

[448] D.C. CODE § 32-521.02(d).

[449] D.C. CODE § 32-521.01(1).

[450] D.C. CODE § 32-521.01(2).

[451] D.C. CODE § 32-521.01(3).

[452] D.C. CODE § 32-521.01(3).

Employees seeking leave are required to provide their employer with a request for leave at least 10 calendar days prior to the event.[453] If the intent to attend the event is not reasonably foreseeable, the 10-day advance notice requirement will not apply.

The employer may deny the leave request only when both: (1) granting leave would disrupt the employer's business; and (2) the leave would make the achievement of production or service delivery unusually difficult.[454]

Employers may not cause the loss of any employment benefits or accrued seniority of any employee who takes school-related leave.[455]

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) *District Guidelines on Blood, Organ, or Bone Marrow Donation*

D.C. 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) *District Voting Time Guidelines*

The District of Columbia has enacted amendments to its Election Code[456] to allow employees to vote during working hours. Under the new law, an employer must provide an employee at least two hours of paid leave to vote, in person, in any election in which the employee is eligible to vote. Moreover, the employer cannot deduct these two hours from an employee's salary, wages, or accrued leave.

The employer can, however, require the employee to request the leave a reasonable time in advance. The employee's request is reasonable if (a) the request is consistent with an existing employee leave policy or (b) in the absence of such a policy, the request is made no later than 7 days before the time requested to vote. The employer can also specify the hours during which the employee can take leave. For instance, employers may specify that employees participate in early voting instead of the day of the election, or that the employees vote either at the beginning or end of working hours.

The employer cannot interfere with, restrain, or deny any attempt to leave or retaliate against the employee in any manner with respect to the employee's voting rights provided under the new law.

The employer must post and maintain a notice that will be developed by the District of Columbia Board of Elections no later than 60 days before all scheduled elections, including special elections. The notice must be posted in a conspicuous place in the workplace and include an easy-to-understand description of

[453] D.C. CODE § 32-521.02(e).

[454] D.C. CODE § 32-521.02(c).

[455] D.C. CODE § 32-521.03.

[456] D.C. CODE § 1-1001-07a.

these provisions. For any employees who work remotely, or if no conspicuous and accessible place exists, employers must meet the notice requirements by providing the notice to their employees by any other reasonable means, provided that employees sign a statement acknowledging receipt of the notice.[457]

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) *District Guidelines on Leave to Participate in Political Activities*

The District of Columbia has not enacted any statutes specifically requiring private employers to offer leave for the purpose of participating in political activities, including leave to serve on the D.C. City Council.

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.[458] 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.[459] For more information, see LITTLER ON LEAVES OF ABSENCE: MILITARY & CIVIC DUTY LEAVES.

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

Leave to Serve on a Jury. An employer cannot discriminate against an employee with respect to any term and condition of employment, because that employee receives a summons, responds to a summons, serves as a juror, or attends court for prospective jury service.[460] An employer that violates this provision is guilty of criminal contempt and may be fined up to $300 and/or imprisoned for up to 30 days. Subsequent violations may result in fines up to $5,000 and/or imprisonment for up to 180 days.[461] If an employee is discharged because of receiving or responding to a summons, serving as a juror or attending court for prospective jury service, the employee may bring a civil action for back pay, an order of

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[457] D.C. MUN. REGS. R. 3-727; 726.3; 726.4; 726.5.

[458] 28 U.S.C. § 1875.

[459] *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).

[460] D.C. CODE § 11-1913(a).

[461] D.C. CODE § 11-1913(b).

reinstatement to employment and damages. The prevailing employee also will be entitled to reasonable attorneys' fees determined by the court.[462]

Employers with 11or more employees are required to pay full-time employees for up to five days of leave for jury service, less any jury service fee received from the court.[463] Employers with 10 or fewer employees are not required to pay employees their usual compensation when they miss work due to jury service.

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) *District Guidelines on Leaves for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

An eligible employee may take time off due to an incident of domestic violence, sexual assault, or stalking under the D.C. Accrued Sick and Safe Leave Act. For more information about the D.C. Accrued Sick and Safe Leave Act, see **3.9(b)(ii)**.

The D.C. Human Rights Act makes it an unlawful employment practice for an employer to:

- discriminate against an employee on the basis of his or her status as a victim or a family member of a victim of domestic violence, a sexual offense, or stalking; and
- take any unlawful discriminatory action against:
  - an employee who attended, participated in, prepared for, or requested leave to attend, participate in, or prepare for a criminal, civil, or administrative proceeding relating to domestic violence, stalking, or a sexual offense of which the employee or employee's family member was a victim, including meeting with an attorney or law enforcement officials;
  - an employee who sought physical or mental health treatment or counseling for domestic violence, a sexual offense, or stalking of which the employee or employee's family member was a victim; and
  - an employee who was subject to disruption of his or her workplace or threat to his or employment related to domestic violence, a sexual offense, or stalking of which the employee or employee's family member was the victim.[464]

In addition, an employer must provide reasonable accommodation to an employee who is a victim or a family member of a victim of domestic violence, a sexual offense, or stalking when accommodation is

[462] D.C. CODE § 11-1913(c).

[463] D.C. CODE § 15-718(c).

[464] D.C. CODE § 2-1402.11.

necessary to ensure the person's security and safety, unless providing accommodation would impose an undue hardship on the employer.[465]

With respect to an employee's status as a family member of a victim of domestic violence, a sexual offense, or stalking, "family member" means the employee's spouse or domestic partner; parents of a spouse; children, including foster children and grandchildren; spouses of children; parents; brothers and sisters; the spouses of brothers and sisters; a child who lives with an individual and for whom the individual permanently assumes and discharges parental responsibility; and a person with whom the individual shares or has shared, for not less than the preceding 12 months, a mutual residence and with whom the individual maintains a committed relationship as defined in the Health Care Benefits Expansion Act of 1992.[466]

"Reasonable accommodation" includes a transfer, reassignment, modified schedule, leave, changed work station, changed work telephone or email address, installed lock, assistance in documenting domestic violence, a sexual offense, or stalking that occurs in the workplace, or the implementation of another safety procedure in response to actual or threatened domestic violence, a sexual offense, or stalking.[467]

With respect to leave as an accommodation, there are no certification or notification requirements specified in the statute. There is also no requirement that an employer provide paid leave, though an employee may be eligible to use earned sick and safe leave under the Accrued Sick and Safe Leave Act.

The statute also imposes confidentiality obligations. An employer is prohibited from disclosing any information related to an employee's status as a victim or family member of a victim of domestic violence, a sexual offense, or stalking as provided to the employer by the employee. However, an employer may make such a disclosure when:

- requested or voluntarily authorized by an employee in writing;
- ordered by a court or administrative agency or otherwise required by law;
- provided to a law enforcement agency;
- necessary to protect other employees from imminent harm; and
- to the extent necessary, to provide a reasonable accommodation for the victim.

The employer must notify an employee in the event of a disclosure.[468]

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**.

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[465] D.C. CODE § 2-1402.11.

[466] D.C. CODE § 2-1401.02.

[467] D.C. CODE § 2-1401.02.

[468] D.C. CODE § 2-1401.11.

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.[469]

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.[470] An eligible employee may also take leave for a qualifying exigency if a covered family member is a member of the regular armed forces and is on duty, or called to active duty, in a foreign country.[471] 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) *District Guidelines on Military-Related Leave*

Military Service Leave. The District of Columbia does not have a law guaranteeing private-sector employees time off for military duty. However, private employers may owe employees leave and other duties as required by the federal USERRA.

Other Military-Related Protections: Spousal Unemployment. The District of Columbia does not have a military-specific spousal unemployment provision in its unemployment statutes. However, individuals are

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[469] 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)).

[470] 29 C.F.R. § 825.126(a).

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

not disqualified from unemployment benefits if they leave work to accompany a spouse because of a change in the location of the spouse's employment that makes it impractical to commute.[472]

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) *District Guidelines on Other Leaves*

Emancipation Day. Employees are entitled to one day of unpaid leave each year on April 16th, the District of Columbia Emancipation Day. The employee must notify the employer of the desire for Emancipation Day leave at least 10 calendar days in advance.[473]

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.[474] Employers are also required to comply with all applicable occupational safety and health standards.[475] To enforce these standards, the federal Occupational Safety and Health Administration ("Fed-OSHA") is authorized to carry out workplace inspections and investigations and to issue citations and assess penalties. The Fed-OSH Act also requires employers to adopt reporting and record-keeping requirements related to workplace accidents. For more information on this topic, see LITTLER ON WORKPLACE SAFETY.

Note that the Fed-OSH Act encourages states to enact their own state safety and health plans. Among the criteria for state plan approval is the requirement that the state plan provide for the development and enforcement of state standards that are at least as effective in providing workplace protection as are comparable standards under the federal law.[476] 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*

The District of Columbia, under agreement with Fed-OSHA, operates its own state occupational safety and health program in accordance with section 18 of the Fed-OSH Act.[477] Thus, the District is a so-called "state plan" jurisdiction, with its own detailed rules for occupational safety and health that parallel, but are separate from, Fed-OSHA standards. The District of Columbia Occupational Safety and Health Act ("D.C.

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[472] D.C. CODE § 51-110(c).

[473] D.C. CODE § 32-521.02.

[474] 29 U.S.C. § 654(a)(1). An *employer* is defined as "a person engaged in a business affecting commerce that has employees." 29 U.S.C. § 652(5). The definition of employer does not include federal or state agencies (except for the U.S. House of Representatives and Senate). Under some state plans, however, state agencies may be subject to the state safety and health plan.

[475] 29 U.S.C. § 654(a)(2).

[476] 29 U.S.C. § 667(c)(2).

[477] 29 U.S.C. § 667.

OSHA") requires employers to provide a workplace and conditions of employment "that are free from recognized hazards that may cause or are likely to cause death or serious physical harm or illness to the employees."[478] District employers must also comply with all occupational safety and health rules promulgated and orders issued pursuant to the Act.[479]

The D.C. OSHA closely tracks the Fed-OSH Act and gives the D.C. Occupational and Health Board (a seven-member panel appointed by the mayor)[480] the right to adopt certain provisions of the Fed-OSH Act and publish such provisions as rules applying to D.C. employers. In addition, the Board has the discretion to deviate from the Fed-OSH Act standards and also promulgate its own rules.[481]

The Office of the Mayor has the authority to inspect employer premises and investigate D.C. OSHA rule violations and issue citations to offending employers.[482] If the mayor finds that an employer violated D.C. OSHA or one of the rules issued by the Board, the mayor must, within three months of the discovery of the violation, issue a written citation and penalty, if any, to the offending employer describing the violation in detail and giving a reasonable time period for the employer to correct the violation.[483]

If an employer wishes to dispute a citation, it must, within 15working days, notify the mayor of the employer's intent to appeal the citation, penalty, and/or abatement period.[484] If the employer fails to notify the mayor of its intent to appeal, the citation becomes a final order not subject to judicial or administrative review.[485] However, if the employer does properly notify the mayor of its intent to appeal, the mayor must immediately afford the employer an opportunity for a hearing and issue a decision and an order based on findings of fact and conclusions of law affirming, modifying, or vacating the citation, the abatement period or the proposed penalty.[486] This decision shall become final if the employer does not, within 30 days, submit an appeal to the Occupational Safety and Health Commission.[487] The Commission shall give both the employer and the mayor the opportunity to be heard, through written brief, oral argument or both, and must then make a decision to sustain, reverse, modify, or vacate the mayor's decision.[488]

The employer has 60 days from the date of the Commission's final order (or from the mayor's final order if the Commission declined review) to appeal the decision to the D.C. Court of Appeals.[489] When a decision of the mayor or the Commission is appealed to the D.C. Court of Appeals, the court may stay enforcement of the citation until the conclusion of the appeal proceeding. After the conclusion of the appeal

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[478] D.C. CODE § 32-1103(a).

[479] D.C. CODE § 32-1103(a).

[480] D.C. CODE § 32-1105(a).

[481] D.C. CODE § 32-1108.

[482] D.C. CODE § 32-1112.

[483] D.C. CODE § 32-1114(a)(e).

[484] D.C. CODE § 32-1114(b).

[485] D.C. CODE § 32-1115(a).

[486] D.C. CODE § 32-1115(c).

[487] The Occupational Safety and Health Commission is an appellate body appointed by the Chairperson of the Board. The Chairperson of the Board also serves as the Chairperson of the Commission. *See* D.C. CODE ANN. § 32-1106.

[488] D.C. CODE § 32-1115(d).

[489] D.C. CODE § 32-1116(a).

proceeding, if the employer does not appeal, or if no stay is granted during the life of the appeal, the mayor may apply to the superior court to enforce the abatement requirement prescribed. The court may punish failure to comply with the abatement order as contempt.[490]

Antiretaliation Provisions. In addition to the above administrative process, the District also prohibits employers from discriminating and/or retaliating against any employee who reports a violation of either the federal or D.C. OSHA statutes and or regulations.[491] Aggrieved employees can file a complaint with the Commission within 60 days of the discrimination or retaliation.[492]

Additional Provisions. To help prevent D.C. or federal OSHA violations, the D.C. Department of Employment Services, through its Office of Occupational Safety and Health, provides free consultation services to D.C. private-sector employers. Such consultation services include:

- voluntary safety and health consultation visits, including training and program assistance;
- worksite surveys in accordance with federal OSHA standards;
- technical and educational assistance/training to employees and employers in an effort to promote safety and health standards on the job;
- recommendations for corrective action and engineering controls to abate detected hazards; and
- follow-up visits to verify corrections of serious hazards.[493]

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) *District Guidelines on Cell Phone & Texting While Driving*

All drivers in the District of Columbia are prohibited from using a mobile phone while operating a motor vehicle within the District limits unless the phone is equipped with a hands-free device. Texting while driving is similarly prohibited.[494]

To avoid vicarious liability, employers with employees that routinely operate a motor vehicle within the District should implement and enforce a policy mirroring the D.C. mobile phone use statute.

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.

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[490] D.C. CODE § 32-1116(b).

[491] D.C. CODE § 32-1117(a).

[492] D.C. CODE § 32-1117(b).

[493] More information about the free services provided by the Office of Occupational Safety and Health can be found at https://does.dc.gov/service/occupational-safety-and-health.

[494] D.C. CODE §§ 50-1731.01 *et seq*.

3.10(c)(ii) *District Guidelines on Firearms on Employer Property*

Employers that own property in the District of Columbia may prohibit or restrict the possession of firearms on their property.[495] Additionally, it is illegal in the District of Columbia for an individual to carry a concealed firearm or to openly carry a firearm on their person.[496] It is also illegal in the District for an individual to transport a loaded firearm in their vehicle. Further, any unloaded firearms and ammunition must be transported outside of the passenger compartment (*i.e.*, firearms must be transported in the trunk of the vehicle). If the vehicle does not have a compartment other than the passenger compartment, the firearm must be stored in a locked container other than the glove compartment or center console.[497]

Signs stating that the carrying of firearms is prohibited on any private property must be clearly and conspicuously posted at any entrance, open to the public, of a building, premises, or real property. A sign shall be considered conspicuous if it is at least 8x 10inches in size and contains writing in contrasting ink using not less than 36-point type.[498]

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) *District Guidelines on Smoking in the Workplace*

All places of employment and public places, including restaurants and nightclubs, must be smoke free.[499] The smoking ban does not apply to tobacco shops, individual hotel rooms, or nightclubs and bars that generate at least 10% of their revenue from the sale of tobacco.[500]

Posting Requirements. Signs stating **"**No Smoking Under Penalty of Law," "No Smoking Except in Smoking Areas," or "Smoking in Accordance With Employer's Smoking Policy Only" must be posted as applicable. The sign must include the international symbol for no smoking. The sign must also include the warning: "Smoking causes lung cancer, heart disease, emphysema, and may cause fetal injury, premature birth, and low birth weight in pregnant woman." Signs must also clearly state the maximum fine for a violation and must be visible to the public at entrances and in several locations inside the workplace.[501]

Antiretaliation Provisions. An employer cannot discharge or otherwise discriminate against an employee for requesting to work in a nonsmoking area.[502] An employee may file a civil action against an owner, manager, or person in charge of the place of employment or public place that violates this provision. Prior to filing a lawsuit, however, an employee must exhaust remedies available under any collective bargaining agreement, grievance procedure, or other established means for resolving employer-employee disputes.

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[495] D.C. CODE § 22-4503.02(b).

[496] D.C. CODE § 22-4504(a).

[497] D.C. CODE § 22-4504.02(b).

[498] D.C. CODE MUN. REGS. tit.24, §§ 2346.1 – 2346.2.

[499] D.C. CODE § 7-741.02.

[500] D.C. CODE §7-741.03.

[501] D.C. CODE §§ 7-741.02, 7-1704.

[502] D.C. CODE § 7-741.06.

An employee who files suit under this provision is eligible to recover damages, including lost or back wages and reasonable attorneys' fees.[503]

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) *District Guidelines on Suitable Seating for Employees*

D.C. law does not address suitable seating requirements for employees.

3.10(f) *Workplace Violence Protection Orders*

3.10(f)(i) *Federal Guidelines on Workplace Violence Protection Orders*

Federal law does not address employer workplace violence protection orders. That is, there is no federal statute addressing whether or how employers might obtain a legal order (such as a temporary restraining order) on their own behalf, or on behalf of their employees or visitors, to protect against workplace violence, threats, or harassment.

3.10(f)(ii) *District Guidelines on Workplace Violence Protection Orders*

D.C. 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");[504] (2) the Americans with Disabilities Act (ADA);[505] (3) the Age Discrimination in Employment Act (ADEA);[506] (4) the Equal Pay Act;[507] (5) the Genetic Information Nondiscrimination Act of 2009 (GINA);[508] (6) the Civil Rights Acts of 1866 and 1871;[509] 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;

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[503] D.C. CODE § 7-741.06.

[504] 42 U.S.C. §§ 2000e *et seq.* Title VII applies to employers with 15 or more employees. 42 U.S.C. § 2000e(b).

[505] 42 U.S.C. §§ 12101 *et seq.* The ADA applies to employers with 15 or more employees. 42 U.S.C. § 12111(5).

[506] 29 U.S.C. §§ 621 *et seq*. The ADEA applies to employers with 20 or more employees. 29 U.S.C. § 630.

[507] 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.

[508] 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)).

[509] 42 U.S.C. §§ 1981, 1983.

- 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);[510]
- 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.[511] Employees must first exhaust their administrative remedies by filing a complaint within 180 days—unless a charge is covered by state or local antidiscrimination law, in which case the time is extended to 300 days.[512]

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

Employers located in the District of Columbia are prohibited from discriminating against employees and applicants for employment by one of the most expansive antidiscrimination laws of any U.S. jurisdiction. The District of Columbia's Human Rights Act (DCHRA) prohibits discrimination based on:

- race;
- color;
- religion;
- national origin;
- sex (including pregnancy, childbirth, related medical conditions, breast feeding, or reproductive health decisions);
- age (18 or older);
- marital status;
- personal appearance (outward appearance, irrespective of sex, regarding body condition or characteristics, manner or style of dress, and manner or style of personal grooming, including, but not limited to: hair style and beards);
- sexual orientation;
- gender identity or expression;
- familial status;

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[510] 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.

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

[512] 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.

- family responsibilities;
- matriculation in school;
- political affiliation;
- genetic information;
- disability;
- source of income;
- victim of intrafamily offense;
- place of residence or business;[513]
- status as a victim or family member of a victim of domestic violence, a sexual offense or stalking;
- homeless status;[514]
- credit information;[515] and
- the use of cannabis, participation in a medical cannabis program, or failure to pass a cannabis drug test (effective following approval by Mayor, a 30-day congressional review, and publication in the DC Register).[516]

The DCHRA covers all employers with one or more employees, as well as individuals working as independent contractors. It does not include the employer's parent, spouse, children, or domestic servants, engaged in work in and about the employer's household; any person acting in the interest of such employer, directly or indirectly; or any professional association.[517]

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

The D.C. Office of Human Rights (OHR) and the D.C. Commission on Human Rights (CHR) administer the municipal regulations for the DCHRA and enforce the law.[518]

Request for Agency Action. Any person or organization, as well as the Director of the OHR, may file a charge of discrimination within one year of the alleged discriminatory practice or the discovery of it. The complaint may charge a single person for one instance of discrimination, or it may charge several people for facilitating a generally discriminatory practice. The charge must provide the name and address of the person alleged to have committed the violation as well as the substance of the charge.[519] A complaint is deemed sufficient when the OHR receives from the person making the charge a written statement sufficiently precise to identify the parties and to describe generally the complained of action or practice.[520]

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[513] D.C. CODE §§ 2-1401.01, 2-1401.02, 2-1401.05, and 2-1402.11.

[514] D.C. CODE § 2-1401.01.

[515] D.C. CODE § 2-1402.11.

[516] D.C. CODE § 2-1401.11.

[517] D.C. CODE § 2-1401.02(10).

[518] D.C. MUN. REGS. tit. 4, § 500.1.

[519] D.C. CODE § 2-1403.04(a).

[520] D.C. MUN. REGS. tit. 4, § 705.5.

The OHR must serve a copy of the charge upon the alleged perpetrator within 15 days of the charge filing.[521] Within 120 days after service of the charge upon all parties involved, the OHR must determine whether it has jurisdiction and whether there is probable cause to believe the discrimination occurred.[522] If the OHR determines that it lacks jurisdiction or there is no probable cause, the OHR must dismiss the complaint.

Alternatively, the complainant may proceed directly to court. As long as the complainant alleges that they suffered an injury because of discrimination by the defendant, the complainant has standing to sue—even if the individual was not the victim of the alleged discriminatory acts.[523]

Settlement & Evidentiary Hearings. The OHR generally will first attempt to eliminate unlawful discriminatory conduct through conciliation.[524] Before the OHR will commence a full investigation, all complaints must be mediated. The parties are given up to 45 days within which to mediate the complaint.[525] If there is no agreement, and if the OHR determines that there is probable cause to believe that the employer has engaged in or is engaging in an unlawful practice, the OHR will allow the parties 60 days within which to execute a conciliation agreement. If the parties reach an agreement at either point, they execute a conciliation agreement, which is then deemed an order of the CHR and is enforceable as such.[526]

Upon failure of conciliation by the parties, the OHR may, in the name of the CHR, issue a written notice requiring the accused to answer to the charges at a public hearing before one or more members of the CHR or before a hearing examiner.[527] Either a tribunal comprised of three members of the CHR will be appointed to make a determination in the case or one or more hearing examiners may be assigned to hear and report to the CHR on the case.[528]

At the hearing, an agent or attorney of the OHR presents the case in support of the complainant. Any commissioner or hearing examiner who has had a role in the investigation, conciliation, or processing of the complaint may not participate in the hearing. Any previous conciliation efforts may not be admitted as evidence before the CHR.[529]

If the accused fails to answer the complaint, the hearing will proceed on the basis of evidence in support of the complaint.[530]

If the CHR determines that the accused has engaged in an unlawful discriminatory practice or has otherwise violated the DCHRA, the CHR will issue an order requiring the accused to discontinue the

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[521] D.C. CODE § 2-1403.05(a).

[522] D.C. CODE § 2-1403.05(b).

[523] *Executive Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724 (D.C. 2000).

[524] D.C. CODE § 2-1403.06(a).

[525] D.C. CODE § 2-1403.04(c).

[526] D.C. CODE § 2-1403.06(c).

[527] D.C. CODE § 2-1403.10.

[528] D.C. CODE § 2-1403.11.

[529] D.C. CODE § 2-1403.12.

[530] D.C. CODE § 2-1403.12(e).

unlawful behavior and to take affirmative action to redress the wrong done.[531] Relief may include, but is not limited to, the payment of compensatory damages, reasonable attorneys' fees, and hearing costs.

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

Reproductive Choices. The DCHRA provides that an employer may not refuse to hire or employ an applicant, or discharge or otherwise discriminate against any employee with respect to compensation or any other term, condition, or privilege of employment because of the individual's reproductive health decisions. A *reproductive health decision* is a decision by an employee, an employee's dependent, or an employee's spouse 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.[532]

Tobacco Use. An employer may not refuse to hire or employ an applicant, or discharge or otherwise discriminate against any employee with respect to compensation or any other term, condition, or privilege of employment because the employee or applicant uses tobacco or tobacco products. However, the statute does not prohibit an employer from establishing or enforcing workplace smoking restrictions that are required or permitted by law, or from establishing tobacco use restrictions that constitute *bona fide* occupational qualifications.[533]

Unemployment. The D.C. Unemployed Anti-Discrimination Act prohibits discrimination based upon a person's status or history of unemployment and makes it illegal for employers to consider a person's unemployment status in the hiring process.[534] The statute provides that it is unlawful for an employer or employment agency to: (1) fail or refuse to consider for employment, or to fail or refuse to hire an individual as an employee, because of the individual's unemployed status; or (2) publish an advertisement or announcement for a job vacancy that includes a provision to disqualify an individual based on the individual's unemployed status.[535]

Unlike the DCHRA, the Unemployed Anti-Discrimination Act does not create a private right of action for individuals claiming discrimination under the statute. Instead, it grants the OHR the authority to review and investigate such complaints and take appropriate enforcement action (including assessing fines of up to $20,000 per violation).[536]

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

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[531] D.C. CODE § 2-1403.13(a)(1).

[532] D.C. CODE § 2-1401.05.

[533] D.C. CODE § 7-1703.03.

[534] D.C. CODE §§ 32-1361 *et seq*.

[535] D.C. CODE § 32-1362.

[536] D.C. CODE §§ 32-1365, 32-1366.

responsibility, and which are performed under similar working conditions."[537] 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.[538]

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

The DCHRA makes it unlawful for an employer to discriminate against any individual, with respect to the individual's compensation based on sex or gender identity or expression.[539] The statute does not specify any exceptions to the rule. As noted in **3.11(a)(iii)**, an employee alleging a violation of the DCHRA may file an administrative complaint with the D.C. Office of Human Rights within one year of the alleged violation or may elect to file suit in court.[540]

The District amended its pay discrimination provisions to afford applicants greater transparency in understanding what the compensation for a vacant position will be. Beginning in July 2024, an employer is required to:

- provide the minimum and maximum projected salary or hourly pay in all job listings and position descriptions advertised; and
- disclose to prospective employees the existence of healthcare benefits that employees may receive before the first interview.

In stating the minimum and maximum salary or hourly pay for the position, the range shall extend from the lowest to the highest salary or hourly pay that the employer in good faith believes at the time of the posting it would pay for the advertised job, promotion, or transfer opportunity. If an employer fails to provide the required disclosures, a prospective employee may ask for the information.[541]

As discussed in **3.7(b)(v)**, D.C. law also prohibits employers from barring employees from disclosing their wages or inquiring about other employees' wages.

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

[537] 29 U.S.C. § 206(d)(1).

[538] 42 U.S.C. § 2000e-5.

[539] D.C. CODE § 2-1402.11(a).

[540] D.C. CODE §§ 2-1403.04, 2-1403.16.

[541] D.C. CODE § 32-1453(4a).

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.[542]

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).[543]

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

An employee seeking a reasonable accommodation must request an accommodation.[544] 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

[542] 42 U.S.C. § 2000gg-1. The regulations provide definitions of *pregnancy*, *childbirth*, and *related medical conditions*. 29 C.F.R. § 1636.3.

[543] 29 C.F.R. § 1636.3.

[544] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1636.3.

an effective reasonable accommodation.[545] 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."[546]

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.[547]

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
- allowing an employee to take breaks to eat and drink, as needed.[548]

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.

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[545] 29 C.F.R. § 1636.3.

[546] 29 C.F.R. § 1636.4.

[547] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1630.2(p).

[548] 29 C.F.R. § 1636.3.

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) *District Guidelines on Pregnancy Accommodation*

Under the Protecting Pregnant Workers Fairness Act, all employers are required to make a reasonable accommodation to a known condition related to pregnancy, childbirth, related medical conditions, or breast feeding unless the employer can demonstrate that an accommodation would impose an undue hardship.[549] *Undue hardship* means any action that requires significant difficulty in the operation of the employer's business or significant expense on the behalf of the employer when considered in relation to factors such as the size of the business, its financial resources, and the nature and structure of its operation. The employer bears the burden of establishing that it would be an undue hardship to provide a reasonable accommodation.

Reasonable accommodation means an accommodation that an employer can make for an employee whose ability to perform the functions of the employee's job are affected by pregnancy, childbirth, a related medical condition, or breastfeeding, including:

- more frequent or longer breaks;
- time off to recover from childbirth;
- the acquisition or modification of equipment or seating;
- the temporary transfer to a less strenuous or hazardous position or other job restructuring such as providing light duty or a modified work schedule;
- having the employee refrain from heavy lifting;
- relocating the employee's work area; or
- providing private nonbathroom space for expressing breast milk.[550]

An employer may require a certification from the employee's health care provider of the medical advisability of an accommodation to the same extent a certification is required for other temporary disabilities. If required, the certification must include: (1) the date the reasonable accommodation became or will become medically advisable; (2) an explanatory statement as to the medical condition and the advisability of providing the reasonable accommodation in light of the condition; and (3) the probable duration that the reasonable accommodation will need to be provided.[551]

An employer must engage in good faith in a timely and interactive process with an employee requesting or otherwise needing a reasonable accommodation to determine a reasonable accommodation for that employee.[552]

Employers are prohibited from:

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[549] D.C. CODE §§ 32-1231.01, 32-1231.02.

[550] D.C. CODE § 32-1231.01.

[551] D.C. CODE § 32-1231.02(b).

[552] D.C. CODE § 32-1231.02(a).

- taking an adverse action against an employee who requests or uses a reasonable accommodation in regard to the employee's conditions or privileges of employment, including failing to reinstate the employee when the need for reasonable accommodations ceases to the employee's original job or to an equivalent position;
- denying employment opportunities to an employee, or a job applicant, if the denial is based on the need of the employer to make reasonable accommodations;
- requiring an employee to accept an accommodation that the employee chooses not to accept if the employee does not have a known limitation related to pregnancy, childbirth, related medical conditions, or breast feeding or the accommodation is not necessary for the employee to perform her duties; or
- requiring a pregnant employee to take leave if a reasonable accommodation can be provided.[553]

Medical Certification. An employer may require a certification from the employee's health care provider of the medical advisability of an accommodation. Certification must include:

- the date the reasonable accommodation became or will become medically advisable;
- an explanatory statement as to the medical condition and the advisability of providing the reasonable accommodation in light of the condition; and
- the probable duration that the reasonable accommodation will need to be provided.[554]

Additional Provisions. An employer must post and maintain in a conspicuous place a notice of rights in both English and Spanish. The employer must also provide written notice of an employee's right to a needed reasonable accommodation related to pregnancy, childbirth, related medical conditions, or breast feeding to: (1) new employees at the commencement of employment; and (2) an employee who notifies the employer of her pregnancy or a related medical condition within 10 days of the notification.[555]

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.[556] Multiple decisions of the U.S. Supreme Court[557] and subsequent lower court decisions have made clear that an employer that does not conduct effective training: (1) will be unable to assert the affirmative defense that it exercised reasonable care to prevent and correct harassment; and (2) will subject itself to the risk of punitive damages. EEOC guidance on employer liability reinforces the important

[553] D.C. CODE § 32-1231.03.

[554] D.C. CODE § 32-1231.02.

[555] D.C. CODE § 32-1231.04.

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

[557] *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).

role that training plays in establishing a legal defense to harassment and discrimination claims.[558] 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) *District Guidelines on Antiharassment Training*

The Tipped Wage Workers Fairness Act of 2018 imposes significant wage payment and employee training requirements on employers of tipped workers.

With respect to harassment prevention, the Act requires employers with tipped employees to provide tipped employees, managers, and owners and operators of businesses with tipped employees must receive harassment training every two years. The training for tipped employees, managers, and owners/operators may be conducted online or in person. Newly-hired tipped employees and managers must complete the training in person or online within 90 days after hire, unless the employee has received the training within the previous two years. The initial training must be conducted no later than August 31, 2023.

The District of Columbia Office of Human Rights (OHR) must design and publish the training program. The training must include information on how to respond to, intervene in, and prevent sexual harassment by coworkers, management, and patrons. The OHR must also certify a list of providers of harassment training programs. Employers providing training programs to their employees must use either the OHR training program or training from an OHR-certified provider.

Within 30 days of completion of harassment training, the employer must submit a certification of completed training for each employee, manager, or owner/operator receiving training to the OHR.[559]

In addition to providing training, employers with tipped employees must create and implement a written harassment prevention policy, and distribute it as follows:

- provide a copy of the policy to employees;
- post a copy of the policy in a conspicuous location accessible to all employees; and
- file a copy of the policy with the OHR.

The policy must outline how employees may report an incident of harassment to the employer and to the OHR.[560]

The Act also imposes recordkeeping and reporting requirements. Employers of tipped employees are required to document instances of sexual harassment reported to management, including whether the reported harasser was a nonmanagerial employee, managerial employee, owner, or operator. Employers must report to the OHR the number of instances of sexual harassment reported to management and the

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[558] 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.

[559] D.C. CODE § 2-1411.05a.

[560] D.C. CODE § 2-1411.05a.

total number of reported harassers who were nonmanagerial employees, managerial employees, owners, or operators on an annual basis.[561]

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) *District Guidelines on Whistleblowing*

There is no general whistleblower law addressing protections for private-sector whistleblowers in the District of Columbia.

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)[562] and the Railway Labor Act (RLA)[563] 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.

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[561] D.C. CODE § 2-1411.05a.

[562] 29 U.S.C. §§ 151 to 169.

[563] 45 U.S.C. §§ 151 *et seq*.

3.12(b)(ii) *Notable District Labor Laws*

The District of Columbia does not have a "right-to-work" law. The most notable D.C. labor law is that, as a condition of the District's investment or other economic participation in a hotel industry development project, employers taking part in the development project must seek agreements with labor organizations in which the labor organizations agree to refrain from adverse economic action against the employers' operations.[564] In other words, a District contract related to hotel development projects in which the District has a financial or proprietary interest must include a provision requiring any employer on the project to enter into a labor peace agreement with any labor organization representing workers on the project. A labor peace agreement is essential consideration for the District entering into the contract.[565] The labor peace agreement must prevent the labor organization from engaging in any picketing, boycotting, work stoppage, or other economic interference with the employer's operations for the duration of the District's proprietary interest in the hotel development project.[566]

4. END OF EMPLOYMENT

4.1 Plant Closings & Mass Layoffs

4.1(a) *Federal WARN Act*

The federal Worker Adjustment and Retraining Notification (WARN) Act requires a covered employer to give 60 days' notice prior to: (1) a *plant closing* involving the termination of 50 or more employees at a single site of employment due to the closure of the site or one or more operating units within the site; or (2) a *mass layoff* involving either 50 or more employees, provided those affected constitute 33% of those working at the single site of employment, or at least 500 employees (regardless of the percentage of the workforce they constitute).[567] 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.[568] 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) *District Mini-WARN Act*

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

4.1(c) *District Mass Layoff Notification Requirements*

The District of Columbia does not require that an employer notify the unemployment insurance department or another department in the event of a mass layoff.

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[564] D.C. CODE § 32-851(e).

[565] D.C. CODE § 32-852(b).

[566] D.C. CODE § 32-853(a).

[567] 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.

[568] 20 C.F.R. §§ 639.4, 639.6.

4.2 Documentation to Provide When Employment Ends

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

Table 11 lists the documents that must be provided when employment ends under federal law.

Table 11. 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.[569] The notice must be provided not later than the earlier of: • the date that is 90 days after the date on which the individual's coverage under the plan commences or, if later, the date that is 90 days after the date on which the plan first becomes subject to the continuation coverage requirements; or • the first date on which the administrator is required to furnish the covered employee, spouse, or dependent child of such employee notice of a qualified beneficiary's right to elect continuation coverage.
Retirement Benefits	The Internal Revenue Service requires the administrator of a retirement plan to provide notice to terminating employees within certain time frames that describe their retirement benefits and the procedures necessary to obtain them.[570]

4.2(b) *District Guidelines on Documentation at End of Employment*

Table 12 lists the documents that must be provided when employment ends under District law.

Table 12. District Documents to Provide at End of Employment	
Category	**Notes**
Health Benefits: mini-COBRA, etc.	Under D.C. law, each health benefits plan issued by a health insurer requires an employer to furnish any employee, whose coverage is terminated, a written notification of the existence of continuation coverage. Notice must be provided to the employee not later than 15 days after the date that coverage under the plan would otherwise terminate.[571]

[569] 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.

[570] 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.

[571] D.C. CODE § 32-732(e).

Table 12. District Documents to Provide at End of Employment	
Category	**Notes**
Unemployment Notice	**Generally.** The District of Columbia does not require that employees be provided notice about unemployment benefits when employment ends. Nonetheless, the employer generally must post and maintain, where readily accessible, notice concerning the availability of unemployment compensation and how to file for benefits.[572] Accordingly, it is recommended that an employer provide a copy of the unemployment notice when employment ends. **Multistate Workers.** The District of Columbia 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) *District Guidelines on References*

D.C. law does not specifically address providing former employees with references.

[572] D.C. CODE § 51-111. This poster is available at https://does.dc.gov/sites/default/files/dc/sites/does/page_content/attachments/UI%20Notice%20to%20Employees-2015.pdf.