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STATE

Littler on

Indiana 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 Indiana 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(a) *Federal Guidelines on Classifying Workers*

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

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

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

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

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

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

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

[2] In addition to an evaluation of the right to control how the work is to be performed, the economic realities test also requires an examination of the underlying "economic realities" of the work relationship—namely, do the workers "depend upon someone else's business for the opportunity to render service or are [they] in business for themselves." *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988); *see also Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).

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

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

1.1(b) *State Guidelines on Classifying Workers*

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

Table 1. State Tests for Classifying Workers

Purpose of Determining Employee Status	State Agency	Test to Apply
Fair Employment Practices Laws	Indiana Civil Rights Commission	There are no relevant statutes or court decisions concerning independent contractor status under the state civil rights law.
Income Taxes	Indiana Department of Revenue[5]	Internal Revenue Service (IRS) twenty-factor test.[6]

[3] Under the hybrid test, a court evaluates the entity's right to control the individual's work process, but also looks at additional factors related to the worker's economic situation—such as how the work relationship may be terminated, whether the worker receives yearly leave or accrues retirement benefits, and whether the entity pays social security taxes on the worker's behalf. *Wilde v. County of Kandiyohi*, 15 F.3d103, 105 (8th Cir. 1994). Because the hybrid test focuses on traditional agency notions of control, as a general rule, it results in a narrower definition of employee than under a pure economic realities test. *Hopkins v. Cornerstone Am.*, 545 F.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] Independent contractors are required to file a statement and documentation of independent contractor status with the Department of Revenue in order to obtain a certificate of exemption. More information is available at https://www.in.gov/dor/i-am-a/business-corp/contractors/#:~:text=Individuals%20who%20wish%20to%20receive,Worker%27s%20Compensation%20Board%20of%20Indiana.

[6] IND. CODE §§ 6-3-1-5, 6-3-1-6. In defining employee and employer, the Indiana tax code references the Internal Revenue Code. In one Letter of Finding, the Indiana Department of Revenue cited both the common-law test used by the IRS and the factors used by the Court of Appeals of Indiana in a wage and hour case. Indiana Dep't of State Rev., *Letters of Finding Nos. 08-0609 & 08-0610*, (July 29, 2009), *available at* http://iac.iga.in.gov/iac/20090729-IR-045090542NRA.xml.html (citing *Snell v. C.J. Jenkins Enters.*, 881 N.E.2d 1088 (Ind. Ct. App. 2008)). These factors include:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
Unemployment Insurance	Department of Workforce Development	Statutory test. The Indiana Employment Security Act adopts a modified ABC test. Under the test, services for pay are presumed to be *employment*, regardless of whether the common-law master-servant relationship exists, unless shown: A. the individual has been and will continue to be free from control and direction, both in contract and in fact; B. the service is performed outside the usual course of the business; and C. the individual: "is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed; or is a sales agent who receives remuneration solely upon a commission basis and who is the master of the individual's own time and effort."[7]
Wage & Hour Laws	Indiana Department of Labor, Wage & Hour Division	IRS twenty-factor test, expressly adopted by statute.[8]

person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer;(i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.

Snell, 881 N.E.2d at 1091-92 (internal quotation omitted).

[7] IND. CODE § 22-4-8-1(b); *see also Circle Health Partners, Inc. v. Unemployment Ins. Appeals*, 47 N.E.3d 1239, 1243 (Ind. Ct. App. 2015) (observing that under the first factor, "[w]hat constitutes control and direction under the statute is a factual question. Each case must be decided upon its own particular facts.") (internal quotation omitted).

[8] IND. CODE § 22-2-15-3 (instructing the Indiana Department of Labor to use the definition of "employee" contained in section 3401(c) of the Internal Revenue Code when developing guidelines and procedures for classification purposes). The Wage and Hour Division also gives deference to the IRS's determination of independent contractor status. Indiana Dep't of Labor, *Wage & Hours FAQs*, *available at* https://kb.dol.in.gov/?tagIds=72caf816-d1f5-8123-59df-96f053704dba.

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
Worker's Compensation	Worker's Compensation Board of Indiana	IRS twenty-factor test, expressly adopted by statute.[9]
Workplace Safety	Indiana Occupational Safety and Health Administration (IOSHA)	Indiana's state-approved plan under the federal Occupational Safety and Health Act defines an *employee* as "a person permitted to work by an employer in employment."[10] There are no relevant court decisions interpreting independent contractor status under that law.

1.2 Employment Eligibility & Verification Requirements

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

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

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

[9] IND. CODE § 22-3-6-1(b)(7). The Worker's Compensation Board provides the same guidance on its website, directing employers to apply the IRS test. This guidance, as well as a link to the IRS guidelines, are available at http://www.in.gov/wcb/2328.htm. The Indiana Supreme Court has also applied a ten-factor analysis, taken from the Restatement of Agency, to aid in resolving the question of whether one is an employee or an independent contractor. *See, e.g.*, *Moberly v. Day*, 757 N.E.2d 1007, 1010 (Ind. 2001); *Howard v. U.S. Signcrafters*, 811 N.E.2d 479, 482 (Ind. Ct. App. 2004).

[10] IND. CODE § 22-8-1.1-1.

simplified acquisition threshold for work in the United States, and for subcontractors under those prime contracts where the subcontract value exceeds $3,500.[11]

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.[12] 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.[13]

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

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

1.2(b)(i) *Private Employers*

Indiana does not have a generally applicable employment eligibility or verification statute. Therefore, private-sector employers in Indiana should follow federal law requirements regarding employment eligibility and verification. Related laws are noted below, however.

Unlawful Labor Contracts. Employers are prohibited from assisting or encouraging the migration of an alien to perform labor or services in the state under a contract made before the migration. Any such contract for services is void.[14] These restrictions do not prevent: (1) citizens or foreigners temporarily in the United States from engaging noncitizens as private secretaries, servants, etc.; (2) the engagement, under contract, of skilled workers in foreign countries to perform labor in the state in an industry not established in the state, provided other skilled labor cannot be obtained; (3) contracts with professional actors, artists, singers, etc.; or (4) a person helping a family member migrate.[15]

Employment Development Incentives. State agencies cannot award a grant of more than $1,000 to a business unless the business: (1) signs a sworn affidavit affirming that the entity has enrolled in and is participating in E-Verify; (2) provides documentation proving that enrollment and participation; and (3) executes an affidavit affirming that the business does not knowingly employ any unauthorized aliens.[16]

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[11] 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.

[12] *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).

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

[14] IND. CODE §§ 22-5-1-1, 22-5-1-2.

[15] IND. CODE § 22-5-1-4.

[16] IND. CODE § 22-5-1.7-11(b). Relevant definitions are found at IND. CODE §§ 22-5-1.7-1 to 22-5-1.7-9.

1.2(b)(ii) *State Contractors*

Employers that are state or local government contractors or subcontractors cannot knowingly hire, retain, or contract with unauthorized aliens.[17] Moreover, state agencies and political subdivisions must use the E-Verify program to verify the work eligibility status of all employees hired after June 30, 2011.

A state agency or political subdivision may not enter into or renew a public contract for services or for a public works project with a contractor unless:

1. the public contract contains:
    a. a provision requiring the contractor to enroll in and verify the work eligibility status of all newly hired employees of the contractor through the E-Verify program; and
    b. a provision that provides that a contractor is not required to verify the work eligibility status of all newly hired employees of the contractor through the E-Verify program if the E-Verify program no longer exists; and
2. the contractor signs an affidavit affirming that the contractor does not knowingly employ an unauthorized alien.[18]

Similar attestations are required if a contractor uses a subcontractor to provide services for work performed under a public contract for services or for a public works project. In that event, the subcontractor must certify to the contractor that the subcontractor, at the time of certification, does not knowingly employ or contract with an unauthorized alien and is participating in the E-Verify program. Contractors must maintain these certifications for the duration of any applicable contract with the subcontractor.[19]

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

Unlawful Labor Contracts. Violations of the provisions regarding contracts for alien labor constitute a Class A misdemeanor punishable by imprisonment and fines.[20]

State Contractors. If a contractor violates the verification provisions, the public agency must require the contractor to cure the violation within 30 days. If it fails to do so in that period, the agency or political subdivision must terminate the public contract, for breach of the contract. Relatedly, the contractor is entitled to a rebuttable presumption that it did not knowingly employ an unauthorized alien if it verified work eligibility status through E-Verify.[21]

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

[17] IND. CODE § 22-5-1.7-12(a). Relevant definitions are found at IND. CODE §§ 22-5-1.7-1 to 22-5-1.7-9.

[18] IND. CODE §§ 22-5-1.7-10, 22-5-1.7-11.

[19] IND. CODE §§ 22-5-1.7-15, 22-5-1.7-16.

[20] IND. CODE §§ 22-5-1-1, 35-50-5-2.

[21] IND. CODE §§ 22-5-1.7-12(b)-(c), 22-5-1.7-13.

guidance pursuant to its authority under Title VII of the Civil Rights Act of 1964 ("Title VII").[22] While there is uncertainty about the level of deference courts will afford the EEOC's guidance, employers should consider the EEOC's guidance related to arrest and conviction records when designing screening policies and practices. The EEOC provides employers with its view of "best practices" for implementing arrest or conviction screening policies in its guidance. In general, the EEOC's positions are:

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

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

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

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

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

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

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

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

Employers may inquire about and use arrest and conviction records, but they may not ask an applicant or employee about or use any record that has been sealed or expunged. A person whose record is expunged must be treated as if the person had never been convicted of a crime.[23] These provisions apply to certain adult and juvenile records.[24]

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[22] 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.

[23] IND. CODE § 35-38-9-10(d)-(e). Moreover, a criminal history provider may not knowingly provide a criminal history report containing information about: (1) a record that has been expunged; (2) a record that has been restricted by a court or the rules of a court; or (3) a record regarding certain misdemeanor convictions. IND. CODE § 24-4-18-6.

[24] *See* IND. CODE §§ 35-38-9-1 to 35-38-9-4.

In an application for employment, employers may question a person about a previous criminal record only in terms that exclude expunged convictions or arrests. A permissible question, for example, would be: "Have you ever been arrested for or convicted of a crime that has not been expunged by a court?"[25]

Antidiscrimination Provisions. Consistent with these principles, it is unlawful discrimination under Indiana law to suspend, expel, refuse to employ, refuse to grant or renew a license, or otherwise discriminate against a person because of a conviction or arrest record that has been expunged or sealed.[26]

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

Employers that discriminate against individuals based on expunged or sealed conviction or arrest records are guilty of a Class C infraction and can be fined or held in contempt of court. Additionally, injunctive relief may be ordered.[27]

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[28] governs an employer's acquisition and use of virtually any type of information gathered by a "consumer reporting agency"[29] regarding job applicants for use in hiring decisions or regarding employees for use in decisions concerning retention, promotion, or termination. Preemployment reports created by a consumer reporting agency (such as credit reports, criminal record reports, and department of motor vehicle reports) are subject to the FCRA, along with any other consumer report used for employment purposes.

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

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

Discrimination Concerns. While federal law does not prevent employers from asking about financial information provided they follow the FCRA, as noted above, federal antidiscrimination law prohibits

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[25] IND. CODE § 35-38-9-10(d).

[26] IND. CODE § 35-38-9-10(a)-(b).

[27] IND. CODE § 35-38-9-10(f).

[28] 15 U.S.C. §§ 1681 *et seq*.

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

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]."[30]

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

Indiana does not have a mini-FCRA law, and there are no additional state provisions specifically restricting a private employer's use of credit information and history.

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

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

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

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

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

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

Indiana 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.[31] The law bars most private-sector employers from requiring, requesting, or suggesting that an

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

[31] 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.

employee or job applicant submit to a polygraph test, and from using or accepting the results of such a test.

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

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

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

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

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

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

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

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

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

Whether an employer must implement a drug testing program for its employees under federal law is often determined by the industry in which it operates. For example, the Omnibus Transportation Employee Testing Act requires testing certain applicants and employees in the transportation industries.[32] 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.[33] 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**.

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[32] 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.

[33] 41 U.S.C. §§ 8101 *et seq*.; *see also* 48 C.F.R. §§ 23.500 *et seq*.

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

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

Indiana law contains no general provisions mandating preemployment drug or alcohol screening by private employers. For additional information on voluntary drug or alcohol testing, see **3.2(b)(ii)**.

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

1.3(f)(i) *State Restrictions on Inquiries Regarding Firearms or Ammunition*

Under the Indiana Disclosure of Firearm and Ammunition Information as a Condition of Employment law, a private employer may not require an applicant or employee to disclose information about whether the employee owns, possess, uses, or transports a firearm or ammunition. Moreover, an employer may not condition employment on an agreement to forego the right to lawfully possess, own, store, use, or transport a firearm or ammunition.[34]

An individual aggrieved by an employer's violation of this law may bring a civil action.[35]

1.3(f)(ii) *State Notice on Protections for Veterans*

Many Indiana employers must provide job applicants with a notice describing rights concerning employment opportunities and protections for veterans.[36] Covered employers include the State of Indiana as well as any political or civil subdivision, as well as private employers, if such entities employ six or more employees. Several exceptions apply, including for employers that are nonprofits organized exclusively for fraternal or religious purposes, religious institutions, and nonprofit social clubs or organizations.[37]

These employers must notify applicants that, among other things, it is unlawful to discriminate against a prospective employee due to the employee's status as a veteran.[38] *Veterans* under this statute include U.S. armed forces personnel, Indiana National Guard members, and members of a reserve component.[39]

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.

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[34] IND. CODE § 34-28-8-6.

[35] IND. CODE § 34-28-8-7.

[36] IND. CODE § 22-9-10-15. The statute indicates that the Indiana Department of Labor will prepare language for employers to use for this notice, but no such guidance or template appears to have been issued.

[37] IND. CODE § 22-9-10-7 (adopting the definition set forth in IND. CODE § 22-9-1-3(h)).

[38] IND. CODE § 22-9-10-9.

[39] IND. CODE § 22-9-10-8.

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
Benefits & Leave Documents: Affordable Care Act (ACA)	Currently, employers covered under the Fair Labor Standards Act (FLSA) must provide to each employee, at the time of hire, written notice: • informing the employee of the existence of an insurance exchange, including a description of the services provided by such exchange, and the manner in which the employee may contact the exchange to request assistance; • that if the employer-plan's share of the total allowed costs of benefits provided under the plan is less than 60% of such costs, the employee may be eligible for a premium tax credit under section 36B of the Internal Revenue Code of 1986[40] and a cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act[41] 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.[42] 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.[43]
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.[44] 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

[40] 26 U.S.C. § 36B.

[41] 42 U.S.C. § 18071.

[42] 29 U.S.C. § 218b.

[43] 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.

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

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	administrators must send separate COBRA rights notices to each address.[45]
Benefits & Leave Documents: Family and Medical Leave Act (FMLA)	In addition to posting requirements, if an FMLA-covered employer has any eligible employees, it must provide a general notice to each employee by including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hiring.[46] 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.[47] 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.[48]
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.[49] For additional information on these requirements, see LITTLER ON I-9 COMPLIANCE & WORK AUTHORIZATION VISAS.

[45] 29 C.F.R. § 2590.606-1.

[46] 29 C.F.R. § 825.300(a).

[47] 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.

[48] 29 C.F.R. § 825.300(a).

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

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
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.[50]
Uniformed Services Employment and Reemployment Rights Act (USERRA) Documents	Employers must provide to persons covered under USERRA a notice of employee and employer rights, benefits, and obligations. Employers may meet the notice requirement by posting notice where employers customarily place notices for employees.[51]
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.[52]

2.1(b) *State Guidelines on Hire Documentation*

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

Table 3. State Documents to Provide at Hire	
Category	**Notes**
Benefits & Leave Documents	No notice requirement located.
Employment Opportunities for Veterans	As noted in **1.3(f)(ii)**, employers with six or more employees must provide applicants with a notice that describes the rights and protections afforded veterans.[53]
Fair Employment Practices Documents	No notice requirement located.
Tax Documents	If an employee claims that they are exempt from withholding under Indiana law, the employee must complete a form asserting the

[50] 26 C.F.R. § 31.3402(f)(2)-1. The IRS provides this form at https://www.irs.gov/pub/irs-pdf/fw4.pdf.

[51] 38 U.S.C. § 4334. This notice is available at https://www.dol.gov/sites/dolgov/files/VETS/legacy/files/USERRA_Private.pdf.

[52] 29 C.F.R. § 531.59.

[53] IND. CODE § 22-9-10-15; *see also* IND. CODE § 22-9-1-3(h) (defining *employer* for these purposes).

Table 3. State Documents to Provide at Hire	
Category	**Notes**
	exemption and their county of residence. The employer is entitled to rely on the employee's statement, regardless of when the employee supplied the form.[54]
Wage & Hour Documents	No notice requirement located.

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.[55] 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).[56]

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

[54] IND. CODE § 6-3-4-8. Relevant exemption forms are available at http://www.in.gov/dor/4100.htm.

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

[56] 42 U.S.C. § 653a.

more states and that file new hire reports either electronically or magnetically. The federal statute permits multistate employers to designate one state to which they will transmit all of their reports twice per month, rather than filing new hire reports in each state. An employer that designates one state must notify the Secretary of the U.S. Department of Health and Human Services (HHS) in writing. When notifying the HHS, the multistate employer must include the following information:

- Federal Employer Identification Number (FEIN);
- employer's name, address, and telephone number related to the FEIN;
- state selected for reporting purposes;
- other states in which the company has employees;
- 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.[57] Multistate employers can receive assistance with registration as a multistate employer from the Multistate Help Desk by calling (410) 277-9470, 9:00 A.M. to 5:00 P.M., Eastern Time.

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

The following is a summary of the key elements of Indiana's new hire reporting law.[58]

Who Must Be Reported. Indiana employers must report employees who are: (1) newly hired; (2) rehired after separation from the previous employment for at least 60 consecutive days; or (3) returning to work after being laid off, furloughed, separated, granted an unpaid leave, or terminated.

Report Timeframe. The report must be submitted electronically within 20 business days of the employee's hire date.

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

[58] IND. CODE § 22-4-10-8. Additional information, including forms and Frequently Asked Questions, is available from the Indiana New Hire Reporting Center at https://www.in-newhire.com/.

Information Required. Employers must report the employee's name, address, Social Security number, current primary standardized occupational classification code, starting compensation, and date of hire (including, for rehired employees, the first date that an employee resumes providing labor or services to an employer after a separation from service with the employer of at least 60 days.) To accompany this information, the employer must also supply its name, address, and federal tax identification number.

Form & Submission of Report. Acceptable reporting forms include: Form W-4, new hire reporting form, or printed list containing all required information. The report may be submitted by first-class mail, fax, electronically (including online and using new hire data entry software), or magnetically.

Location to Send Information.

Indiana New Hire Reporting Center
P.O. Box 55097
Indianapolis, IN
46205-5097
(317) 612-3028
(866) 879-0198
(317) 612-3036 (fax)
(800) 408-1388 (fax)
https://in-newhire.com/default

Multistate Employers. Employers with employees in two or more states have two options to complete their reporting. First, they may report new hires to the state in which those employees work, following that state's regulations. Second, multistate employers may consolidate their reporting obligations by choosing one state where they have employees working and reporting all employees to that state electronically. Under the second option, employers must notify HHS of the state designation, comply with that state's requirements, and report electronically.[59]

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

[59] Further details and assistance are available at https://www.in-newhire.com/default.

through a restrictive covenant. Even where states agree on the interest that can be protected, they may vary on what is seen as a reasonable and enforceable provision for such protection.

Protections against trade secret misappropriation are also available to employers. Until 2016, trade secrets were the only form of intellectual property (*i.e.*, copyrights, patents, trademarks) not predominately governed by federal law. However, the Defend Trade Secrets Act of 2016 (DTSA) now provides a federal court civil remedy and original (but not exclusive) jurisdiction in federal court for claims of trade secret misappropriation.[60] As such, the DTSA provides trade secret owners a uniform federal law under which to pursue such claims. The DTSA operates alongside more limited existing protections under the federal Economic Espionage Act of 1996 and the Computer Fraud and Abuse Act, as well as through state laws adopting the Uniform Trade Secrets Act (UTSA).

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

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

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

There is no statute in Indiana that governs the enforceability of noncompetition covenants. Indiana courts generally view covenants not to compete as restraints on trade that are disfavored.[61] However, because Indiana courts recognize that businesses have an interest in preserving certain legitimate business interests, courts enforce covenants not to compete under proper circumstances.

Indiana courts have developed a series of common-law principles concerning the enforceability of covenants not to compete. As an initial matter, the court must determine whether three prerequisites exist. The court will ask if the restriction imposed on the employee:

1. is necessary to protect a legitimate interest of the employer;
2. is reasonable and not unduly restrictive of the employee; and
3. is contrary to the public interest.[62]

The question of whether a covenant is reasonable is extremely fact sensitive and "the test of the validity of a noncompetition covenant is dependent not merely upon the covenant itself but on the entire contract and the situation to which it is related."[63] Whether the covenant is enforceable is a question of law for the courts.[64]

Indiana has some basic requirements for an enforceable restrictive covenant including consideration, the legitimate interests of the employer, and reasonable geographic and time restrictions. Indiana courts generally recognize two categories of employer interests that will justify a restrictive covenant: (1) good

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[60] 18 U.S.C. §§ 1832 *et seq.*

[61] *MacGill v. Reid*, 850 N.E.2d 926 (Ind. Ct. App. 2006).

[62] *Sharvelle v. Magnante*, 836 N.E.2d 432 (Ind. Ct. App. 2005); *see also Mercho-Roushdi-Shoemaker-Dilley Thoraco-Vascular Corp. v. Blatchford*, 900 N.E.2d 786 (Ind. Ct. App. 2009).

[63] *Ackerman v. Kimball Intern., Inc.*, 652 N.E.2d 507, 509 (Ind. 1995).

[64] *Raymundo v. Hammond Clinic Ass'n*, 449 N.E.2d 276 (Ind. 1983).

will;[65] and (2) confidential and proprietary information.[66] To be a legitimate protectable interest, however, the information generally cannot be readily available in the public domain.[67] Absent a finding of a defined legitimate protectable interest, general skills, knowledge, and general information acquired by an employee through their employment will not support a noncompete.[68]

Further, the geographic area within which competition is restrained must be narrowly drawn so as not to exceed the area necessary to protect the employer's business interest.[69] Generally, a *reasonable area* is considered to be the territory in which the employee performed services for the employer.[70] A geographic scope exceeding the employee's duties may be warranted in the event trade secrets provide the protectable interest.[71]

A covenant not to compete must contain reasonable limitations as to the time during which competition is to be restrained.[72] Reasonableness depends on the factual circumstances of each case. Indiana courts generally have upheld restrictive covenants with temporal durations of three years or less.[73] However, under proper circumstances, one court approved a five-year limitation.[74] There is no bright line rule as to accepted temporal duration, and Indiana courts are more inclined to find an extended temporal duration acceptable with respect to covenants entered into in the sale of business context.[75]

Finally, a noncompete may include only reasonable limitations on the scope of activity restrained. In most cases, this restriction should be related to the activities in which the former employee engaged while working with the employer. Thus, a covenant restricting an employee from working with a competitor *in any capacity* most likely is overbroad and unenforceable unless there is a specific link to a legitimate protectable interest.[76]

Enforceability Following Employee Discharge. Noncompete agreements remain enforceable so long as the employer did not materially breach the agreement.[77]

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[65] *Press-A-Dent v. Weigel*, 849 N.E.2d 661 (Ind. Ct. App. 2006); *see also Coffman v. Olson & Co., P.C.*, 906 N.E.2d 201 (Ind. Ct. App. 2009).

[66] *McGlothen v. Heritage Envtl. Servs., L.L.C.*, 705 N.E.2d 1069 (Ind. Ct. App. 1999) (Indiana courts protect trade secrets and confidential information such as marketing policies, advertising programs, pricing strategies, customer lists, and sales data.).

[67] *American Shippers Supply Co. v. Campbell*, 456 N.E.2d 1040 (Ind. Ct. App. 1980).

[68] *Donahue v. Permacel Tape Corp.*, 127 N.E.2d 235 (Ind. 1955).

[69] *Product Action Int'l v. Mero*, 277 F. Supp. 2d 919 (S.D. Ind. 2003).

[70] *Harvest Ins. Agency, Inc. v. Inter-Ocean Ins. Co.*, 492 N.E.2d 686, 690 (Ind. 1986).

[71] *Waterfield Mortg. Co. v. O' Connor*, 361 N.E.2d 924, 927 (Ind. Ct. App. 1977).

[72] *College Life Ins. Co. v. Austin*, 466 N.E.2d 738, 744 (Ind. Ct. App. 1984).

[73] *Seach v. Dieterle & Co.*, 439 N.E.2d 208 (Ind. Ct. App. 1982) (upholding a restriction of three years).

[74] *Rollins v. American State Bank*, 487 N.E.2d 842 (Ind. Ct. App. 1986).

[75] *H&G Ortho, Inc. v. Neodontics Int'l, Inc.*, 823 N.E.2d 718 (Ind. Ct. App. 2005).

[76] *Burk v. Heritage Food Serv. Equip., Inc.*, 737 N.E.2d 803, 811 (Ind. Ct. App. 2000).

[77] *Unger v. FFW Corp.*, 771 N.E.2d 1240 (Ind. Ct. App. 2002); *see also Gomex v. Chua Med. Corp.*, 510 N.E.2d 191 (Ind. Ct. App. 1987) (noncompete held not enforceable where employee was discharged in bad faith). Though note that, in *Gomex*, the Indiana Court of Appeals held an employer need not establish a valid reason for discharge in order for the noncompete to be enforceable, stating: "If the termination is made in bad faith, equity may be called

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.

Indiana requires that restrictive covenants be supported by adequate consideration.[78] For employees entering into a covenant at the time of initial employment, the job itself constitutes the necessary consideration.[79] Continuation of an at-will employee's existing employment also will support a restrictive covenant.[80] While additional "special consideration" is not required in Indiana, a number of employers will recite special considerations such as a promotion, bonus, stock options, severance and/or pay raise in an effort to highlight the fairness of the agreement.

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 Indiana, where a restrictive covenant contains distinct and readily severable provisions, some of which are valid and others of which are not, courts will enforce the valid provisions while striking the invalid provisions.[81] While a court may excise unreasonable language from a restrictive covenant, it cannot add terms to an unenforceable restrictive covenant, even when that agreement contains language purporting to give a court the power to do so.[82] While there is some disagreement among Indiana courts as to whether the doctrine must be strictly mechanical, the general practice is that the doctrine severely limits any court's ability to "rewrite the agreement" other than to strike unenforceable terms.[83] There is an open

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upon to deny enforcement, but neither equity nor the law will deny enforcement upon the basis that the employer must establish that a discharge was made in good faith, or for good cause." 510 N.E.2d at 195.

[78] *Field v. Alexander & Alexander, Inc.*, 503 N.E.2d 627 (Ind. Ct. App. 1987).

[79] *Advanced Copy Prods., Inc. v. Cool*, 363 N.E.2d 1070, 1071 (Ind. Ct. App. 1977) (citing a long line of cases that stand for the proposition that an initial offer of employment and the mutual benefits that accompany such is sufficient consideration for a covenant not to compete in Indiana).

[80] *Ackerman v. Kimball Intern., Inc.*, 652 N.E.2d 507 (Ind. 1995).

[81] *Licocci v. Cardinal Assocs., Inc.*, 445 N.E.2d 556, 561 (Ind. 1983); *see also Burk v. Heritage Food Serv. Equip.*, 737 N.E.2d 803, 811-12 (Ind. Ct. App. 2000); *see also Distrib. Servs., Inc. v. Stevenson*, 16 F. Supp. 3d 964 (S.D. Ind. 2014).

[82] *Heraeus Medical, LLC, et al. v. Zimmer, Inc., et al.*, 135 N.E.3d 150 (Ind. 2019).

[83] *Uniform House, Inc. v. Scrubs to Go Inc.*, 859 N.E.2d 1286 (Ind. Ct. App. 2007).

question in Indiana as to whether a court may modify or reform an unreasonable restrictive covenant when, in the agreement itself, the parties expressly authorize the court to do so. At least one Indiana court ruled that it had such authority, however, the Indiana Supreme Court vacated the decision on other grounds.[84]

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

Definition of a Trade Secret. Indiana has adopted, with some revisions, the Uniform Trade Secrets Act (UTSA). The UTSA "displaces all conflicting law of this state pertaining to the misappropriation of trade secrets, except contract law and criminal law."[85] As adopted in Indiana, the UTSA defines a *trade secret* as:

> [I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process, that
>
> > (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by prior means by, other persons who can obtain economic value from its disclosure or use; and
> > (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[86]

The Indiana statute confirms that it "shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject matter of this chapter among states enacting the provisions of this chapter."[87] Thus, Indiana courts are guided not only by Indiana precedent but also by case law from other jurisdictions having adopted the UTSA.[88]

Two overarching principles are critical to any trade secrets analysis. First, the definition of *trade secret* itself is very expansive and the statutory list of examples is not exhaustive.[89] Second, basic information under one fact scenario may qualify as a trade secret while, under another scenario, the same information may not qualify.[90] Moreover, a trade secret may consist of a compilation of several elements that individually may be readily ascertainable, but when viewed together may qualify for trade secret protection.[91]

Misappropriation of a Trade Secret. Despite the fact that a trade secret and duty not to disclose may exist, no liability arises unless the trade secret has been misappropriated. Misappropriation under the Indiana statute can occur in one of two manners: (1) acquisition of a trade secret "by a person who knows or has reason to know that the trade secret was acquired by improper means;" or (2) unauthorized use or

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[84] *Dicen v. New Sesco Inc.*, 806 N.E.2d 833 (Ind. Ct. App. 2004), *vacated in part by* 839 N.E.2d 684 (Ind. 2005).

[85] IND. CODE § 24-2-3-1(c).

[86] IND. CODE § 24-2-3-2.

[87] IND. CODE § 24-2-3-1(a).

[88] *Amoco Prod. Co. v. Laird*, 622 N.E.2d 912, 917-18 (Ind. 1993).

[89] *See, e.g.*, *Ackerman v. Kimball Int'l, Inc.*, 634 N.E.2d 778, 783 (Ind. Ct. App. 1994), *vacated in part, adopted in part by Ackerman v. Kimball Intern., Inc.*, 652 N.E.2d 507 (Ind. 1995).

[90] *Amoco Prod. Co.*, 622 N.E.2d at 916.

[91] 622 N.E.2d at 918.

disclosure of a trade secret.[92] As for the latter scenario, the UTSA defines misappropriation to include disclosure or use of another's trade secret, without express or implied permission, by a person who:

1. used improper means to acquire the knowledge;
2. knew or had reason to know that the knowledge passed on to him/her was obtained improperly, under various circumstances;[93] or
3. "before a material change of his [or her] 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."[94]

A court may enjoin actual or threatened misappropriation of a trade secret.[95] Although an injunction should normally terminate when the trade secret ceases to exist, a court may continue an injunction for an additional time period to eliminate any commercial advantage that otherwise would be derived from misappropriation.[96] In addition to or in lieu of injunctive relief, the complainant may recover damages for the actual loss caused by misappropriation.[97] In addition, the statute permits recovery for any unjust enrichment created by the misappropriation not included in computing damages for actual loss.[98] In cases of willful and malicious misappropriation, a court may award punitive damages up to twice the amount awarded for actual loss and unjust enrichment.[99]

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

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

3. DURING EMPLOYMENT

3.1 Posting, Notice & Record-Keeping Requirements

3.1(a) *Posting & Notification Requirements*

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

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

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[92] IND. CODE § 24-2-3-2.

[93] IND. CODE § 24-2-3-2 (describing three ways in which trade secrets could be passed on improperly so as to constitute misappropriation).

[94] IND. CODE § 24-2-3-2.

[95] IND. CODE § 24-2-3-3.

[96] IND. CODE § 24-2-3-3(a).

[97] IND. CODE § 24-2-3-4(a).

[98] IND. CODE § 24-2-3-4(a).

[99] IND. CODE § 24-2-3-4(c).

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.[100]
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.[101]
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.[102]
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.[103]
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.[104]
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.[105]

[100] 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.

[101] 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.

[102] 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.

[103] 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.

[104] 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.

[105] 29 C.F.R. § 525.14. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/disab.htm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
Occupational Safety and Health Act ("the Fed-OSH Act")	Employers must post a notice or notices informing employees of the Fed-OSH Act's protections and obligations, and that for assistance and information employees should contact the employer or nearest U.S. Department of Labor office.[106]
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.[107]
In addition to the federal posters required for all employers, government contractors may be required to post the following posters.	
"EEO is the Law" Poster with the EEO is the Law Supplement	Employers subject to Executive Order No. 11246 must prominently post notice, where it can be readily seen by employees and applicants, explaining that discrimination in employment is prohibited on numerous grounds.[108] 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.[109]
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.[110]
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

[106] 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.

[107] 20 C.F.R. app. § 1002. This poster is available at http://www.dol.gov/vets/programs/userra/poster.htm.

[108] 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.

[109] 41 C.F.R. §§ 60-300.44, 60-741.44.

[110] 29 C.F.R. § 5.5(a)(l)(i). This poster is available at https://www.dol.gov/whd/regs/compliance/posters/davis.htm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	attaching a notice to the contract, or may post the notice at the worksite.[111]
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.[112]
Notice to Workers with Disabilities/Special Minimum Wage Poster	Employers of workers with disabilities under special minimum wage certificates authorized by the Service Contract Act or the Walsh-Healey Public Contracts Act must post notice, explaining the conditions under which the special minimum wages may be paid. Where an employer finds it inappropriate to post this notice, directly providing the poster to its employees is sufficient.[113]
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.[114]
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.[115]
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

[111] 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.

[112] U.S. Citizenship and Immigration Servs., Dept. 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.

[113] 29 C.F.R. § 525.14. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/disab.htm.

[114] 29 C.F.R. § 471.2. This poster is available at https://www.dol.gov/olms/regs/compliance/EO13496.htm.

[115] 48 C.F.R. §§ 3.1000 *et seq*. This poster is available at https://oig.hhs.gov/documents/root/243/OIG_Hotline_Ops_Poster_-_Grant__Contract_Fraud.pdf.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	right to earn and use paid sick leave. Notice may be provided electronically if customary to the employer.[116] **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).[117]
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.[118]
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.[119]

[116] 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.

[117] 29 C.F.R. § 13.5.

[118] 41 C.F.R. § 60-1.35(c). This poster is available at https://www.dol.gov/agencies/ofccp/posters.

[119] 29 C.F.R. §§ 10.29, 23.290. The poster, referencing both Executive Orders, is available at https://www.dol.gov/whd/regs/compliance/posters/mw-contractors.htm.

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

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

Table 6. State Posting & Notice Requirements

Poster or Notice	Notes
Child Labor: Hour Restrictions	Where minors aged 14 or over work, employers must post a notice stating: • the maximum number of hours a child may be employed or permitted to work each day of the week; and • the hours of beginning and ending each day.[120]
Fair Employment Practices	Employers with at least 6 employees[121] must post a notice, in an accessible format, informing employees and applicants of their rights under the Indiana equal employment law.[122]
Human Trafficking Awareness	Posters raising awareness about human trafficking are required for employers operating *adult entertainment* businesses, which are defined to include "adult oriented entertainment in which performers disrobe or perform in an unclothed state."[123] The posters must describe human trafficking, explain indicators of human trafficking (such as restricted freedom of movement and signs of physical abuse), provide hotline telephone numbers, and be approved by the commission. Posters must be displayed in at least 2 of these 3 locations: (1) manager's office; (2) locker room used by performers or employees; and (3) break room. In addition, employers in this industry must have all performers and other employees sign an acknowledgement that they are aware of the problem of human trafficking.[124]

[120] IND. CODE § 22-2-18.1-22. This poster is available at https://www.in.gov/dol/files/YouthEmployment_teenWorkHourRestrictionsPoster.pdf.

[121] The statute appears to cover employers engaged in an industry affecting commerce, with at least fifteen employees. IND. CODE § 22-9-5-10 (explaining that covered employers have at least 15 employees "for each working day in each of at least twenty (20) calendar weeks in the current or preceding year"). But the poster prepared by the Indiana Department of Workforce Development indicates that this requirement applies to employers with only six employees. Out of an abundance of caution, employers should consider complying with the broader requirement.

[122] IND. CODE § 22-9-5-25. This poster is available at https://www.in.gov/icrc/files/Equal_Employment_Poster_New1.pdf. It is also available in Spanish at https://www.in.gov/icrc/files/Equal_Employment_Poster_Spanish_New.pdf.

[123] IND. CODE § 7.1-3-23-20.5.

[124] IND. CODE § 7.1-3-23-20.5. A poster prepared by the National Human Trafficking Resource Center is available at http://www.in.gov/atc/files/Human_Trafficking_Poster.pdf.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Unemployment Compensation	Employers must post a notice in a conspicuous place where readily accessible to all employees, informing employees of the unemployment statute's basic protections, as well as who to contact for assistance and information.[125]
Wages, Hours & Payroll: Indiana Minimum Wage & Overtime Law	Employers with 2 or more employees (except those subject to the FLSA) must display a single-page poster providing employees notice of the following information: • the current Indiana minimum wage; • an employee's basic rights under Indiana's minimum wage law; and • contact information on how to obtain additional information from or to direct questions or complaints to the Indiana department of labor.[126]
Worker's Compensation	Employers must post a notice informing employees that their employment is covered by worker's compensation. The notice must also contain the name, address, and telephone number of the employer's insurance carrier or the person responsible for administering the employer's worker's compensation claims if the employer is self-insured. The notice must be in the approved form and posted at a conspicuous location at the place of business to provide reasonable notice to all employees. If the employer is required by federal law or regulation to post a notice, this Indiana notice must be posted in the same location or locations where the federal notice is posted. An employer that has mobile or remote employees must convey this information in an electronic format or in the same manner as the employer conveys other employment-related information.[127]
Workplace Safety: Indiana Protection on the Job Poster	Each employer must keep and maintain a poster from the Indiana Occupational Safety and Health Administration (IOSHA), in each establishment in a conspicuous place or places where notices to employees are customarily posted. This notice must inform employees of their protections under the law and refer them to appropriate sources for assistance and information. Employers must take steps to

[125] IND. CODE §§ 22-4-9-6, 22-4-17-1. This poster is available at https://www.in.gov/dwd/files/Employer-Poster.pdf. It is also available in Spanish at https://www.in.gov/dwd/files/Employer-Poster-Spanish.pdf. Similar information must be provided to employees at the time they become unemployed.

[126] IND. CODE § 22-2-2-8. This poster is available at https://www.in.gov/dol/publications/.

[127] IND. CODE § 22-3-2-22. These posters are available in English and Spanish at https://www.in.gov/wcb/employers/.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
	ensure that such notices are not altered, defaced, or covered by other material.[128]
Workplace Safety: No Smoking Signs	Smoking is prohibited in Indiana in all workplaces, and within eight feet of any entrance to a place of employment. Employers must notify applicants and employees of this prohibition. In addition, any "owner, operator, manager, or official in charge of a public place or place of employment" must post conspicuous signs at each public entrance to the location. The signs must read "State Law Prohibits Smoking Within 8 Feet of this Entrance" or use similar language.[129]

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

[128] IND. CODE § 22-8-1.1-3.1; 610 IND. ADMIN. CODE 9-2-3. This poster is available at http://www.in.gov/dol/files/English_IOSHA_Poster.pdf. It is also available in Spanish at http://in.gov/dol/files/Spanish_Poster.pdf.

[129] IND. CODE § 7.1-5-12-4.

[130] 29 U.S.C. § 626; 29 C.F.R. § 1627.3(a).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• 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.[131]	
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.[132]	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.[133]	At least 1 year from the date the records were made, or from the date of the personnel action involved, whichever is later.
Title VII & the Americans with Disabilities Act (ADA): Complaints of Discrimination	*When a charge of discrimination has been filed or an action brought against the employer, it must:* • make and keep such records relevant to the determination of whether unlawful employment practices have been or are being committed, including personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person; and	Until final disposition of the charge or action (*i.e.*, until the statutory period for bringing an action has expired or, if an action has been

[131] 29 C.F.R. § 1627.3(b).

[132] 29 C.F.R. § 1627.3(b).

[133] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• retain application forms or test papers completed by unsuccessful applicants or candidates for the position.[134]	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).[135]	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.[136]	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 for an exemption.

[134] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[135] 29 C.F.R. § 1602.7.

[136] 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.[137]	
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).[138]	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.[139]	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.

[137] 29 U.S.C. § 1027.

[138] 29 C.F.R. § 1620.32(a).

[139] 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).[140] 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.[141]	

[140] 29 C.F.R. §§ 516.2, 516.5.

[141] 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.[142]	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.[143]	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.[144]	At least 2 years from the date of last entry.

[142] 29 C.F.R. §§ 516.2, 516.3. Presumably the regulation's reference to "prerequisites" is an error and should refer to "perquisites."

[143] 29 C.F.R. § 516.5.

[144] 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.[145]	
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.

[145] 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).[146]	
Immigration	Employers must retain all completed Form I-9s.[147]	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

[146] 26 C.F.R. §§ 31.6001-1, 31.6001-2.

[147] 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.[148]	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.[149]	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.[150]	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.

[148] 26 U.S.C. § 3402; 26 C.F.R. § 1.6001-1.

[149] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

[150] 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.[151]	
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.

[151] 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.[152]	
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.[153]	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.[154]	At least 30 years.

[152] 29 C.F.R. § 1910.1020(d).

[153] 29 C.F.R. § 1910.1020(d).

[154] 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.[155]	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.[156]	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 150 employees or does not have a contract of at least $150,000, the minimum retention period is one year from

[155] 29 C.F.R. §§ 1904.33, 1904.44.

[156] 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.[157]	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.[158]	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.

[157] 41 C.F.R. §§ 60-1.12, 60-300.80, and 60-741.80.

[158] 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.[159]	
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.

[159] 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.[160]	
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.[161]	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.

[160] 29 C.F.R. § 13.25.

[161] 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.[162]	
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.[163]	At least 3 years from the last date of entry.

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

Table 8 summarizes the state record-keeping requirements.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Fair Employment Practices: Age Discrimination	Every employer must keep true and accurate records of the age of each person employed, as reported by the employee.[164]	None specified.
Public Works Contracts: E-Verify	A contractor must maintain the certification provided by a subcontractor on a public works contract, in which the	Duration of the contract with the subcontractor.

[162] 29 C.F.R. § 4.6.

[163] 41 C.F.R. § 50-201.501.

[164] IND. CODE § 22-9-2-6.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	subcontractor verifies that it is not employing any unauthorized aliens and that it is participating in E-Verify.[165]	
Unemployment Compensation	*Each employer must keep true and accurate records for each employee, as the Indiana Department of Workforce Development (IDWD) considers necessary.* The IDWD explains that the following payroll and employment records must be kept: • name and Social Security number for each employee; • cash remuneration paid to each employee per calendar quarter; • remuneration other than cash paid to each employee per calendar quarter; • date each employee last worked and date to which wages were last payable; • reason for termination; • reason for lost time in any week during which an employee earns less than the maximum weekly benefit amount established by law; • remuneration earned by each employee is in fact a week of less than full-time work; and • base of operations of each employee.[166] *The IDWD Unemployment Insurance Employer Handbook states that the following additional records must be kept:* • beginning and ending date of each pay period; • total wages paid during each pay period; • number of employees each month; • total number of employees each quarter; • each employee's name, Social Security number and wages for each pay period; • date each employee was hired, re-hired, or returned to work after a temporary lay-off; and • date each discharged employee was terminated and the cause of the termination.[167]	Four years in addition to the current calendar year.

[165] IND. CODE § 22-5-1.7-16.

[166] IND. CODE § 22-4-19-6; Indiana Dep't of Workforce Dev., *Payroll and Employment Records for Unemployment Insurance Purposes*, DWD Policy 2008-24 (Jan. 2, 2009), *available at* https://www.in.gov/dwd/files/activepolicies/2008-24-P_Payroll_Employment_Records_UI_Purposes.pdf.

[167] Indiana Dep't of Workforce Dev., *Unemployment Insurance Employer Handbook* (rev. Apr. 15, 2015), *available at* http://www.in.gov/dwd/files/Employer_Handbook.pdf.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Wages, Hours & Payroll	*Every employer must keep true and accurate payroll records, including the following:* • name, address, and occupation of each employee; • daily and weekly hours worked by each employee; and • wages paid to each employee each pay period, listing deductions. Records of daily and weekly hours worked or wages paid need not be kept for *bona fide* executive, agricultural, domestic, administrative, or professional employees, or for employees working in the capacity of an outside salesperson.[168]	None specified.
Worker's Compensation	*Every employer must keep records of the following incidents, as suffered by or claimed to have been received by employees in the course of their employment:* • all injuries, fatal or otherwise; and • all disablements by occupational disease, fatal or otherwise.[169]	None specified.
Workplace Safety: Exposure or Medical Records	*Employers that make, maintain, or have access to employee exposure or medical records must retain:* • records indicating employee exposures to toxic materials or harmful physical agents; and • records concerning the health status of employees exposed or potentially exposed to toxic materials or harmful physical agents, including the results of medical examinations and tests, any opinions or recommendations of a physician or other health professional concerning the health of an employee, and any employee medical complaint relating to workplace exposure.[170] Medical records must be made available to the Commissioner of Labor upon request.	None specified.
Workplace Safety: Injuries & Illnesses	*For the most part, Indiana follows the Fed-OSHA requirements*. Specifically, Indiana has adopted the Fed-OSHA's record-keeping requirement as it existed on January 1, 2006—*except that* reporting of fatalities and multiple	See Fed-OSH Act rules.

[168] IND. CODE §§ 22-1-1-15, 22-2-2-8.

[169] IND. CODE §§ 22-3-4-13, 22-3-7-37.

[170] IND. CODE § 22-8-1.1-17.1; 620 IND. ADMIN. CODE 1-1-16.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	hospitalization incidents (required by 29 C.F.R. 1904.39) must be made to IOSHA.[171] Deaths and disasters must be reported directly to the Indiana commissioner within eight hours. *Disaster* is any incident that results in the hospitalization of three or more persons. The Indiana Commissioner of Labor may adopt further rules requiring employers with 11 or more employees to make and retain records of, and to reports, all work-related deaths, injuries, and illnesses.	

3.1(c) *Personnel Files*

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

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

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

Indiana 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) *State Guidelines on Background Screening of Current Employees*

Indiana law is mainly silent on background screening of current employees, although there are restrictions on an employer's inquiry as to whether an employee has a criminal record that has been sealed or expunged or if an employee owns or uses firearms or ammunition. For information on these restrictions, see 1.3(a)(iv) and 1.3(f)(i), respectively.

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).

[171] IND. CODE § 22-8-1.1-43.1.

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

Controlled substance testing is neither encouraged, nor prohibited or authorized, by Indiana statute.[172]

Indiana has no specific procedural requirements for administering controlled substance testing, although there is nothing in the state statutes prohibiting employers from testing job applicants or employees for the illegal use of drugs. Nonetheless, particular statutes, both federal and state, explain the scope and extent of permissible testing. For example, because a controlled substance test is not considered an "independent medical examination," the employer does not have the right to order a substance abuse test under the Indiana Worker's Compensation Act. Under the federal Department of Transportation rules and regulations, however, an employer may require a controlled substance test if there is a reasonable suspicion that an employee-driver is abusing drugs or alcohol.

Indiana employers may make employment decisions based on applicant and employee drug test results.[173] Employers must keep in mind that employees who are no longer using illegal drugs after completing a drug rehabilitation program and employees who are no longer using illegal drugs while participating in a supervised drug rehabilitation program may be considered individuals with disabilities.[174] With respect to these employees, employers may adopt reasonable policies and procedures including drug testing to ensure illegal drug use has ceased.[175]

3.2(c) *Marijuana Laws*

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

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

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

Indiana does not have either a medical or recreational marijuana law. However, state law permits the sale of low-THC hemp extract, which is a substance or compound that: (1) is derived from or contains any part of the plant Cannabis sativa L. that meets the definition of industrial hemp; (2) contains not more than 0.3% total of delta-9-THC, including precursors, by weight; and, (3) contains no other controlled substances.[177] Previously, cannabinol (CBD) oil was legal for certain medicinal purposes related to epilepsy.

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:

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[172] IND. CODE § 22-9-5-24.

[173] IND. CODE § 22-9-5-24.

[174] IND. CODE § 22-9-5-6(b)(1)-(2).

[175] IND. CODE § 22-9-5-6(b)(1)-(2).

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

[177] *See* IND. CODE §§ 24-4-22-1 *et seq*.

- An employer providing identity protection services to an employee whose personal information may have been compromised due to a data security breach is not required to include the value of the identity protection services in the employee's gross income and wages.
- An individual whose personal information may have been compromised in a data breach is not required to include in their gross income the value of the identity protection services.
- The value of the provided identity theft protection services is not required to be reported on an information return (such as Form W-2 or Form 1099-MISC) filed with respect to affected employees.[178]

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.[179]

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

Under Indiana's data security statute, when a covered entity discovers or is notified of a breach of its security system involving the unauthorized acquisition of personal information, the entity must notify all affected parties.[180] Disclosure is required if the covered entity knows, or should know, that the breach has resulted in or could result in identity theft or fraud.[181] *Personal information* is defined as a Social Security number, or an individual's first name or first initial and last name, in combination with any one or more of the following:

- driver's license number or state identification card number;
- a credit card number; or
- a financial account number or debit card number, along with "a security code, password, or access code that would permit access to the person's account."[182]

Coverage & Exceptions. Any person (including an employer) that owns or licenses computerized data that includes personal information is subject to Indiana's data security breach statute.

There are several exceptions, however, for entities that have existing compliant policies or legal obligations. For example, a covered entity that maintains and complies with a notification procedure as part of its own information security policy for the treatment of personal information is compliant with this

[178] 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.

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

[180] IND. CODE §§ 24-4.9-1-1 *et seq*.

[181] IND. CODE § 24-4.9-3-1(a).

[182] IND. CODE § 24-4.9-2-10. Effective July 1, 2024, personal information also includes information collected by an adult oriented website operator, or their designee, under Ind. Code § 24–4–23.

statute. The policy must afford the same or greater protection to the affected individuals as the data security statute.[183]

Likewise, a covered entity that maintains and abides by disclosure procedures as part of an information privacy, security policy, or compliance plan under certain federal statutes is also in compliance with Indiana law. This exception applies to employers who comply with policies under:

- the federal USA Patriot Act;
- Executive Order No. 13224;
- the federal Driver's Privacy Protection Act;
- the federal Fair Credit Reporting Act;
- the federal Financial Modernization Act of 1999;
- the federal Health Insurance Portability and Accountability Act (HIPAA); or
- the Federal Interagency Guidance on Response Programs for Unauthorized Access to Customer Information and Customer Notice or the Guidance on Response Programs for Unauthorized Access to Member Information and Member Notice, as applicable to financial institutions.[184]

Content & Form of Notice. Notice of the breach to affected Indiana residents may be in one of the following formats:

- mail;
- telephone;
- fax;
- email, if the covered entity has the email address of the affected resident; or
- substitute notice, if
  - the covered entity demonstrates that—
    - the cost of providing notice would exceed $250,000; or
    - the affected class of persons to be notified exceeds 500,000.[185]

Substitute notice consists of:

- conspicuous posting of the notice on the website of the covered entity, if it maintains a website; and
- notification by statewide media in the geographic area where Indiana residents affected by the breach reside.[186]

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[183] IND. CODE § 24-4.9-3-4(c).

[184] IND. CODE § 24-4.9-3-4(d); *see also* IND. CODE § 24-4.9-3-3.5.

[185] IND. CODE § 24-4.9-3-4.

[186] IND. CODE § 24-4.9-3-4.

Timing of Notice. Notice must be given without unreasonable delay, but no later than 45 days after discovery of the breach. Notification may be delayed if:

- The Attorney General's office or a law enforcement agency indicates that notification will impede a criminal investigation or jeopardize national security.
- A covered entity needs time to determine the scope of the breach.
- A covered entity needs time to restore the reasonable integrity of the data system.[187]

Additional Provisions. If a covered entity is required to issue a security breach notification under this law, it must also notify the Indiana Attorney General's office. If the breach triggers disclosure to more than 1,000 Indiana residents, the covered entity must also notify each consumer reporting agency to assist in fraud prevention.[188]

3.2(e) *Microchipping*

Indiana's employers are prohibited from requiring an employee to have a device implanted as a condition of employment.[189] Under the law, an *employer* means any state or individual, partnership, association, LLC, corporation, business trust, or other government entity or political subdivision with one or more employees.

3.3 Minimum Wage & Overtime

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

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

As a general rule, federal wage and hour laws do not preempt state laws.[190] 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.[191]

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

[187] IND. CODE § 24-4.9-3-3.

[188] IND. CODE § 24-4.9-3-1(b)-(c).

[189] IND. CODE § 22-5-8-1.5.

[190] 29 U.S.C. § 218(a).

[191] 29 U.S.C. § 206.

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.[192]

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.[193]

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

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

The Indiana Minimum Wage Law of 1965 applies only to those Indiana employers that have at least two employees and that are not subject to the minimum wage requirements of the FLSA.[195] Because the vast majority of Indiana businesses with at least two employees are subject to the FLSA's minimum wage provisions, the Minimum Wage Law is seldom invoked. Employers subject to the FLSA should follow its provisions.

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

In the rare cases where the Minimum Wage Law is applicable, it requires any employer with two or more employees working in a workweek, to pay each employee at least the federally-mandated minimum wage (currently, $7.25 per hour) for each hour worked up to 40 hours in a workweek.[196]

3.3(b)(ii) *Tipped Employees*

Tipped employees are paid differently. If an employee earns tips, an employer may take a maximum tip credit (as currently set by the FLSA) of $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 tips actually received, and the minimum wage, which is currently $7.25 per hour. The 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. The state minimum wage provisions for tipped employees do not apply to employers covered by the FLSA.[197]

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

The Minimum Wage Law excludes a wide variety of people from the definition of "employee," making it unnecessary to pay such persons either a minimum wage or overtime compensation.[198] This group includes:

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[192] 29 U.S.C. §§ 203, 206.

[193] 29 U.S.C. § 3(m)(2)(B).

[194] 29 U.S.C. § 207.

[195] IND. CODE § 22-2-2-3.

[196] IND. CODE §§ 22-2-2-3, 22-2-2-4.

[197] IND. CODE §§ 22-2-2-3, 22-2-2-4.

[198] IND. CODE § 22-2-2-3.

- minors under 16 years of age;
- independent contractors;
- individuals performing services not in the course of the employing unit's trade or business;
- employees paid on a commission basis;
- individuals employed by their own parent, spouse, or child;
- members of any religious order performing any service for that order, any ordained, commissioned, or licensed minister, priest, rabbi, sexton, or Christian Science reader, and volunteers performing services for any religious or charitable organization;
- individuals performing services as student nurses in the employ of a hospital or nurses training school while enrolled and regularly attending classes in a nurses training school chartered or approved under law, or students performing services in the employ of persons licensed as both funeral directors and embalmers as a part of their requirements for apprenticeship to secure an embalmer's license or a funeral director's license from the state, or during their attendance at any schools required by law for securing an embalmer's or funeral director's license;
- individuals who have completed a four-year course in a medical school when employed as interns or resident physicians by any accredited hospital;
- students performing services for any school, college, or university in which they are enrolled and are regularly attending classes;
- individuals with physical or mental disabilities performing services for nonprofit organizations organized primarily for the purpose of providing employment for persons with disabilities or for assisting in their therapy and rehabilitation;
- individuals employed as insurance producers, insurance solicitors, and outside salesmen, if all their services are performed for remuneration solely by commission;
- individuals performing services for any camping, recreational, or guidance facilities operated by a charitable, religious, or educational nonprofit organization;
- certain agricultural employees;
- executive, administrative, or professional employees who have the authority to employ or discharge and who earn $150 or more a week, and outside salespersons;
- any individual not employed for more than four weeks in any four consecutive three-month periods; and
- employees covered under the federal Motor Carrier Act.[199]

3.3(c) *State Guidelines on Overtime Obligations*

Similar to the federal overtime requirements, the Indiana Minimum Wage Law mandates that covered employers pay at least one and one-half times the employee's regular hourly rate of pay for each hour

[199] IND. CODE § 22-2-2-3.

worked over 40 hours in a workweek.[200] The state overtime provisions do not apply to employers covered by the FLSA. Employers subject to the FLSA should follow its provisions.[201]

3.3(d) *State Guidelines on Overtime Exemptions*

Indiana's Minimum Wage Law exempts certain categories of individuals from the definition of "employee," thus negating the need to pay them overtime compensation (see **3.3(b)(iii)**).[202] This group includes executive, administrative, and professional employees "who have the authority to employ or discharge" and who earn $150 or more a week, as well as outside salesmen.[203]

Tracking the FLSA closely, but not completely, the Minimum Wage Law allows various types of collective bargaining agreement and individual employment agreement provisions regarding overtime.[204]

Overtime provisions also do not apply to an employee of a retail or service establishment if:

- the employee's regular rate exceeds 1.5 times the state minimum wage; and
- more than half of the employee's compensation for a representative period (not less than one month) represents commissions on goods or services.[205]

In calculating the proportion of compensation representing commissions, "all earnings resulting from the application of a *bona fide* commission rate [are] considered commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee."[206]

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

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[200] IND. CODE § 22-2-2-4(k).

[201] IND. CODE §§ 22-2-2-3, 22-2-2-4.

[202] IND. CODE § 22-2-2-3(a)-(p).

[203] IND. CODE § 22-2-2-3(n).

[204] IND. CODE § 22-2-2-4(m)-(o).

[205] IND. CODE § 22-2-2-4(q).

[206] IND. CODE § 22-2-2-4(q).

[207] 29 C.F.R. § 785.19.

Federal law contains no generally applicable rest period requirements for adults. Under the FLSA, rest periods of short duration, running from five to 20 minutes, must be counted as "hours worked" and must be paid.[208]

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.[209] 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.[210] An employer must also provide a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.[211] Exemptions apply for smaller employers and air carriers.[212]

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.[213] Lactation is considered a related medical condition.[214] 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.[215] For more information on these topics, see **LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES**.

[208] 29 C.F.R. § 785.18.

[209] 29 U.S.C. § 218d.

[210] 29 U.S.C. § 218d(b)(2).

[211] 29 U.S.C. § 218d(a).

[212] 29 U.S.C. § 218d(c), (d).

[213] 42 U.S.C. § 2000gg–1.

[214] 29 C.F.R. § 1636.3.

[215] 29 C.F.R. § 1636.3.

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

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

There are no generally applicable meal and rest period requirements for adults in Indiana. "Indiana state law does not generally require employers to provide rest breaks, meal breaks, or breaks for other purposes to adult employees."[216]

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

The Department of Labor recommends that if a minor works or is scheduled to work more than six hours in a shift, the minor must receive at least two 15-minute rest breaks or one 30 minute rest break.[217]

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

As of April 1, 2020, the Indiana Break Law for minors was repealed.[218]

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

In general, an individual may breast feed their child anywhere they have a right to be.[219] Private employers with 25 or more employees must provide a private location (other than a toilet stall) for an employee to express breast milk in privacy during any period away from the employee's assigned duties. To the extent reasonably possible, an employer must provide a refrigerator or other cold storage space for keeping milk that has been expressed or allow the employee to provide her own portable cold storage device for keeping milk that has been expressed until the end of the work day. Except in cases of willful misconduct, gross negligence or bad faith, an employer is not liable for any harm caused by or arising from the expression of an employee's breast milk or storage of expressed milk that occur on the employer's premises.[220]

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

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[216] Indiana Dep't of Labor, *Wage & Hours FAQs*, Question 2.D (Breaks/Lunches), *available at* https://www.in.gov/dor/i-am-a/business-corp/contractors/#:~:text=Individuals%20who%20wish%20to%20receive,Worker%27s%20Compensation%20Board%20of%20Indiana.

[217] 610 IND. ADMIN. CODE 10-3-2.

[218] Indiana Dep't of Labor, *Summary of Indiana "Youth Employment" Law Changes*, *available at* https://www.in.gov/dol/files/YouthEmployment_2020-4-1_trainingSummary.pdf.

[219] IND. CODE § 16-35-6-1.

[220] IND. CODE § 22-2-14-2.

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

training, or travel time—is or is not "work." In addition, the Portal-to-Portal Act of 1947 excluded certain preliminary and postliminary activities from "work time."[222]

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

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

Indiana law does not contain any provisions addressing what constitutes compensable work time.

With respect to on-call pay, however, the state labor department takes the position that employees who are required to remain on call at home, or who are allowed to leave a message where they can be reached, are not considered to be working while on call. To the contrary, employees who are required to remain on call at *the employer's premises* are considered to be working while on call, and the time is compensable.[223]

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.[224] 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.[225] For more information on the FLSA's child labor restrictions, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

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[222] *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").

[223] Indiana Dep't of Labor, *Wage & Hours FAQs*, Question 1.G (Payroll practices), *available at* https://www.in.gov/dor/i-am-a/business-corp/contractors/#:~:text=Individuals%20who%20wish%20to%20receive,Worker%27s%20Compensation%20Board%20of%20Indiana.

[224] 29 C.F.R. §§ 570.36, 570.50.

[225] 29 C.F.R. § 570.6.

3.6(b) *State Guidelines on Child Labor*

Indiana's child labor laws apply to all persons under 18 years of age.[226] The Indiana provisions closely track the FLSA.

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

General Restrictions. Table 9 summarizes the state restrictions on type of employment by age.

Table 9. State Restrictions on Type of Employment by Age	
Age Range	**Restrictions**
Under Age 18	In Indiana, minors under age 18 cannot work in an occupation designated as hazardous by the FLSA's child labor provisions. However, minors in the training department of a school, who are personally supervised by an instructor, may work on a properly guarded machine.[227]
Under Age 14	In Indiana, minors under age 14 cannot be employed, subject to limited exceptions. Minors under age 14 are limited to the following categories of employment: caddying on golf courses, domestic service work, and farm labor.[228] Minors under age 12 may only perform farm labor on a farm operated by their own parents.[229]

Restrictions on Selling or Serving Alcohol. A minor under age 21 may not work where alcoholic beverages are sold, furnished, or given away for consumption either on or off the licensed premises, in a capacity which requires or allows the minor to sell, furnish, or otherwise deal in alcoholic beverages.[230]

However, the following is not prohibited by this section:

- The employment of a person at least 18 years of age but less than 21 years of age on or about licensed premises where alcoholic beverages are sold, furnished, or given away for consumption either on or off licensed premises for a purpose other than selling, furnishing, other than serving, consuming, or otherwise dealing in alcoholic beverages.[231]
- A person aged at least 18 years of age but less than 21 years of age from ringing up a sale of alcoholic beverages in the course of the person's employment.[232]

[226] IND. CODE § 22-2-18.1-3.

[227] IND. CODE §§ 22-2-18.1-23, 22-2-18.1-24.

[228] IND. CODE § 22-2-18.1-12.

[229] IND. CODE § 22-2-18.1-12.

[230] IND. CODE § 7.1-5-7-13.

[231] IND. CODE § 7.1-5-7-13.

[232] IND. CODE § 7.1-5-7-13.

- A person who is at least 18 years of age but less than 21 years of age and who has successfully completed an alcohol server training program from serving alcoholic beverages in a dining area or family room of a restaurant or hotel:
  - in the course of a person's employment as a waiter, waitress, or server; and
  - under the supervision of a person who:
    - is at least 21 years of age;
    - is present at the restaurant or hotel; and
    - has successfully completed an alcohol server training program certified under the commission.
  - a person who is at least 18 years of age and less than 21 years of age may not be a bartender.[233]
- The employment of a person at least 18 years of age but less than 21 years of age on or about licensed premises where alcoholic beverages are sold, furnished or given away for consumption either on or off the licensed premises if all the following apply:
  - The person is employed as an assistant on a delivery truck.
  - The person's duties with respect to alcoholic beverages are limited to handling alcoholic beverages in connection with the loading, unloading, stowing, or storing of alcoholic beverages that are being delivered or picked up.
  - The person does not sell, furnish, or deal in alcoholic beverages in any manner except as expressly permitted above.
  - The person acts under the supervision of a driver holding a salesman's permit.
  - The person does not collect money for the delivery or pick up.[234]
- This chapter does not prohibit a person less than 21 from being on the premises of a brewery, a farm winery, or an artisan distillery if:
  - The person is a child, stepchild, grandchild, nephew, or niece of an owner of the above; and employed on the premises for a purpose other than selling, furnishing, other than serving, consuming or otherwise dealing in alcoholic beverages.
  - The minor in the instance above is not required to be accompanied by a parent, legal guardian or family member who is at least 21 years.[235]

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

Minors may not work after 10:00 P.M. or before 6:00 A.M. in any establishment open to the public, unless another employee at least 18 years of age is also working. Failure to follow this rule is considered a hazardous-occupation violation and may be cause for sanctions against the employer.[236]

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[233] IND. CODE § 7.1-5-7-13.

[234] IND. CODE § 7.1-5-7-13.

[235] IND. CODE § 7.1-5-7-13.

[236] IND. CODE § 22-2-18.1-23.

In addition, minors at least 14 but less than 16 years old may not work before 7:00 A.M. or after 7:00 P.M. (after 9:00 P.M. from June 1st through Labor Day), more than three hours on a school day, more than 18 hours during a school week, more than eight hours on a nonschool day, or more than 40 hours during a nonschool week.[237]

Minors aged at least 16 and less than 18 may work pursuant to the following hourly restrictions: no more than nine hours per day, 40 hours per school week, 48 hours per non-school week, and six days per week; and not before 6:00 A.M.[238] Generally, these minors may work only until 10:00 P.M. on nights followed by a school day, or 11:00 P.M. if the employer has obtained written permission from the minor's parent. Lastly, a minor who is at least 16 and less than 18 can work the same daily and weekly hours and at the same time of day as an adult employee if the minor is:

- a high school graduate;
- has completed an approved career and technical education program or special education program; or
- is not enrolled in a regular school term.[239]

Effective January 1, 2025:

A minor between the ages of 14 and 16 may work until 9:00 P.M. on days preceding school days from June 1 through Labor Day. In addition, all laws addressing minors over the age of 16 have been repealed. Therefore, child labor laws are applicable only to minors less than 16 years of age. The amended law also provides that minors between the ages of 16 and 18 are not prohibited from being employed in agriculture, even if the occupation is designated as hazardous.[240]

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

Indiana's child labor law restrictions generally do not apply to parents (or guardians) that employ their child. Certain limitations continue to apply, however, including restrictions regarding employment under age 14, employment during school hours, and employment in hazardous occupations designated by federal law.[241]

Additionally, no Indiana child labor law is meant to prevent a child of any age from singing, playing, or performing in a studio, circus, theatrical or musical exhibition, concert or festival, in radio and television broadcasts, or as a live or photographic model, subject to certain restrictions.[242]

The child labor restrictions do not apply to the following:

- a parent who employs the parent's own child;
- a person standing in place of a parent who employs a child in the person's custody;

[237] IND. CODE § 22-2-18.1-17.

[238] IND. CODE § 22-2-18.1-18.

[239] IND. CODE §§ 22-2-18.1-18 - 22-2-18.1-21.

[240] IND. CODE §§22-2-18.1-16, 22-2-18.1-17; 22-2-18.1-23.

[241] IND. CODE § 22-2-18.1-2.

[242] IND. CODE § 22-2-18.1-14.

- legal entity in which a parent of the employed child or a person standing in place of a parent of the employed child has an ownership interest, except in the instances of employment in hazardous occupations designated by federal law; or
- a minor enrolled in a work based learning course.[243]

Effective January 1, 2025, the following jobs are exempt from the time and hour limitations imposed on minors:

- minors employed as actors or performers in motion pictures, theatrical, radio or television productions;
- minors employed as newspaper carriers, regardless of age;
- minors employed as homeworkers engaged in the making of evergreen wreaths; and
- minors employed to perform sports-attending services at professional sporting events.[244]

Additionally, **effective January 1, 2025**, any of the following minors between the ages of 14 and 16 are exempted from the child labor requirements:

- has graduated from high school;
- has completed eighth grade, is excused from the compulsory school attendance requirements, and whose parent submits proof and a signed statement declaring that the minor has been excused from the attendance requirements; and
- has a child to support, is excused from the compulsory school attendance requirements, and whose parent submits proof and a signed statement declaring that the minor has been excused from the attendance requirements; and
- is subject to an order issued by a court that has jurisdiction over the minor that prohibits the minor from attending school; or
- has been expelled from school and is not required to attend an alternative school or an alternative educational program.[245]

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

Employers that hire, employ, or permit five or more minors who are at least 14 and less than 18 years old in a gainful occupation must register with the state labor and provide, in the form and manner prescribed by the department, the following information:

- The name of the employer.
- The email address of the employer.
- The number of minors whom the employer has hired. For the purposes of this subdivision, the minor's date of hire is the first date on which the minor performs work for the employer.

[243] IND. CODE § 22-2-18.1-2.

[244] H.B. 1093 (Ind. 2024).

[245] H.B. 1093 (Ind. 2024).

- Any other information required by the department.[246]

Effective January 1, 2025:

On or before the 15th and last business day of each month, an employer that is required to register under this chapter must also provide the following information:

- a qualifying location; and
- the names and numbers of minors at each qualifying location.

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

The Indiana Department of Labor and its authorized inspectors and agents are responsible for enforcing the child labor laws. The Department's inspectors and agents may visit and inspect all establishments covered by the child labor laws at all reasonable hours and as often as practicable and necessary.[247] Any such officer may inquire into the true age of any young person who is employed.[248]

Effective January 1, 2025, while the Department may impose a civil penalty of up to $100 per violation, a civil penalty may not be assessed if the violation is 10 minutes or less.[249]

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).[250]

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

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

[246] IND. CODE § 22-2-18.1-26. More information about the Youth Employment System is available at https://www.in.gov/dol/youth-employment/youth-employment-home/.

[247] IND. CODE § 22-2-18.1-28.

[248] IND. CODE § 22-2-18.1-29.

[249] IND. CODE § 22-2-18.1-30.

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

> payroll deposit account, if it is at a place convenient to their employment and without charge to them.[251]

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.[252]

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.[253] 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.[254]

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.[255] As part of the disclosures, employees must: (1) receive a statement of pay card fees; (2) have ready access to a statement of all fees and related information; and (3) receive periodic statements of recent account activity or free and easy access to this information online. Under the prepaid rule, employees have limited

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

[252] 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.

[253] 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/.

[254] 12 C.F.R. § 1005.2(b)(3)(i)(A).

[255] 12 C.F.R. § 1005.18; *see also* Consumer Fin. Prot. Bureau, *Guide to the Short Form Disclosure* (Mar. 2018), *available at* https://files.consumerfinance.gov/f/documents/cfpb_prepaid_guide-to-short-form-disclosure.pdf; *Prepaid Disclosures* (Apr. 1, 2019), *available at* https://files.consumerfinance.gov/f/documents/102016_cfpb_PrepaidDisclosures.pdf.

responsibility for unauthorized charges or other unauthorized access, provided they have registered their payroll card accounts.[256]

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.[257]

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.[258]

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

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

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

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

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

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

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

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

The FLSA does not have a general expense reimbursement obligation. Nonetheless, it prohibits employers from circumventing minimum wage and overtime laws by passing onto employees the cost of items that are primarily for the benefit or convenience of the employer, if doing so reduces an employee's wages below the highest applicable minimum wage rate or cuts into overtime premium pay.[259] Because the FLSA requires an employer to pay minimum wage and overtime premiums "free and clear," the employer must

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[256] 12 C.F.R. § 1005.18.

[257] *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.

[258] 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.

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

reimburse employees for expenses that are primarily for the benefit of the employer if those expenses would reduce the applicable required minimum wage or overtime compensation.[260] Accordingly, among other items, an employer may be required to reimburse an employee for expenses related to work uniforms,[261] tools and equipment,[262] and business transportation and travel.[263] 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.[264]

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;[265]
- 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);[266]
- 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);[267]
- with an employee's authorization for:
  - the purchase of U.S. savings stamps or U.S. savings bonds;
  - union dues paid pursuant to a valid and lawful collective bargaining agreement;
  - payments to the employee's store accounts with merchants wholly independent of the employer;
  - insurance premiums, if paid to independent insurance companies where the employer is under no obligation to supply the insurance and derives, directly or indirectly, no benefit or profit from it; or
  - voluntary contributions to churches and charitable, fraternal, athletic, and social organizations, or societies from which the employer receives no profit or benefit, directly or indirectly;[268]

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[260] 29 C.F.R. §§ 531.35, 531.36, and 531.37.

[261] 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.

[262] 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).

[263] 29 C.F.R. § 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c04.

[264] 29 C.F.R. § 778.217.

[265] 29 C.F.R. § 531.38.

[266] 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*.

[267] 29 C.F.R. § 531.40.

[268] 29 C.F.R. § 531.40.

- the reasonable cost of providing employees board, lodging, or other facilities by including this cost as wages, if the employer customarily furnishes these facilities to employees;[269] 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.[270]

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.[271]

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.[272] 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.[273]

Deductions During Non-Overtime v. Overtime Workweeks. Whether an employee receives overtime during a given workweek affects an employer's ability to take deductions from the employee's wages. During non-overtime workweeks, an employer may make qualifying deductions (*i.e.*, the cost is reasonable and there is no employer profit) for "board, lodging, or other facilities" even if the deductions would reduce an employee's pay below the federal minimum wage. Deductions for articles that do not qualify as "board, lodging, or other facilities" (*e.g.*, tools, equipment, cash register shortages) can be made in non-overtime workweeks if, after the deduction, the employee is paid at least the federal minimum wage.[274]

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

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[269] 29 U.S.C. § 203. However, the cost cannot be treated as wages if prohibited under a collective bargaining agreement.

[270] 29 C.F.R. § 825.213.

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

[272] 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.

[273] 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.

[274] 29 C.F.R. § 531.36.

deductions for "board, lodging, or other facilities." However, deductions made only in overtime weeks, or increases in prices charged for articles or services during overtime workweeks will be scrutinized to determine whether they are manipulations to evade FLSA overtime requirements.[275]

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.[276]

3.7(b) *State Guidelines on Wage Payment*

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

Authorized Instruments. Wages may be paid by cash, check, draft, money order, or electronic transfer to a financial institution designated by the employee.[277]

Direct Deposit. Employers may pay wages by electronic transfer to a financial institution designated by the employee. Moreover, per the state labor department, mandatory direct deposit is permitted.[278]

Payroll Debit Card. Indiana law does not address the use of payroll debit cards as a wage payment method.

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

An employer must pay its employees their wages no later than 10 business days after the end of each pay period. Payment may be on a monthly or semi-monthly basis. If requested, an employer must pay its employees at least semi-monthly or biweekly. However, this requirement does not apply to salaried employees who are eligible for overtime compensation under the FLSA.

Special rules apply for certain industries, including mining, quarrying, manufacturing, iron, steel, lumber, staves, barrels, bricks, tile, machinery agriculture, or mechanical implements.[279]

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

Discharge. When employees are fired or suspended due to a labor dispute, their final paycheck is due and payable by the next regularly scheduled payday for the period in which the separation occurred.[280]

Resignation. When employees voluntarily quit employment, their final paycheck is due and payable on the next regularly scheduled payday for the period in which they worked.[281]

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[275] 29 C.F.R. § 531.37.

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

[277] IND. CODE §§ 22-2-4-1, 22-2-5-1.

[278] IND. CODE §§ 22-2-4-1, 22-2-5-1; Indiana Dep't of Labor, *Wage & Hours FAQs*, Question 1.G (Payroll practices), *available at* https://kb.dol.in.gov/?tagIds=3b7a993f-b6f6-4e21-9ff1-ba9d08792fad,78273661-eee6-8d7e-c366-36d97f896f60&knowledgeId=9f3217fd-0462-4586-bb47-d479fc62d2f0.

[279] IND. CODE §§ 22-2-4-1, 22-2-5-1, and 22-2-5-1.1.

[280] IND. CODE § 22-2-9-2.

[281] IND. CODE § 22-2-5-1.

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

Employers subject to Indiana's Minimum Wage Law (employers that have at least two employees and that are not subject to the minimum wage requirements of the FLSA) must furnish to each employee on each pay period a statement of:

- hours worked;
- wages paid; and
- any deductions taken.[282]

Indiana law requires that a wage statement be provided each pay period, but does not specify what form it must take. Concerning electronic wage statements, the state labor department has stated that "in and of itself, an electronic method would not violate Indiana's wage and hour statutes."[283]

3.7(b)(v) *Wage Transparency*

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

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

Changing Regular Paydays. There are no general statutory notice requirements. However, it is recommended that employees receive advance written notice before a change occurs.

Changing Pay Rate. There are no general statutory notice requirements. However, per the state labor department, employers must notify employees about a pay rate reduction before the change occurs.[284]

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

In Indiana, there is no general obligation to indemnify an employee for business expenses.

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

Indiana law very narrowly circumscribes the deductions—beyond payroll taxes, the Federal Insurance Contributions Act (FICA) tax, and garnishment orders—that an employer may make from an employee's paycheck. Nonmandatory deductions are called wage assignments.[285] A *wage assignment* is any direction an employee gives to an employer to make a deduction from the employee's wages once earned.[286]

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[282] IND. CODE § 22-2-2-8.

[283] IND. CODE § 22-2-2-8; Indiana Dep't of Labor, *Wage & Hours FAQs*, Question 1.G (Payroll practices), *available at* https://www.in.gov/dor/i-am-a/business-corp/contractors/#:~:text=Individuals%20who%20wish%20to%20receive,Worker%27s%20Compensation%20Board%20of%20Indiana.

[284] Indiana Dep't of Labor, *Wage & Hours FAQs*, Question 1.G (Payroll practices), *available at* https://www.in.gov/dor/i-am-a/business-corp/contractors/#:~:text=Individuals%20who%20wish%20to%20receive,Worker%27s%20Compensation%20Board%20of%20Indiana.

[285] IND. CODE § 22-2-6-1.

[286] IND. CODE § 22-2-6-1.

Requirements for Deductions. To be valid, a wage assignment must:

- be in writing;
- be signed by both the employee and the employer;
- state on its face that the employee may revoke the assignment at any time by providing written notice to the employer; and
- be returned to the employer within 10 days after the employee signs it.[287]

Permissible Deductions. Valid wage assignments are limited to the following circumstances:

- a premium on an insurance policy that the employee purchases through the employer;
- a pledge or contribution to a charitable or nonprofit organization;
- the purchase price of bonds or securities issued or guaranteed by the United States;
- the purchase price of shares of stock, or fractional interests of shares, of the employer or a company owning the majority of the issued and outstanding stock of the employer company;
- labor organization dues;
- the purchase price of merchandise sold by the employer to the employee per the employee's written request;
- a loan made to the employee by the employer (evidenced by a separate written note and subject to statutory restrictions regarding wage overpayments);
- contributions, assessments, or dues to a hospital service or a surgical or medical expense plan or to an employees' association, trust, or plan existing for the purpose of paying pensions or other benefits to the employee or to the employee's designees;
- payment to any credit union, nonprofit organization, or association of the employer's employees organized under federal or any state's law;
- payment to any person or organization regulated under the Uniform Consumer Credit Code for deposit or credit to the employee's account by electronic transfer or as otherwise designated by the employee;
- premiums on policies of insurance and annuities that the employee is purchasing on the employee's own life;
- for the purchase rental, or use of uniforms, shirts, pants, or other job-related clothing, at an amount not to exceed the direct cost paid by an employer to an external vendor for those items;
    - the total amount of wages subject to assignment under this subsection and the equipment and tools subsection may not exceed the lesser of $2,500 per year or 5% of the employee's weekly disposable earnings;

[287] IND. CODE § 22-2-6-2(a).

- for the purchase of equipment or tools necessary to fulfill the duties of employment at an amount not to exceed the direct cost paid by an employer to an external vendor for those items;
    - the total amount of wages subject to assignment under this subsection and the uniforms subsection may not exceed the lesser of $2,500 per year or 5% of the employee's weekly disposable earnings;
- the purchase price of shares or fractional interest in shares in one or more mutual fund(s); and
- a judgment that the employee owes, if the payment is made in accordance with an agreement between the employee and the creditor and is not a garnishment; and
- the employee's drug education and addiction services.

Additionally, employees may not be charged or subject to a wage assignment for protective equipment, including personal protective equipment.[288]

Wage Overpayments. In addition, if an employer accidentally overpays an employee by less than 10 times the amount that was supposed to be paid, the employer must give the employee two weeks' notice that it intends to deduct the amount of the overpayment.[289] A deduction for wage overpayment must not exceed the lesser of:

- 25% of the employee's earnings for the week the deduction occurs; or
- the amount by which the employee's wages for the week of deduction exceed 30 times the federal minimum wage.[290]

If, however, an employer misplaces a decimal point and pays an employee 10 times their regular wage, the entire overpayment may be deducted immediately.[291] An employer may not deduct "overpaid" wages if the amount of wages due is in dispute.[292]

Prohibited Deductions. An employer may not deduct from an employee's wages for cash register shortages, property damage, or property that an employee does not return upon termination of employment.[293]

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[288] IND. CODE § 22-2-6-2(b).

[289] IND. CODE § 22-2-6-4(a).

[290] IND. CODE § 22-2-6-4(c)(1).

[291] IND. CODE § 22-2-6-4(c)(2).

[292] IND. CODE § 22-2-6-4(b).

[293] *See, e.g.*, *E & L Rental Equip., Inc. v. Bresland*, 782 N.E.2d 1068, 1071 (Ind. Ct. App. 2003) (employer liable for treble damages and attorneys' fees after withholding amounts from employee's paycheck to cover the cost of property damage to vehicles).

An employer must be careful to limit deductions to the acceptable categories set forth above and not take any deductions unless the employer has obtained revocable written authorization from the employee. Improper deductions will subject the employer to treble damages and attorneys' fees.[294]

Exemptions. A variety of classes of employees are exempt from the described limitations on deductions from wages, including (but not limited to):

- persons employed on a commission basis;
- persons engaged in agricultural labor;
- persons employed in executive, administrative, or professional occupations who have the authority to employ or discharge and who earn one hundred fifty dollars ($150) or more a week; and
- outside salespersons.[295]

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

Garnishment for Money Judgments. Prior to entry of judgment, no creditor may garnish unpaid earnings of an employee.[296] In most circumstances, the maximum amount of a garnishment to satisfy a judgment is the lesser of 25% of the employee's disposable earnings, or the amount by which the employee's disposable earnings for the week exceed 30 times the federal minimum wage.[297]

An employer that is required to garnish an employee's wages may collect a fee equal to the greater of $12 or 3% of the total amount required to be deducted by the garnishment order or series of orders arising out of the same judgment debt.[298] If the employer chooses to impose a fee, the employer shall deduct one-half of the fee from the employee's other disposable earnings and one-half from the amount otherwise due the creditor. An employer may collect only one fee for each garnishment order or series of orders arising out of the same judgment debt. The employer may collect the whole fee from one or more of the initial deductions it makes from the employee's disposable earnings. In the alternative, the employer may collect the fee ratably over all the pay periods during which deductions from the employee's disposable earnings are required. The fee deductions do not increase the amount of the judgment debt.[299] Deduction of a garnishment collection fee is not considered a wage assignment.[300]

Employers may not discharge employees because of garnishment orders.[301] An employee discharged because of a garnishment order may, within six months, bring a civil action for recovery of wages lost due

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[294] *Cox v. Rome City*, 764 N.E.2d 242, 250 (Ind. Ct. App. 2002) (employer liable for treble damages and attorneys' fees after withholding a health insurance premium from an employee's final paycheck without explicit, revocable written authorization).

[295] IND. CODE § 22-2-2-3.

[296] IND. CODE § 24-4.5-5-104.

[297] IND. CODE § 24-4.5-5-105(2).

[298] IND. CODE § 24-4.5-5-105(5).

[299] IND. CODE § 24-4.5-5-105(5).

[300] IND. CODE § 24-4.5-5-105(6).

[301] IND. CODE § 24-4.5-5-106.

to the termination. An employee may also request an order requiring reinstatement. The sum-total for recoverable damages cannot exceed the equivalent of six weeks of wages.[302]

Orders of Support. Indiana employers must begin withholding for child support within 14 days after receiving a child support order.[303] Employers must remit the withheld amount to the state central collection unit when obligated employees are paid.[304] The amount subject to withholding under a child support order is 50% of disposable income if a noncustodial parent is supporting a second family or 60% if there is no second family.[305] There are special provisions for support orders covering a time period prior to the 12-week period that ends with the beginning of the workweek in which the employer first complies with the support order.[306]

An employer may retain a fee of not more than $2.00 from an employee-obligor's disposable earnings each time the employer forwards income to the state central collection unit.[307] If an employer retains a fee under this subsection, the employer must reduce the amount of income withheld for the payment of current and past due child support, if necessary to avoid exceeding the maximum amount permitted to be withheld.[308] Withholding this fee is not a wage assignment.[309]

An employer must notify the child support enforcement agency within 10 days of an employee-obligor's termination.[310] The employer must provide the employee-obligor's last known address and the name and address of the employee-obligor's new employer if known.[311]

A support order has priority over any secured or unsecured claim on income except claims for federal, state, and local taxes.[312] If the amount withheld under the support order is less than the maximum amount subject to garnishment, a garnishment order may be concurrently enforced.[313]

If more than one person is claiming child support from the same employee, and the employee has insufficient disposable earnings to pay the amount required by all orders, an employer must distribute the withheld earnings pro rata between orders with priority to current child support orders.[314]

Employers may not discharge, refuse to hire, discipline, or otherwise discriminate against an employee because of a support order or the obligations imposed on the employer because of the support order.[315] If an employer engages in any of this prohibited activity, it will be subject to a monetary penalty of up to

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[302] IND. CODE § 24-4.5-5-202(6).

[303] IND. CODE § 31-16-15-7.5(3).

[304] IND. CODE § 31-16-15-7.5(1).

[305] IND. CODE § 24-4.5-5-105(3).

[306] IND. CODE § 24-4.5-5-105(3).

[307] IND. CODE §§ 24-4.5-5-105(7), 31-16-15-7.5(b).

[308] IND. CODE § 31-16-15-7.5(b).

[309] IND. CODE § 24-4.5-5-105(6).

[310] IND. CODE § 31-16-15-18(1).

[311] IND. CODE § 31-16-15-18(2).

[312] IND. CODE § 31-16-15-27.

[313] IND. CODE § 24-4.5-5-105(8).

[314] IND. CODE § 31-16-15-17.

[315] IND. CODE § 31-16-15-25.

$5,000 payable to the state.[316] Either the child support agency or an obligor may bring a civil action seeking this penalty.[317] In addition, any employee who is discharged may sue for reinstatement and up to six weeks of lost wages.[318]

If the employer is required to withhold income from more than one employee, the employer may combine into a single payment the withheld amounts, identify each employee's contribution, and forward the total amount to the state's central collection unit.[319] If an employer has more than 50 employees and is required to withhold support payment from more than one employee-obligor, the employer must make payments to the state central collection unit through electronic funds transfer or through electronic or internet access made available by the state central collection unit.[320] Failure to utilize one of these methods of payment will subject the employer to a civil penalty of $25 per employee-obligor per pay period.[321]

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

Wage Payment & Wage Claims Statutes. There are separate claim filing procedures for the Wage Payment and Wage Claims Statutes. The pertinent factor for determining which statute applies is the "employee's status at the time he or she files the claim."[322] Employees pursuing claims covered by the Wage Payment Statute (*i.e.*, claims by current employees or employees who voluntarily separated) may proceed directly to court.[323]

Employees pursuing claims covered by the Wage Claims Statute (*i.e.*, claims by employees who were involuntarily terminated) must first file a claim with the Indiana Department of Labor.[324] According to the Wage Claims Statute, it is the duty of the Indiana Commissioner of Labor to enforce the statute by investigating claims of violation and "institut[ing] or caus[ing] to be instituted actions for penalties and forfeitures."[325] The Commissioner may refer cases to Indiana's attorney general who may act upon them or refer them to private counsel.[326]

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316 IND. CODE § 31-16-15-25.

317 IND. CODE § 31-16-15-25.

318 IND. CODE §§ 24-4.5-5-202(6), 31-16-15-25.

319 IND. CODE § 31-16-15-16(a).

320 IND. CODE § 31-16-15-16(b).

321 IND. CODE § 31-16-15-16(c).

322 *Bragg v. Kittle's Home Furnishings, Inc.*, 52 N.E.3d 908, 915 (Ind. Ct. App. 2016).

323 IND. CODE § 22-2-5-2.

324 IND. CODE § 22-2-9-4; *see also Naugle v. Beech Grove City Schs.*, 864 N.E.2d 1058, 1061 n.1 (Ind. 2007) (claimants under the Wage Payment Act may go directly to court, but "the Wage Claims Statute requires that a wage claim be submitted to the Department of Labor for administrative enforcement"); *Hollis v. Defender Sec. Co.*, 941 N.E.2d 536, 539-40 (Ind. Ct. App. 2011) (holding that terminated employee had to first pursue claims with the Indiana Department of Labor because the status of the employee [terminated or current] at the time the employee brings the claim controls whether the employee can proceed under the Indiana Wage Claims Statute or the Indiana Wage Payment Statute); *Lemon v. Wishard Health Servs.*, 902 N.E.2d 297, 302 (Ind. Ct. App. 2009) (holding that the act of filing a putative class action does not enable the putative class members to subvert the statutory requirement to first submit the claim to the Department of Labor).

325 IND. CODE § 22-2-9-4(a).

326 IND. CODE § 22-2-9-4(b).

The Indiana Department of Labor cannot accept assignment of any wage claim that exceeds $6,000.[327] The Department takes the position that it will not "accept" claims greater than this amount for investigation and possible administrative resolution. Accordingly, if a terminated employee seeks relief from the Indiana Department of Labor with a claim of more than $6,000, the Department of Labor will immediately refer him/her to private counsel. Thus, for these types of claims, the "administrative remedy" is simply one more required step before filing a lawsuit.

The Wage Payment and Wage Claims Statutes share a penalty provision.[328] An employer will be liable not only for the wages due, but also for liquidated damages at a rate of 10% per day for each day wages remain unpaid.[329] The liquidated damages continue to accrue until they are double the amount of wages originally due.[330] Practically speaking, this provision usually results in the employer paying three times the amount of wages due. In addition, the employer will be required to pay any attorneys' fees the employee incurs while attempting to obtain their paycheck.[331] Both the liquidated damages and attorneys' fees provisions are mandatory.[332] A two-year statute of limitations applies to claims under both statutes.[333]

Minimum Wage Law. The Indiana Minimum Wage Law gives employees the right to sue for unpaid wages and an equal additional amount in liquidated damages.[334] Any such actions must be brought within three years after the cause of action arises.[335] The Minimum Wage Law allows a prevailing plaintiff to recover attorneys' fees and costs.[336] Finally, the law provides criminal penalties for knowing, intentional, or repeated violations.[337]

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).[338] 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.[339] Further, the U.S. Supreme Court, in *Massachusetts v. Morash*, noted that extensive state

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[327] IND. CODE § 22-2-9-5(a).

[328] IND. CODE §§ 22-2-5-2, 22-2-9-4(b) ("The provisions of [Indiana Code section] 22-2-5-2 apply to civil actions initiated under this subsection by the attorney general or his designee.").

[329] IND. CODE § 22-2-5-2.

[330] IND. CODE § 22-2-5-2.

[331] IND. CODE § 22-2-5-2.

[332] IND. CODE § 22-2-5-2.

[333] IND. CODE § 34-11-2-1.

[334] IND. CODE § 22-2-2-9.

[335] IND. CODE § 22-2-2-9.

[336] IND. CODE § 22-2-2-9.

[337] IND. CODE § 22-2-2-11.

[338] 29 U.S.C. § 1002.

[339] 29 C.F.R. § 2510.3-1; *see also* U.S. Dep't of Labor, *Advisory Opinion 2004-10A* (Dec. 30, 2004), *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2004-10a; U.S.

regulation of vesting, funding, and participation rights of vacation benefits may provide greater protections for employees than ERISA and, as a result, the court was reluctant to have ERISA preempt state law in situations where it was not clearly indicated.[340]

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

Indiana does not have a statute that explicitly addresses either vacation pay or holiday pay. Holiday pay is generally considered a gratuity provided at an employer's discretion. There is no reported Indiana case law suggesting that holiday pay is considered "wages."

Vacation pay, however, is considered wages. Indiana courts construe the term *wages* as used in the Wage Payment and Wage Claims statutes broadly to include any type of compensation (including deferred compensation) that is "akin to the wages paid on a regular periodic basis for regular work done by the employee."[341] In simplest terms, "[t]o qualify as a wage, the compensation must be connected to the work performed by the employee."[342]

Accordingly, vacation pay,[343] some sick pay,[344] and many bonuses[345] are considered wages. These types of deferred compensation will accrue over time and be payable at some later date unless there is an agreement or published policy to the contrary.[346] This interpretation gives Indiana employers latitude to place virtually any conditions they choose on the receipt of deferred compensation, provided such conditions are clearly published to employees in a written policy.[347] An employer may therefore implement a paid time off policy that includes a "use-it-or-lose-it" provision,[348] and may also require forfeiture of accrued paid time off upon termination of employment. If a policy does not contain a forfeiture provision, however, it is likely that payout is required when employment ends.[349]

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.

340 490 U.S.107, 119 (1989).

341 *Quezare v. Byrider Fin., Inc.*, 941 N.E.2d 510, 514 (Ind. Ct. App. 2011) (citing *Wank v. Saint Francis Coll.*, 740 N.E.2d 908, 912 (Ind. Ct. App. 2000) (internal quotation omitted), *trans. denied, abrogated by Jackson v. ArvinMeritor, Inc.*, 2008 WL 64528, at **5-6 (S.D. Ind. Jan. 3, 2008)).

342 *Wank*, 740 N.E.2d at 912.

343 *Die & Mold, Inc. v. Western*, 448 N.E.2d 44, 48 (Ind. Ct. App. 1983).

344 *Compare Schwartz v. Gary Cmty. Sch. Corp.*, 762 N.E.2d 192, 197-99 (Ind. Ct. App. 2002) (accrued but unused sick days payable as wages upon termination of employment), *with Shorter v. City of Sullivan*, 701 N.E.2d 890, 892 (Ind. Ct. App. 1998) (sick day pay need not be paid out as wages upon termination because policy stated that days could be used only for specific purposes like personal illness or to care for a sick child; conditions prevented the pay from being simply accrued over time and payable at some later date).

345 *See, e.g.*, *Gurnik v. Lee*, 587 N.E.2d 706, 709 (Ind. Ct. App. 1992).

346 *See, e.g.*, *Williams v. Riverside Cmty. Corr. Corp.*, 846 N.E.2d 738, 748-51 (Ind. Ct. App. 2006) (collecting cases).

347 846 N.E.2d 738.

348 *Commissioner of Labor ex rel. Shofstall v. Int'l Union of Painters & Allied Trades AFL-CIO, CLC Dist. Council 91*, 991 N.E.2d 100 (Ind. 2013).

349 *Mitchell v. Universal Solutions of N.C., Inc. / Hamilton v. Ricker Oil Co., Inc.*, 853 N.E.2d 953 (Ind. Ct. App. 2006); *Williams v. Riverside Cmty. Corr. Corp.*, 846 N.E.2d 738 (Ind. Ct. App. 2006); *Indiana Heart Assocs. v. Bahamonde*, 714 N.E.2d 309 (Ind. Ct. App. 1999). *See also, e.g.*, *Collins v. Inland Techs. Int'l*, 2021 WL 631551 (Feb. 18, 2021).

3.8(b) *Holidays & Days of Rest*

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

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

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

Indiana 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.[350] 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).[351] However, under COBRA, only an employee and the employee's spouse and dependent children are considered "qualified beneficiaries."[352] Here again, states may choose to extend continuation coverage requirements to domestic partners and civil union partners under state mini-COBRA statutes.

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

Couples may register as domestic partners in Indianapolis. However, state law does not address whether an employee's domestic partner is required to be considered an eligible beneficiary or dependent for purposes of employee benefit plans.

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[350] 29 U.S.C. § 1144.

[351] 29 U.S.C. § 1161.

[352] 29 U.S.C. § 1167(3).

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;[353]
- to care for an immediate family member (spouse, child, or parent) with a serious health condition;[354]
- to take medical leave when the employee is unable to work because of a serious health condition;[355]
- 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.[356] A *covered employee* has completed at least 12 months of employment and has worked at least 1,250 hours in the last 12 months at a location where 50 or more employees work within 75 miles of each other.[357] For information on the FMLA, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

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

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

3.9(b) *Paid Sick Leave*

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

Federal law does not require private employers (that are not government contractors) to provide employees paid sick leave. Executive Order No. 13706 requires certain federal contractors and subcontractors to provide employees with a minimum of 56 hours of paid sick leave annually, to be

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[353] 29 C.F.R. §§ 825.102, 825.112, 825.113, 825.120, and 826.121.

[354] 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).

[355] 29 C.F.R. §§ 825.112, 825.113.

[356] 29 U.S.C. § 2611(4); 29 C.F.R. §§ 825.104 to 825.109.

[357] 29 U.S.C. § 2611(2); 29 C.F.R. §§ 825.110 to 825.111.

accrued at a rate of at least one hour of paid sick leave for every 30 hours worked.[358] The paid sick leave requirement applies to certain contracts solicited—or renewed, extended, or amended—on or after January 1, 2017, including all contracts and subcontracts of any tier thereunder. For more information on this topic, see LITTLER ON GOVERNMENT CONTRACTORS & EQUAL EMPLOYMENT OPPORTUNITY OBLIGATIONS.

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

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

3.9(c) *Pregnancy Leave*

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

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

Pregnancy Discrimination Act (PDA). Under the PDA, which as part of Title VII applies to employers with 15 or more employees, disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions must be treated the same as disabilities caused or contributed to by other medical conditions under an employer's health or disability insurance or sick leave plan.[359] 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 the employee is pregnant, as long as the employee is able to perform their 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.[360] 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

[358] 80 Fed. Reg. 54,697-54,700 (Sept. 10, 2015).

[359] 42 U.S.C. § 2000e(k); *see also* 29 C.F.R. § 1604.10.

[360] 29 C.F.R. § 825.202.

impairment.[361] An employee may also be allowed to take leave beyond the maximum FMLA leave if the additional leave would be considered a reasonable accommodation.

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

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

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

3.9(d) *Adoptive Parents Leave*

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

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

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

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

3.9(e) *School Activities Leave*

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

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

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

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

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

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

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

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

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

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[361] 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.

3.9(g) *Voting Time*

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

There is no federal law concerning time off to vote.

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

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

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

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

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

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

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

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

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

The Jury System Improvements Act prohibits employers from terminating or disciplining "permanent" employees due to their jury service in federal court.[362] 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.[363] For more information, see LITTLER ON LEAVES OF ABSENCE: MILITARY & CIVIC DUTY LEAVES.

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

Leave to Serve on a Jury. If an employee receives a jury summons and notifies their employer within a reasonable period after receiving the summons (but before the employee is required to appear for jury duty), the employer may not subject the employee to any adverse employment action because of jury-related service.[364] Employers cannot require or ask employees to use annual, vacation, or sick leave for time spent responding to a jury summons, participating in the selection of a jury, or serving on a jury.[365]

If an employee who works for an employer with 10 or fewer full-time employees is directed to appear for jury duty that would overlap with the jury service of a fellow employee, either the prospective juror or

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[362] 28 U.S.C. § 1875.

[363] *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).

[364] IND. CODE § 33-28-5-24.3(a).

[365] IND. CODE § 33-28-5-24.3(b).

the fellow employee already serving jury duty may notify the court. Upon receiving such notification, the court will reschedule the prospective juror's service for another date.[366]

A person who knowingly terminates an employee, deprives the employee of job benefits, or threatens such action because an employee has received or responded to a summons, served as a juror, or attended court for prospective jury service commits "interference with jury service," which is a Class B misdemeanor.[367] Note that the statute refers to "a person," not an employer. Accordingly, a supervisor could be charged with a crime for such a dismissal in contravention of company policy.

An employee whose employer knowingly or intentionally dismisses him/her for jury-related service may sue the employer (within 90 days of discharge) for reinstatement, lost wages, and reasonable attorneys' fees.[368]

Leave to Comply with a Subpoena. In Indiana, a person who knowingly dismisses an employee, deprives an employee of employment benefits, or threatens such action because the employee has received or responded to a subpoena in a criminal proceeding commits "interference with witness service," which is a Class B misdemeanor.[369] Again, the liability runs to "a person," leaving open the possibility of individual criminal liability for a rogue supervisor.

The statute described in the preceding paragraph effectively requires employers to allow unpaid leaves for employees to comply with subpoenas in criminal matters.

There are no statutes requiring witness duty leave for civil proceedings, but many Indiana employers also provide unpaid leave to employees who need to comply with civil subpoenas.

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

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

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

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

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

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

[366] IND. CODE § 33-28-5-24.3(c).

[367] IND. CODE § 35-44.1-2-11.

[368] IND. CODE § 34-28-4-1.

[369] IND. CODE § 35-44.1-2-12.

information on these statutes, including notice and other requirements, see LITTLER ON LEAVES OF ABSENCE: MILITARY & CIVIC DUTY LEAVES.

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

Some states provide greater protections for employees with respect to military leave. USERRA, however, establishes a "floor" with respect to the rights and benefits an employer is required to provide to an employee to take leave, return from leave, and be free from discrimination. Any state law that seeks to supersede, nullify, or diminish these rights is void under USERRA.[370]

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.[371] 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.[372] Notably, leave is only available for covered relatives of military members called to active *federal* service by the president and is not available for those in the armed forces recalled to state service by the governor of the member's respective state.
2. **Military Caregiver Leave.** An eligible employee may take up to 26 weeks of unpaid leave in a single 12-month period to care for a "covered servicemember" with a serious injury or illness if the employee is the servicemember's spouse, child, parent, or next of kin.

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

Military Service Leave. Private employers in Indiana must grant members of the National Guard, members of military reserve components and retired personnel of U.S. naval, air, or ground forces a leave of absence, separate from the employee's vacation period, for the total number of days that the member is

[370] 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)).

[371] 29 C.F.R. § 825.126(a).

[372] 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).

called by Indiana's governor to serve on state active duty. State active duty leave may be paid or unpaid at the employer's discretion. The employer has discretion, under Indiana law, to charge the employee with lost time for such a leave.[373]

Indiana government (state, city, township, municipality) and public school employers must grant the persons described in the preceding paragraph up to 15 days of paid leave per calendar year to participate in training or to serve as a member of any reserve component by order.[374] This leave may not be charged against the employee as lost time, and it must be offered in addition to any vacation entitlement.[375]

An employer that knowingly or intentionally refuses to allow a member of the Indiana National Guard to attend any assembly at which the member has a duty to perform statutorily defined services commits a Class B misdemeanor.[376]

Family Military Leave. Indiana employers with 50 or more employees must provide an eligible employee who is the spouse, parent, grandparent, child, or sibling of an individual ordered to active duty in the U.S. armed forces or Indiana National Guard (Army or Air) up to 10 working days of unpaid, job-protected leave in a single calendar year because of the deployment.[377] *Active duty* is considered military duty that exceeds 89 calendar days.[378]

The employee may take this leave within 30 days before the individual is deployed, during a period of leave during the individual's deployment, or within 30 days after the individual's deployment ends.[379] In general, an employee must be restored to the position that the employee held before the leave or to an equivalent position, with equivalent seniority, pay, benefits, and other terms and conditions of employment.[380]

To be eligible for this leave, an employee must have been employed for at least 12 months and must have worked at least 1,500 hours in the 12 months immediately preceding the leave.[381]

Qualified family members can substitute any available paid leave, except medical or sick leave, for any part of the ten-day leave period.[382] Employers must make it possible for employees to continue health care benefits, at the employees' expense, during family military leave.[383]

An employee must provide their employer with written notice of the date leave will begin and, if available, a copy of the active duty orders. An employee must give at least 30 days' notice of the leave unless active duty orders are issued less than 30 days before the requested leave is to begin. An employer may seek

[373] IND. CODE §§ 10-16-7-6, 10-16-7-7.

[374] IND. CODE §§ 10-16-7-2, 10-16-7-5.

[375] IND. CODE § 10-16-7-5.

[376] IND. CODE § 10-16-7-4.

[377] IND. CODE §§ 22-2-13-1 *et seq*.

[378] IND. CODE § 22-2-13-7.

[379] IND. CODE § 22-2-13-11.

[380] IND. CODE § 22-2-13-13.

[381] IND. CODE § 22-2-13-11(a).

[382] IND. CODE § 22-2-13-11(d).

[383] IND. CODE § 22-2-13-14.

verification of the employee's eligibility for leave. If the employee refuses or fails to provide verification, the employer may deem the absence unexcused.[384]

An employee may enforce their rights under this statute with a civil action in an Indiana circuit court. The circuit court may enjoin any act or practice that violates the leave law and order any necessary and proper equitable relief.[385]

3.9(l) *Other Leaves*

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

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

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

Emergency Response & Civil Air Patrol Leave. Employees who are volunteer firefighters or members of another volunteer emergency medical service enjoy certain protections under Indiana law.

Private- and public-sector employers in Indiana, other than the state itself, are prohibited from disciplining an employee because the employee is absent from work because the employee is responding to a fire or emergency call that came in before the beginning of the employee's scheduled work hours. Discipline is also prohibited when an employee leaves work to respond to an emergency call, if the employee obtains their supervisor's authorization before departing. Finally, if an employee is injured while engaged in emergency firefighting or another emergency response activity, their employer may not discipline them either because of the injury, or because of any absence from work arising from the injury that lasts for six months or less.[386]

To qualify for protection from discipline, the employee must notify the employer in advance that the employee is a member of a volunteer fire department or emergency medical service.[387] Upon being notified, a private-sector employer may reject the notification on the grounds that the employee is an *essential employee*—one who is essential to operation of the business and without whom the employer is likely to suffer economic harm.[388] Such a rejection would prohibit the employee from missing work due to emergency situations.[389] Public-sector employers may not designate individuals as "essential employees."

A public- or private-sector employer may require an employee to provide a written statement from the fire chief or other officer in charge after the emergency, indicating that the employee was actually engaged in the emergency activity.[390] Also, if any employee is injured while engaged in firefighting or another emergency response activity and is subsequently absent from work because of the injury, their employer may require the employee to provide a written statement from a medical professional showing treatment for the injury during the absence and a connection between the injury and the employee's

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[384] IND. CODE § 22-2-13-12.

[385] IND. CODE § 22-2-13-16.

[386] IND. CODE §§ 36-8-12-10.5, 36-8-12-10.7.

[387] IND. CODE §§ 36-8-12-10.5, 36-8-12-10.7.

[388] IND. CODE §§ 36-8-12-2 (definition of *essential employee*), 36-8-12-10.7(c).

[389] IND. CODE § 36-8-12-10.7(c).

[390] IND. CODE §§ 36-8-12-10.5(d), 36-8-12-10.7(d).

emergency firefighting or other emergency response activities.[391] The employer must retain this information in a separate medical file created for the employee and treated as a confidential medical record.[392]

Leave to respond to emergencies may be unpaid. The employee may seek remuneration for the absence by the use of vacation leave, personal time, compensatory time off, or, if the absence is due to an injury suffered while responding to a fire or other emergency, sick leave.[393] When an employee's absence from work is due to an emergency-response-related injury, an employer must administer the absence in a manner consistent with the federal Family and Medical Leave Act.[394]

A public-sector employee who is disciplined by the individual's employer in violation of this statute may bring a civil action against the employer in the county of employment and seek back wages, reinstatement, and wrongfully denied seniority rights. Any such action must be filed within one year after the date of the disciplinary action.[395] No such explicit private right of action is provided for private-sector employees.

Other parts of the Indiana Code create a scheme virtually identical to that described above allowing discipline-free absences for public- and private-sector employees to participate in emergency activities of the Civil Air Patrol.[396]

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.[397] Employers are also required to comply with all applicable occupational safety and health standards.[398] 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

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391 IND. CODE §§ 36-8-12-10.5(e), 36-8-12-10.7(e).

392 IND. CODE §§ 36-8-12-10.5(f), 36-8-12-10.7(f).

393 IND. CODE § 36-8-12-10.9(b).

394 IND. CODE § 36-8-12-10.9(c).

395 IND. CODE § 36-8-12-10.5(g).

396 IND. CODE §§ 10-16-19-1 (public sector), 10-16-19-2 (private sector).

397 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.

398 29 U.S.C. § 654(a)(2).

comparable standards under the federal law.[399] 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*

Indiana, under agreement with Fed-OSHA, operates its own state occupational safety and health program in accordance with section 18 of the Fed-OSH Act.[400] Thus, Indiana 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. Pursuant to Indiana's Occupational Safety and Health Act ("the Indiana OSH-Act"), an occupational safety standards commission ("OSS Commission") has been created to promulgate, modify, or revoke safety and health standards in Indiana and to hear and determine applications for temporary and permanent variances from those standards.[401]

Under the Indiana OSH-Act, every Indiana employer must establish and maintain conditions of work that are reasonably safe and healthful for employees. Such conditions include a working environment that is free from recognized hazards that are likely to cause death or serious physical harm to employees.[402] The OSS Commission has the authority to inspect an employer's place of business to ensure its compliance with the Act.[403] If, after the inspection, it is determined that an employer is not in compliance, the OSS may issue a "safety order," which describes the nature of the violation and provides a deadline for correcting the harm.[404]

In Indiana, employers are prohibited from discharging or retaliating in any way against an employee who has filed a complaint or is otherwise participating in a proceeding that relates to a violation of state workplace health and safety standards.[405]

3.10(b) *Cell Phone & Texting While Driving Prohibitions*

3.10(b)(i) *Federal Guidelines on Cell Phone & Texting While Driving*

Federal law does not address cell phone use or texting while driving.

3.10(b)(ii) *State Guidelines on Cell Phone & Texting While Driving*

No one in Indiana may hold or use a telecommunications device while operating a motor vehicle. This prohibition applies to employees driving for work purposes and could expose an employer to liability. Employers therefore should be cognizant of, and encourage compliance with, the restriction.

The law provides an exception to the prohibition for devices used in conjunction with hands-free or voice-operated technology or in the case of a genuine emergency.[406] In addition, the law specifically states that

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399 29 U.S.C. § 667(c)(2).

400 29 U.S.C. § 667.

401 IND. CODE § 22-8-1.1-7.

402 IND. CODE § 22-8-1.1-2.

403 IND. CODE § 22-8-1.1-23.1(a)(1).

404 IND. CODE § 22-8-1.1-25.1(a).

405 IND. CODE § 22-8-1.1-38.1.

406 IND. CODE § 9-21-8-59(a).

police officers may not confiscate the cell phone, PDA, or pager to determine whether a driver is complying with the law.[407]

3.10(c) *Firearms in the Workplace*

3.10(c)(i) *Federal Guidelines on Firearms on Employer Property*

Federal law does not address firearms in the workplace.

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

Firearms in the Workplace. Indiana's handgun regulation statute specifically does not prevent a person who owns, leases, rents, or otherwise legally controls private property from regulating or prohibiting the possession of firearms on the private property.[408]

As mentioned in **1.3(f)(i)**, an employer may not require an applicant or an employee to disclose whether they own, possess, use, or transport a firearm or ammunition, unless the firearm is used in fulfilling the duties of employment. Employment or any employment benefit may not be conditioned on the ownership, possession, storage, transportation, or use of a firearm or ammunition. An employer is not prohibited from regulating or prohibiting the possession or carrying of a firearm by an employee during and in the course of the duties of the employee on behalf of the employer or while on the property of the employer—except that the employer cannot enforce any rule that prevents an employee from storing a firearm in their personal vehicle on company property, subject to certain parameters described below.[409]

Firearms in Company Parking Lots. Under Indiana's Possession of Firearms and Ammunition in Locked Vehicles Law, Indiana employers may not adopt or enforce a policy or rule that prohibits, or has the effect of prohibiting, employees, including contract employees, from possessing a firearm or ammunition that is:

1. locked in the trunk of the employee's vehicle;
2. kept in the glove compartment of the employee's locked vehicle; or
3. stored elsewhere in the employee's locked vehicle, as long as the firearm or ammunition is stored out of plain sight.[410]

The statute protects only individuals who may legally possess a firearm or ammunition without a specific federal license.[411] This statute does not prohibit the adoption or enforcement of a policy or rule that prevents persons from possessing firearms or ammunition on the property of schools, various types of licensed child care institutions, penal facilities, domestic violence shelters, private residences, and several other specifically identified places.[412]

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[407] IND. CODE § 9-21-8-59(b).

[408] IND. CODE § 35-47-2-1(c).

[409] IND. CODE §§ 34-28-7-2, 34-28-8-6.

[410] IND. CODE § 34-28-7-2(a).

[411] IND. CODE § 34-28-7-1.

[412] IND. CODE § 34-28-7-2(b).

The statute also provides for a broad private cause of action under which a person may be held liable for actual damages, costs, and attorneys' fees.[413] Employers should bring policies and handbooks into compliance with this law to avoid potential liability.

3.10(d) *Smoking in the Workplace*

3.10(d)(i) *Federal Guidelines on Smoking in the Workplace*

Federal law does not address smoking in the workplace.

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

In Indiana, smoking is prohibited in all places of employment and within eight feet of a public entrance to any place of employment.[414] Indiana law provides exceptions for horseracing facilities, riverboat casinos, retail tobacco stores, and certain bars and taverns, among other establishments.[415]

Posting Requirements. Employers must notify employees and prospective employees of the smoking prohibition. Ashtrays must be removed from all nonsmoking areas, and signs much be posted stating "State Law Prohibits Smoking Within 8 Feet of this Entrance" or other similar language.[416]

Antiretaliation Provisions. Employers may not take any adverse action against an individual who reports a violation of Indiana's smoking ban.[417]

3.10(e) *Suitable Seating for Employees*

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

Federal law does not address suitable seating requirements for employees.

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

Indiana law does not address suitable seating requirements for employees.

3.10(f) *Workplace Violence Protection Orders*

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

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

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

Employers in Indiana can seek an injunction and a temporary restraining order on behalf of any employee who is the subject of unlawful violence in the workplace or who receives a credible threat of violence that

[413] IND. CODE § 34-28-7-3.

[414] IND. CODE § 7.1-5-12-4.

[415] IND. CODE § 7.1-5-12-5.

[416] IND. CODE § 7.1-5-12-4.

[417] IND. CODE § 7.1-5-12-11.

could be carried out in the workplace.[418] An injunction or order is permitted whenever any of the following conduct occurs or is deemed likely to occur:

- following or stalking an employee to or from the workplace;
- entering an employee's workplace;
- following an employee during hours of employment;
- telephoning the employee during work hours; or
- corresponding with the employee by any means, including public or private mail, email, interoffice mail, or fax.[419]

An employer, or its legal counsel, must provide the appropriate law enforcement agencies with a copy of each temporary restraining order or injunction by the close of business on the day the order or injunction is granted.

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");[420] (2) the Americans with Disabilities Act (ADA);[421] (3) the Age Discrimination in Employment Act (ADEA);[422] (4) the Equal Pay Act;[423] (5) the Genetic Information Nondiscrimination Act of 2009 (GINA);[424] (6) the Civil Rights Acts of 1866 and 1871;[425] and (7) the Civil Rights Act of 1991. As a result of these laws, federal law prohibits discrimination in employment on the basis of:

- race;
- color;
- national origin (includes ancestry);
- religion;

[418] IND. CODE § 34-26-6-6.

[419] IND. CODE § 34-26-6-1.

[420] 42 U.S.C. §§ 2000e *et seq.* Title VII applies to employers with 15 or more employees. 42 U.S.C. § 2000e(b).

[421] 42 U.S.C. §§ 12101 *et seq.* The ADA applies to employers with 15 or more employees. 42 U.S.C. § 12111(5).

[422] 29 U.S.C. §§ 621 *et seq*. The ADEA applies to employers with 20 or more employees. 29 U.S.C. § 630.

[423] 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.

[424] 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)).

[425] 42 U.S.C. §§ 1981, 1983.

- 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);[426]
- 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.[427] 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.[428]

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

The Indiana Civil Rights Law (ICRL) provides protection from most of same types of discrimination addressed by the federal statutes. While not bound by federal law, the Indiana Civil Rights Commission (ICRC) and Indiana courts regularly look to Title VII precedent as guidance when deciding sex, race, national origin, ancestry, and religion cases arising under the ICRL.[429] The ICRL prohibits discrimination on the basis of the following:

- race;
- religion;
- color;
- sex;
- disability;
- national origin; or
- ancestry.[430]

Covered employers under the ICRL include any person employing six or more employees in the state. ICRL coverage does not extend to:

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[426] 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.

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

[428] 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.

[429] *See, e.g.*, *Indiana Civil Rights Comm'n v. Alder*, 714 N.E.2d 632, 636 (Ind. 1999); *Indiana Dep't of Nat. Res. v. Cobb*, 832 N.E.2d 585, 591 (Ind. Ct. App. 2005) ("[A]lthough federal decisions are not binding on this court, federal decisions are helpful in construing Indiana's Civil Rights Act."); *see also Indiana Civil Rights Comm'n v. Kidd & Co., Inc.*, 505 N.E.2d 863, 866-67 (Ind. Ct. App. 1987) (noting variations exist in the federal *McDonnell Douglas* balancing test and applying same to sex-based termination case); *Indiana Civil Rights Comm'n v. Marion Cnty. Sheriff's Dep't*, 644 N.E.2d 913, 916 (Ind. Ct. App. 1994) (applying *McDonnell Douglas* balancing in race case).

[430] IND. CODE § 22-9-1-2(a).

- nonprofit corporations or associations organized exclusively for fraternal or religious purposes;
- schools, educational, and charitable religious institutions that are owned, conducted by, or affiliated with a church or religious institution; or
- exclusively social clubs, corporations, or associations that are not organized for profit.[431]

Covered employers under the IADA include labor organizations and any person employing one or more individuals. IADA coverage does not extend to:

- religious, charitable, fraternal, social, education, or sectarian corporations or associations that are not organized for private profit, other than labor organizations and nonsectarian corporations or organizations engaged in social service work; and
- any person or governmental entity that is subject to the federal Age Discrimination in Employment Act (ADEA).[432]

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

Agency Enforcement. The Indiana Civil Rights Commission (ICRC) a bipartisan, seven-member, Governor-appointed group, is charged with enforcing the ICRL.[433] The ICRC is a fair employment practices/deferral agency that processes claims that also arise under Title VII or the ADA in accord with a work-sharing arrangement with the EEOC.[434] Accordingly, the deadline to file a charge with the EEOC alleging an Indiana-based violation of Title VII or the ADA is extended from 180 to 300 days from the alleged discriminatory event.[435]

Exclusivity of Remedy. The ICRL does not create an independent private right of action that allows an employee or applicant to sue directly in state court.[436] Instead, it creates an administrative scheme that can, but frequently does not, lead to a courtroom. The employee or unsuccessful applicant must first seek relief through the ICRC. If the ICRC enters a *probable cause* finding on the request for relief, the parties may either proceed to hearing before an ICRC-appointed administrative law judge, or move into the state

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[431] IND. CODE § 22-9-1-3(h).

[432] IND. CODE § 22-9-2-1.

[433] IND. CODE §§ 22-9-1-4 to 22-9-1-6.

[434] 29 C.F.R. § 1601.13; s*ee, e.g.*, *Chaudhry v. Nucor Steel-Ind.*, 546 F.3d 832, 836 (7th Cir. 2008) (explaining that a "charge must be filed within 300 days after the alleged unlawful employment practice occurred or else the employee may not challenge the practice in court"); *Davenport v. Indiana Masonic Home Found., Inc.*, 2003 WL 1888986 , at *3 (S.D. Ind. Mar. 27, 2003).

[435] 29 C.F.R. § 1601.13. *But see Helm v. Ancilla Domini Coll.*, 2012 WL 33018, at *7 n.7 (N.D. Ind. Jan. 5, 2012) (noting, in dicta, a conflict between *Chaudhry* and *Williamson v. Indiana Univ.*, 345 F.3d459, 463 (7th Cir. 2003) ("A claimant may file a charge of discrimination with the EEOC within a 180-day window permitted under Title VII") and stating that absent a showing either that a plaintiff actually filed a charge with a deferral agency or that the deferral agency explicitly waived its right to an "exclusive processing period" for the type of charge the plaintiff filed, "the 180-day limitations period might apply").

[436] *Ellis v. CCA of Tenn., L.L.C.*, 2010 WL 2605870, at **9-10 (S.D. Ind. June 21, 2010) (the statute creates no independent private right of action; parties can only reach the trial court after a probable cause finding and a written agreement by both parties to move the matter to the trial court); *see also M.C. Welding & Machining Co. v. Kotwa*, 845 N.E.2d 188, 192 (Ind. Ct. App. 2006) (argument that trial court had no subject matter jurisdiction over age and disability claims filed without proper recourse to ICRC procedures had merit, but general verdict for plaintiff affirmed because trial court had subject matter jurisdiction over public policy retaliatory discharge claim).

court system. However, for the case to move out of the ICRC and into a state court, the respondent and the complainant must agree, in writing, to have a court rather than the ICRC decide the claim. If *both* parties enter into such a written agreement, then the complainant is free to file a civil action in either a circuit or superior court with jurisdiction over the geographic location where the alleged discriminatory action purportedly occurred. No jury trial is available.[437]

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

Additional FEP Protections. The Indiana Age Discrimination Act (IADA) prohibits an employer from refusing to hire, firing, or refusing to rehire any person who is at least 40 and not yet 75 years of age, because of the individual's age.[438] The IADA's protections do not extend to private domestic servants and farm laborers. The statute is also inapplicable to those persons who are already eligible to receive benefits under an employer's pension plan or system.[439]

Use of Tobacco Products. Indiana employers are prohibited from discriminating against any employee or applicant who uses tobacco products.[440] The discrimination provision covers all employers, except churches, religious organizations, and their affiliated schools or businesses.[441] In other words, employers cannot make abstinence from tobacco use a condition of employment. Nor can an employee's use of tobacco products during nonwork hours affect the employee's compensation, benefits, or other employment terms and conditions. To reduce tobacco use, an employer may offer financial incentives to employees if the incentives are related to an employer-provided health benefit program.[442]

3.11(a)(v) *Local FEP Protections*

In addition to the federal and state laws, employers with operations in Evansville, Fort Wayne, Indianapolis-Marion County, Monroe County, and South Bend are subject to local fair employment practices ordinances.

- **Evansville.** Employers employing six or more employees must extend antidiscrimination protections on the basis of: race; sex; color; religion; disability; ancestry; national origin; age (40-74 years); sexual orientation; and gender identity.[443] An individual alleging a violation of the ordinance may file a complaint with the Human Relations Commission within 90 days after the date of the alleged discriminatory practice.[444]
- **Fort Wayne.** Employers employing more than five employees are subject to the following antidiscrimination protections: race; sex; color; religion; disability; ancestry; national origin;

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[437] IND. CODE § 22-9-1-17.

[438] IND. CODE §§ 22-9-2-1 (defining discrimination), 22-9-2-2.

[439] IND. CODE § 22-9-2-10.

[440] IND. CODE § 22-5-4-1.

[441] IND. CODE § 22-5-4-4.

[442] IND. CODE § 22-5-4-1.

[443] EVANSVILLE, IND., MUN. CODE § 2.30.010 (includes exclusion for *bona fide* occupational qualifications and exceptions include a nonprofit corporation or association organized exclusively for fraternal or religious purposes; a school, education, charitable, or religious institution owned or conducted by, or affiliated with, a church or religious institution; and any exclusively social club, corporation, or association that is not organized for profit and is not open to the general public).

[444] EVANSVILLE, IND., MUN. CODE § 2.30.010(H).

place of birth; age (40-74 years); and sexual orientation.[445] An individual alleging a violation of the ordinance may file a complaint with the Metropolitan Human Relations Commission within 180 days of the discrimination.[446]

- **Indianapolis-Marion County.** Protected classifications include: race; religion; color; disability; sex; sexual orientation; gender identity; national origin; ancestry; age (40-74 years); and U.S. military service/veteran status. Employers that, at the time of the alleged violation, employ six or more employees within the jurisdiction of the human rights office are subject to the antidiscrimination provisions.[447] An aggrieved person may file a complaint with the Indianapolis Office of Equal Opportunity with the Office of Corporation Counsel within 180 calendar days of the discrimination.[448]
- **Monroe County.** Employers employing six or more employees within Monroe County, but outside the municipal limits of any city or town within Monroe County must extend antidiscrimination protections on the basis of: race; religion; color; sex; national origin; ancestry; sexual orientation; gender identity; disability; housing status; and veteran status.[449] An individual alleging a violation of the ordinance may file a complaint with the Monroe County Human Rights Commission within 180 days from the occurrence of the alleged discriminatory practice, or from the date of termination of a published and meaningful grievance procedure provided by the employer or a labor union.[450]
- **South Bend.** Employers employing six or more employees within Indiana and doing business within the city of South Bend are subject to the following antidiscrimination protections: race; religion; color; sex; disability; national origin; ancestry; sexual orientation; and gender identity.[451] The South Bend Human Rights Commission may investigate charges of discriminatory practice within 90 days from the date of the alleged act, or from the date of the termination of a published or meaningful grievance procedure provided by the employer

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[445] FORT WAYNE, IND., CODE OF ORDINANCES §§ 93.002 (definitions), 93.004 (exemptions, including religious), 93.016, 93.016A (covering employment discrimination against persons with disabilities as well as preemployment inquiries, medical examinations, and drug testing), and 93.021 (noting that the authority of the Fort Wayne Metropolitan Human Relations Commission is limited with respect to investigation and resolution of sexual orientation complaints).

[446] FORT WAYNE, IND., CODE OF ORDINANCES § 93.054; METROPOLITAN HUMAN RELATIONS COMM'N R. 1-3.2.

[447] INDIANAPOLIS-MARION CNTY., IND., CODE OF ORDINANCES §§ 581-101, 581-103 (definitions), 581-403 (discriminatory practices declared unlawful), and 581-404 (exceptions).

[448] INDIANAPOLIS-MARION CNTY., IND., CODE OF ORDINANCES §§ 581-405, 581-408.

[449] MONROE CNTY., IND., CODE §§ 520-2, 520-3 (exceptions to definition of employer includes not-for-profit corporation or associations organized exclusively for fraternal or religious purposes; any school, educational, or charitable religious institution owned or conducted by, or affiliated with, a church or religious institution; and any exclusively social club, corporation, or association not organized for profit).

[450] MONROE CNTY., IND., CODE § 520-7.

[451] SOUTH BEND, IND., MUN. CODE §§ 2-127.1 (exceptions include certain religious organizations with regard to sexual orientation and gender identity discriminatory practices), 2-128 (exceptions to definition of employer includes any *bona fide* private membership club, other than a labor organization, which is exempt from taxation under the Internal Revenue Code; and any school, educational, or charitable institution owned or conducted by or affiliated with a church or religious institution to the extent that the school, education, or charitable institution hires employees of a particular religion).

or a labor union.[452] An aggrieved individual may file a civil action in the St. Joseph County circuit or superior court or any other court of proper jurisdiction not less than one year after the occurrence or termination of the alleged discriminatory practice.[453]

3.11(b) *Equal Pay Protections*

3.11(b)(i) *Federal Guidelines on Equal Pay Protections*

The Equal Pay Act requires employers to pay male and female employees equal wages for substantially equal jobs. Specifically, the law prohibits employers covered under the federal Fair Labor Standards Act (FLSA) from discriminating between employees within the same establishment on the basis of sex by paying wages to employees at a rate less than the rate at which the employer pays wages to employees of the opposite sex for equal work on jobs—"the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[454] 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.[455]

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

The Indiana minimum wage statute prohibits non-FLSA-covered employers from discriminating between employees within any establishment on the basis of sex by paying an employee a rate less than the rate at which the employer pays wages to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility and which are performed under similar working conditions.[456] The prohibition does not apply where payment is made pursuant to a: (1) seniority system; (2) merit system; (3) system which measures earnings by quantity or quality of production; or (4) differential based on any other factor other than sex. An employer paying a wage differential in violation of the equal pay provisions cannot reduce the wage rate of any employee in order to comply with the statute.

An employee alleging a violation of the equal pay statute may file a civil action within three years of the alleged violation.[457]

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[452] SOUTH BEND, IND., MUN. CODE §§ 2-128(l), 2-131.

[453] SOUTH BEND, IND., MUN. CODE § 2-132.1.

[454] 29 U.S.C. § 206(d)(1).

[455] 42 U.S.C. § 2000e-5.

[456] IND. CODE § 22-2-2-4.

[457] IND. CODE § 22-2-2-9.

3.11(c) *Pregnancy Accommodation*

3.11(c)(i) *Federal Guidelines on Pregnancy Accommodation*

As discussed in **3.9(c)(i)**, the federal Pregnancy Discrimination Act (PDA), which amended Title VII, the Family and Medical Leave Act (FMLA), and the Americans with Disabilities Act (ADA) may be implicated in determining the extent to which an employer is required to accommodate an employee's pregnancy, childbirth, or related medical conditions.
Additionally, the Pregnant Workers Fairness Act (PWFA) makes it an unlawful employment practice for an employer of 15 or more employees to:

- fail or refuse to make reasonable accommodations for the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on its business operations;
- require a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process;
- deny employment opportunities to a qualified employee, if the denial is based on the employer's need to make reasonable accommodations for the qualified employee;
- require a qualified employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided; or
- take adverse action related to the terms, conditions, or privileges of employment against a qualified employee because the employee requested or used a reasonable accommodation.[458]

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).[459]

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

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[458] 42 U.S.C. § 2000gg-1. The regulations provide definitions of *pregnancy*, *childbirth*, and *related medical conditions*. 29 C.F.R. § 1636.3.

[459] 29 C.F.R. § 1636.3.

An employee seeking a reasonable accommodation must request an accommodation.[460] To request a reasonable accommodation, the employee or the employee's representative need only communicate to the employer that the employee needs an adjustment or change at work due to their limitation resulting from a physical or mental condition related to pregnancy, childbirth, or related medical conditions. The employee must also participate in a timely, good faith interactive process with the employer to determine an effective reasonable accommodation.[461] 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."[462]

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.[463]

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.[464]

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[460] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1636.3.

[461] 29 C.F.R. § 1636.3.

[462] 29 C.F.R. § 1636.4.

[463] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1630.2(p).

[464] 29 C.F.R. § 1636.3.

The PWFA expressly states that it does not limit or preempt the effectiveness of state-level pregnancy accommodation laws. State pregnancy accommodation laws are often specific in terms of outlining an employer's obligations and listing reasonable accommodations that an employer should consider if they do not cause an undue hardship on the employer's business.

Where a state law focuses primarily on providing job-protected leave for pregnancy or childbirth—as opposed to a pregnancy accommodation—it is discussed in **3.9(c)(ii)**. For more information on these topics, see **LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES**.

3.11(c)(ii) *State Guidelines on Pregnancy Accommodation*

While state law does not require employers to provide reasonable accommodation to a pregnant employee, the state nonetheless offers some limited protections. An employee may submit a written request to an employer seeking an accommodation relating to the employee's pregnancy. "Pregnancy" includes pregnancy, childbirth, and related medical conditions. The employer is required to respond to the employee's written accommodation request within a reasonable time, though the statute does not define what is considered reasonable.[465]

An employee's request for an accommodation does not:

- require an employer to provide an accommodation for an employee's pregnancy; or
- impose a duty or obligation upon the employer to provide an accommodation or an exception to the employer's policies, unless existing federal or state laws require that an accommodation must be made.[466]

Further, an employer may not discipline, terminate, or retaliate against an employee who requested or was provided with an accommodation. An employer's attempt to accommodate or a decision not to accommodate is not considered disciplinary or retaliatory action. The statutes apply only to employers with 15 or more employees.[467]

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.[468] Multiple decisions of the U.S. Supreme Court[469] 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

[465] IND. CODE § 22-9-12-2.

[466] IND. CODE § 22-9-12-3.

[467] IND. CODE § 22-9-12-4.

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

[469] *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.[470] Training for all employees, not just managerial and supervisory employees, also demonstrates an employer's "good faith efforts" to prevent harassment. For more information on harassment claims and employee training, see LITTLER ON HARASSMENT IN THE WORKPLACE and LITTLER ON EMPLOYEE TRAINING.

3.11(d)(ii) *State Guidelines on Antiharassment Training*

There are no antiharassment training and education requirements mandated for private employers in Indiana, although training is recommended to minimize liability.

3.12 Miscellaneous Provisions

3.12(a) *Whistleblower Claims*

3.12(a)(i) *Federal Guidelines on Whistleblowing*

Protections for whistleblowers can be found in dozens of federal statutes. The federal Occupational Safety and Health Administration ("Fed-OSHA") administers over 20 whistleblower laws, many of which have little or nothing to do with safety or health. Although the framework for many of the Fed-OSHA-administered statutes is similar (*e.g.*, several of them follow the regulations promulgated under the Wendell H. Ford Aviation Investment and Reform Act (AIR21)), each statute has its own idiosyncrasies, including who is covered, timeliness of the complaint, standard of proof regarding nexus of protected activity, appeal or objection rights, and remedies available. For more information on whistleblowing protections, see LITTLER ON WHISTLEBLOWING & RETALIATION.

3.12(a)(ii) *State Guidelines on Whistleblowing*

Indiana's False Claims and Whistleblower Act (IFCWA) was adopted in response to the 2005 Deficit Reduction Act, which incentivized states to enact false claims acts that establish liability to the state for the submission of false or fraudulent claims to the state's Medicaid program.[471] The False Claims Act (FCA) portion of the IFCWA mirrors the federal False Claims Act.

The IFCWA provides that an employee is entitled to relief if the employee is discharged, demoted, suspended, harassed, or otherwise discriminated against for: (1) objecting to a violation of the IFCWA; or (2) initiating, testifying, or participating in an investigation, an action or a hearing.[472] To establish a retaliatory discharge claim, an employee must prove: (1) the employee acted in furtherance of a FCA enforcement action; (2) the employer knew the employee was engaged in this protected conduct; and (3) the employer was motivated, at least in part, to terminate their employment because of the protected conduct.[473] A person engages in protected activity under the FCA (and, therefore, IFCWA) by reporting the

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[470] 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.

[471] IND. CODE §§ 5-11-5.5 *et seq*.

[472] IND. CODE § 5-11-5.5-8(a).

[473] *See United States v. Indianapolis Neurosurgical Grp. Inc.*, 2013 WL 652538, at **7-8 (S.D. Ind. Feb. 21, 2013) (citing *Brandon v. Anesthesia & Pain Mgmt. Assocs.*, 277 F.3d 936, 944 (7th Cir. 2002)); *see also Kuhn v. LaPorte Cnty. Comprehensive Mental Health Council*, 2008 WL 4099883, at *7 (N.D. Ind. Sept. 4, 2008) (noting that the Indiana FCA and the federal FCA are analyzed the same way).

alleged wrongdoing to the individual's employer. The reporting party does not have to file a complaint with the state to receive protection.[474]

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)[475] and the Railway Labor Act (RLA)[476] are the two main federal laws governing employer relations with unions in the private sector. The NLRA regulates labor relations for virtually all private-sector employers and employees, other than rail and air carriers and certain enterprises owned or controlled by such carriers, which are covered by the RLA. The NLRA's main purpose is to: (1) protect employees' right to engage in or refrain from *concerted activity* (*i.e.*, group activities attempting to improve working conditions) through representation by labor unions; and (2) regulate the collective bargaining process by which employers and unions negotiate the terms and conditions of union members' employment. The National Labor Relations Board (NLRB or "Board") enforces the NLRA and is responsible for conducting union elections and enforcing the NLRA's prohibitions against "unfair" conduct by employers and unions (referred to as *unfair labor practices*). For more information on union organizing and collective bargaining rights under the NLRA, see LITTLER ON UNION ORGANIZING and LITTLER ON COLLECTIVE BARGAINING.

Labor policy in the United States is determined, to a large degree, at the federal level because the NLRA preempts many state laws. Yet, significant state-level initiatives remain. For example, *right-to-work laws* are state laws that grant workers the freedom to join or refrain from joining labor unions and prohibit mandatory union dues and fees as a condition of employment.

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

Right-to-Work Law. Indiana is a right-to-work state. Under Indiana's Right-to-Work Law, a union and an employer are prohibited from entering into an express or implied contract that requires an individual (not just an employee) to: (1) become a member of a labor organization; (2) pay dues or charges to a labor organization; or (3) pay to a charity or third party an amount that is equivalent to or a portion of dues that would be paid to a labor organization.[477] The State of Indiana and its political subdivisions are not covered by the statute.

The law does not prohibit so-called "dues check off provisions" whereby employers agree contractually to deduct union dues from the paychecks of employees who voluntarily authorize such a deduction.

Actual or threatened statutory violations are punishable through monetary damages, including up to $1,000 in liquidated damages, plus attorneys' fees and injunctive relief.[478]

Union Election / Secret Ballot Law. In any election required or permitted by Indiana or federal law for the designation, authorization, or retention of employee representation, employees are guaranteed the right

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[474] *Indianapolis Neurosurgical Grp. Inc.*, 2008 WL 4099883, at *7 (citing *Abner v. Jewish Hosp. Health Care Servs., Inc.*, 2008 WL 3853361, at *8 (S.D. Ind. Aug. 13, 2008)).

[475] 29 U.S.C. §§ 151 to 169.

[476] 45 U.S.C. §§ 151 *et seq*.

[477] IND. CODE § 22-6-6-8.

[478] IND. CODE § 22-6-6-11.

to vote by secret ballot.[479] In addition, the right of an employer to engage in an election campaign is guaranteed.[480] Finally, the results of an election that violates these provisions are void.[481] Indiana's Union Election law only applies to the extent the NLRA or any other federal law concerning labor relations or labor organizations does not.[482]

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).[483] 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.[484] There are exceptions that either reduce or eliminate notice requirements. For more information on the WARN Act, see LITTLER ON REDUCTIONS IN FORCE.

4.1(b) *State Mini-WARN Act*

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

4.1(c) *State Mass Layoff Notification Requirements*

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

4.2 Documentation to Provide When Employment Ends

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

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

Table 10. Federal Documents to Provide at End of Employment

Category	Notes
Health Benefits: Consolidated Omnibus	Under COBRA, the administrator of a covered group health plan must provide written notice to each covered employee and spouse of the

[479] IND. CODE §§ 22-6-5-1, 22-6-5-2.

[480] IND. CODE § 22-6-5-3.

[481] IND. CODE § 22-6-5-4.

[482] IND. CODE § 22-6-5-1(b).

[483] 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.

[484] 20 C.F.R. §§ 639.4, 639.6.

Table 10. Federal Documents to Provide at End of Employment	
Category	**Notes**
Budget Reconciliation Act (COBRA)	covered employee (if any) of the right to continuation coverage provided under the plan.[485] 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.[486]

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

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

Table 11. State Documents to Provide at End of Employment	
Category	**Notes**
Health Benefits: Mini-COBRA, etc.	No notice requirement located.
Reason for Firing & Service Letters	A service letter must be provided if an employee is discharged or voluntarily quits and provides a written request to the employer for a service letter. The letter must set forth whether the employee quit or was involuntarily discharged. There is an exception, however; this requirement does not apply "to any person, firm, limited liability company, or corporation which does not require written recommendations or written applications showing qualifications or experience for employment."[487]

[485] 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.

[486] 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.

[487] IND. CODE § 22-6-3-1; *see also* IND. CODE § 22-5-3-1.

Table 11. State Documents to Provide at End of Employment	
Category	**Notes**
Unemployment Compensation	**Generally.** Employers must provide employees, at the time they become unemployed, printed benefit rights information furnished by the Department of Workforce Development.[488] **Multistate Workers.** Whenever an individual covered by a multistate election is separated from employment, an employer must notify the individual as to the jurisdiction under whose unemployment compensation law the services have been covered. If, at the time of termination, the individual is not located in the elected jurisdiction, an employer must notify the individual as to the procedure for filing interstate benefit claims. In addition to these notice requirements, employers must comply with the covered jurisdiction's general notice requirement, if applicable.[489]

4.3 Providing References for Former Employees

4.3(a) *Federal Guidelines on References*

Federal law does not specifically address providing former employees with references.

4.3(b) *State Guidelines on References*

Indiana's requirement to provide service letters for former employees is also discussed in **0**.

In addition, any person or employer that, after having discharged any employee, prevents the discharged employee from getting another job, commits the criminal offense of *blacklisting*. The discharged employee may file a civil action for damages.[490]

However, an employer can inform, in writing, any other person to whom the discharged employee has applied for employment a truthful statement concerning the reasons for the employee's discharge. An employer disclosing information about a current or former employee is immune from civil liability for the disclosure and the consequences, unless it is proven by a preponderance of the evidence the disclosed information was known to be false when the disclosure was made.[491]

Further, a job applicant may submit a written request to the applicant's prospective employer, which must be honored, seeking copies of any written communications from their current or former employers that

[488] IND. CODE § 22-4-17-1. This notice is available at https://www.in.gov/dwd/files/Employer-Poster.pdf. It is also available in Spanish at https://www.in.gov/dwd/files/Employer-Poster-Spanish.pdf.

[489] 646 IND. ADMIN. CODE 5-12-7.

[490] IND. CODE § 22-5-3-1.

[491] IND. CODE § 22-5-3-1.

might affect the employee's possibility of getting a job. An applicant must submit this request to the prospective employer within 30 days after applying for employment.[492]

[492] IND. CODE § 22-5-3-1.