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STATE

Littler on

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

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

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

DISCLAIMER

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

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1.1 Classifying Workers: Employees v. Independent Contractors

1.1(a) *Federal Guidelines on Classifying Workers*

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

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

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

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

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

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

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

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

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

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

1.1(b) *State Guidelines on Classifying Workers*

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

The Kentucky Education and Labor Cabinet (KELC) has entered into a partnership with the U.S. Department of Labor (DOL), Wage and Hour Division to work cooperatively through information sharing, joint enforcement efforts, and coordinated outreach and education efforts in order to reduce instances of misclassification of employees as independent contractors.[5]

Table 1. State Tests for Classifying Workers

Purpose of Determining Employee Status	State Agency	Test to Apply
Fair Employment Practices Laws	Kentucky Commission on Human Rights	Federal common-law agency 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.3d 103, 105 (8th Cir. 1994). Because the hybrid test focuses on traditional agency notions of control, as a general rule, it results in a narrower definition of employee than under a pure economic realities test. *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 347 (5th Cir. 2008).

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

[5] More information about the DOL Misclassification Initiative is available at https://www.dol.gov/whd/workers/misclassification/#stateDetails. The Memorandum of Understanding with the KELC is available at https://www.dol.gov/whd/workers/MOU/ky.pdf.

[6] The Kentucky Court of Appeals has noted that because the Kentucky Civil Rights Act generally tracks the language of Title VII of the Civil Rights Act of 1964 ("Title VII"), the state law should be interpreted consistently with Title VII. *Steilberg v. C2 Facility Solutions, L.L.C.*, 275 S.W.3d 732, 735 (Ky. Ct. App. 2008). In so reasoning, the court applied the federal common-law agency test as set forth in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992), which determines independent contractor versus employee status in Title VII cases. *Steilberg*, 275 S.W.3d at 735-36. Under *Darden,* in determining whether a hired party is an employee under the common law of agency, courts consider "the hiring party's right to control the manner and means by which the product is accomplished." 503 U.S. at 323. Relevant factors include:

> the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects

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Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
Income Taxes	Kentucky Department of Revenue	Under Kentucky income tax law, the terms *employer* and *employee* are defined the same as in the Internal Revenue Code.[7] There is no case law identifying a test for independent contractor status in this context.
Unemployment Insurance	Kentucky Office of Employment & Training	Common-law test, adopting the Restatement (Second) of Agency section 220 test. The test considers the following 10 factors: 1. the extent of control, which, by the agreement, the alleged employer may exercise over the details of the work; 2. whether the individual employed is engaged in a distinct occupation or business; 3. the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; 4. the skill required for the occupation; 5. whether the employer or the worker supplies the instrumentalities, tools, and place of work for the person doing the work; 6. the length of time for which the individual is employed; 7. the method of payment, and whether payment is made based on the time or the job; 8. whether the work is a part of the regular business of the employer; 9. whether the parties believe they are creating the relationship of master and servant; and, 10. whether the alleged employer is or is not in business. No one factor is determinative.[8]

to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. 503 U.S. at 323-24.

[7] KY. REV. STAT. ANN. § 141.010(14)-(15).

[8] *Kentucky Unemp't Ins. Comm'n v. Landmark Cmty. Newspapers*, 91 S.W.3d 575, 579-80 (Ky. 2002); *see also Kentucky Unemp't Ins. Comm'n v. Boone Cty. Bd. of Educ.*, 354 S.W.3d 605, 608-09 (Ky. Ct. App. 2011). Under

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Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
Wage & Hour Laws	KELC, Division of Wages, Hours & Mediation	Multi-factor test, including the right to control, as adopted by administrative regulation.[9] The following factors are significant to the analysis: "(a) The extent to which the services rendered are an integral part of the principal's business; (b) The permanency of the relationship; (c) The amount of the alleged contractor's investment in facilities and equipment; (d) An alleged contractor's opportunities for profit and loss; (e) The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent enterprise; and (f) The nature and degree of control by the principal"[10] To determine "control" consider: "1. Whether there are restrictive provisions in the agreement between the possible employer and possible employee which require that the work must be satisfactory to the possible employer and detailing how the work is to be performed; 2. Whether the possible employer has control over the business of the person performing work even though the possible employer does not control the particular circumstances of the work; 3. Whether the agreement is indefinite or for a long period of time; 4. Whether the possible employer may cancel the agreement at their discretion, and on how much notice; 5. Whether the possible employer may discharge employees of an alleged independent contractor; [and]

Kentucky's unemployment compensation law, *covered employment* means service performed by "[a]n individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee." KY. REV. STAT. ANN. § 341.050(1)(a).

[9] *Employee* is defined broadly in the wage and hour law as "any person employed by or suffered or permitted to work for an employer," with exceptions in franchise situations. KY. REV. STAT. ANN. § 337.010(2)(a); 803 KY. ADMIN. REGS. 1:006.

[10] 803 KY. ADMIN. REGS. 1:006.

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
		6. Whether the work done by an alleged independent contractor is the same or similar to that done by admitted employees; and 7. The degree of independent business organization and operation."[11] The regulations set forth additional factors to consider if control cannot be firmly established, as well as factors that are immaterial to the determination of whether an employer-employee relationship exists. Later, in *Oufafa v. Taxi, L.L.C.*, the Kentucky Supreme Court held that the economic realities test was also the proper test to determine whether a worker is an employee or an independent contractor.[12]
Workers' Compensation	KELC, Department of Workers' Claims	Kentucky courts consider the following nine factors: "(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;

[11] 803 KY. ADMIN. REGS. 1:006 (emphasis added). The following considerations are also relevant to determining employee versus independent contractor status:

> (a) Is the alleged independent contractor listed on the payroll with the appropriate tax deductions, or are the payments charged to the labor and salary account or selling expense account?
>
> (b) Must employees of the alleged independent contractor be approved by the possible employer?
>
> (c) Does the possible employer keep the books and prepare the payroll for the possible employee?
>
> (d) Is the alleged independent contractor assigned to a particular territory without freedom of movement outside thereof?
>
> (e) Does the alleged independent contractor have an independent economic or other interest in his work, other than increasing their own pay?
>
> (f) How do the respective tax returns of the parties list the remuneration paid?
>
> (g) Does the possible employer have control over the manner in which work is performed?

803 KY. ADMIN. REGS. 1:006. Finally, the regulation lists the following factors as *immaterial* to whether there is an employment relationship: the fact that a government grants a license to the alleged independent contractor; the method of compensation; the fact that the no compensation is paid to the independent contractor and they rely on tips; the location where work is performed; whether payment is made by piece or job or on a percentage or commission basis; and, the absence of a formal employment agreement. 803 KY. ADMIN. REGS. 1:006.

[12] 664 S.W.3d 592 (Ky. 2023).

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
		(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the 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; and (i) whether or not the parties believe they are creating the relationship of master and servant."[13] In *Oufafa v. Taxi, L.L.C.*, the Kentucky Supreme Court held that the economic realities test was also the proper test to determine whether a worker is an employee or an independent contractor.[14]
Workplace Safety	KELC, Occupational Safety & Health Program	While Kentucky has a state plan, there are no statutory definitions or case law identifying a test for independent contractor status in this context.

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

[13] *Ashley v. Mercer*, 2015 WL 1544250, at **3-4 (Ky. Apr. 2, 2015) (citing *Ratliff v. Redmon*, 396 S.W.2d 320, 324-25 (Ky. 1965)). Of the nine factors, the four that Kentucky courts have identified as "predominant" are: (1) the nature of the work as compared to the regular business of the alleged employer; (2) the degree of control the alleged employer may exercise over the details of the work; (3) the professional skill of the worker; and, (4) the parties' intentions. *Ashley*, 2015 WL 1544250, at *4 (citing *Chambers v. Wooten's IGA Foodliner*, 436 S.W.2d 265, 266 (Ky. 1969)). The KELC has also published guidance identifying the aforementioned four factors as central to the determination of whether a worker is an independent contractor or employee. KELC, Dep't of Workers' Claims, Sec. & Compliance, Security and Compliance FAQ, *What is the difference between employees and independent contractors?, available at* https://elc.ky.gov/Workers-Compensation/Pages/Security-Compliance.aspx.

[14] 664 S.W.3d 592 (Ky. 2023).

cannot present the required documents within three business days of hire, they cannot continue employment.

Although IRCA requires employers to review specified documents establishing an individual's eligibility to work, it provides no way for employers to verify the documentation's legitimacy. Accordingly, the federal government established the "E-Verify" program to allow employers to verify work authorization using a computerized registry. Employers that choose to participate in the program must enter into a Memorandum of Understanding with the Department of Homeland Security (DHS) which, among other things, specifically prohibits employers from using the program as a screening device. Participation in E-Verify is generally voluntary, except for federal contractors with prime federal contracts valued above the simplified acquisition threshold for work in the United States, and for subcontractors under those prime contracts where the subcontract value exceeds $3,500.[15]

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.[16] 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.[17]

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*

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

1.3 Restrictions on Background Screening & Privacy Rights in Hiring

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

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

There is no applicable federal law restricting employer inquiries into an applicant's criminal history. However, the federal Equal Employment Opportunity Commission (EEOC) has issued enforcement

[15] 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.

[16] *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).

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

guidance pursuant to its authority under Title VII of the Civil Rights Act of 1964 ("Title VII").[18] 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*

Kentucky has adopted the employment standards and procedures for employee selection as promulgated by the EEOC.[19] In addition, Kentucky 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*

As noted in **1.3(a)(ii)**, Kentucky has adopted the EEOC's employment standards and procedures for employee selection.

Although not directly covering private employers, an individual may not be disqualified from *public* employment or engaging in any occupation for which a *license* is required "solely because of a prior conviction of a crime" unless the crime is a felony, high misdemeanor, or otherwise directly relates to the position of employment sought. *Conviction of a crime* refers to felonies or misdemeanors.[20]

If a hiring or licensing authority denies an individual a position of *public* employment or disqualifies the individual from pursuing, practicing, or engaging in any occupation requiring a *license* based solely on a prior conviction, the hiring or licensing authority must notify the individual of the following in writing of:

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[18] 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.

[19] 104 KY. ADMIN. REGS. 1:050.

[20] KY. REV. STAT. ANN. §§ 335B.020(1), 335B.010.

(1) the grounds and reasons for the denial or the disqualification; (2) their right to a hearing, if a written request for such is made within 10 days after service of the notice; (3) the earliest day they may reapply for the position of public employment or license; and, (4) the fact that evidence of rehabilitation may be considered upon reapplication.[21]

Additionally, a state hiring or licensing authority may not disqualify an individual from engaging in an occupation that requires a license solely because of individual has been previously convicted of a crime, unless the authority provides them with a written notice that the authority has determined that the prior conviction may disqualify the person, demonstrates the connection between the prior conviction and the license being sought, and gives the individual an opportunity to be personally heard prior to the board making a decision on disqualification.[22]

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

A Kentucky employer is prohibited from requiring an applicant to disclose any information contained in a sealed record in any application, interview, or in any other way. A person whose criminal history records have been expunged does not have to disclose the fact of the records or any matter relating thereto on an application for employment.[23]

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

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

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[21] KY. REV. STAT. ANN. § 335B.030(1).

[22] KY. REV. STAT. ANN. §§ 335B.020; 335B.030.

[23] KY. REV. STAT. ANN. §§ 431.076(6) (records for those found not guilty or for whom charges have been dismissed); 431.078(6) (misdemeanor convictions); 510.300(3) (arrest records relating to specific sexual offenses); and 610.330(4) (sealed juvenile records).

[24] 15 U.S.C. §§ 1681 *et seq*.

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

requirements. For additional information on the FCRA, see LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING.

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

Discrimination Concerns. While federal law does not prevent employers from asking about financial information provided they follow the FCRA, as noted above, federal antidiscrimination law prohibits employers from applying a financial requirement differently based on an individual's protected status—*e.g.*, race, national origin, religion, sex, disability, age, or genetic information. The EEOC also cautions that an employer must not have a financial requirement "if it *does not help the employer to accurately identify* responsible and reliable employees, and if, at the same time, the requirement significantly disadvantages people of a particular [protected category]."[26]

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

Kentucky 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*

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

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

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

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

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

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

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

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

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

Kentucky 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.[28] The Drug-Free Workplace Act of 1988 also requires some federal contractors and all federal grantees (but not

[27] 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.

[28] 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.

subcontractors or subgrantees) to certify to the appropriate federal agency that they are providing a drug-free workplace.[29] Employers not legally mandated to implement workplace substance abuse and drug and alcohol testing policies may still do so to promote workplace safety, deter illegal drug use, and diminish absenteeism and turnover. For more information on drug testing requirements under federal law, see LITTLER ON EMPLOYMENT TESTING.

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

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

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

However, a Kentucky employer may voluntarily choose to promote a drug-free workplace in order to receive a discount on workers' compensation premiums.[30] Employers that seek to establish a drug-free workplace program must establish a written policy that is distributed to all employees and posted at each worksite in areas accessible to all employees, which includes a detailed statement describing the employer's assistance program (EAP), the educational and training program regarding alcohol and drug abuse, a statement of confidentiality, and a detailed description of the alcohol and drug testing methods or procedures to be used.[31]

All drug testing must be conducted in accordance with applicable federal and state requirements.[32] Employers may conduct drug testing that involves the submission of a urine sample only after issuing a conditional job offer. Breath alcohol testing may only be conducted after a conditional offer of employment is made as well.[33]

For more information on drug and alcohol testing of current employees, see **3.2(b)**.

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.

[29] 41 U.S.C. §§ 8101 *et seq*.; *see also* 48 C.F.R. §§ 23.500 *et seq*.

[30] 803 KY. ADMIN. REGS. 25:280; *see also* Kentucky Education and Labor Cabinet, Dep't of Workers' Claims, *Drug Free Workplace*, *available at* https://elc.ky.gov/Workers-Compensation/Pages/Drug-Free-Workplace.aspx (providing various drug-free workplace materials including a brochure, sample policy, and poster).

[31] 803 KY. ADMIN. REGS. 25:280.

[32] 803 KY. ADMIN. REGS. 25:280.

[33] 803 KY. ADMIN. REGS. 25:280.

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[34] and a cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act[35] 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.[36] 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.[37]
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.[38] 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

[34] 26 U.S.C. § 36B.

[35] 42 U.S.C. § 18071.

[36] 29 U.S.C. § 218b.

[37] 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.

[38] 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.[39]
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.[40] 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.[41] 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.[42]
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.[43] For additional information on these requirements, see LITTLER ON I-9 COMPLIANCE & WORK AUTHORIZATION VISAS.

[39] 29 C.F.R. § 2590.606-1.

[40] 29 C.F.R. § 825.300(a).

[41] 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.

[42] 29 C.F.R. § 825.300(a).

[43] *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.[44]
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.[45]
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.[46]

2.1(b) *State Guidelines on Hire Documentation*

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

Table 3. State Documents to Provide at Hire	
Category	**Notes**
Benefits & Leave Documents	No notice requirement located.
Fair Employment Practices Documents: The Kentucky Pregnant Workers Act	An employer must provide written notice of the right to be free from discrimination in relation to pregnancy, childbirth, and related medical conditions, including the right to reasonable accommodations, to new employees at the time of hire.[47]

[44] 26 C.F.R. § 31.3402(f)(2)-1. The IRS provides this form at https://www.irs.gov/pub/irs-pdf/fw4.pdf.

[45] 38 U.S.C. § 4334. This notice is available at https://www.dol.gov/sites/dolgov/files/VETS/legacy/files/USERRA_Private.pdf.

[46] 29 C.F.R. § 531.59.

[47] KY. REV. STAT. ANN. § 344.040(3)(a)-(b). Employers must also post this notice in an area accessible to employees. An Equal Employment Opportunity poster/notice, which covers the Kentucky Pregnant Workers Act is available from the Kentucky Commission on Human Rights in both English and Spanish at https://kchr.ky.gov/Resources/Pages/Brochures-and-Posters.aspx.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
Tax Documents	All employees must complete and sign a state withholding exemption certification (Form K-4) at the commencement of employment.[48]
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.[49] 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).[50]

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.

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[48] KY. REV. STAT. ANN. § 141.325; *see* Kentucky Dep't of Revenue, *Withholding Kentucky Income Tax: Instructions for Employers*, (rev. May 2015), *available at* http://revenue.ky.gov/Forms/42A003515.pdf. Form K-4 is available at http://revenue.ky.gov/Forms/42A8041113.pdf.

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

[50] 42 U.S.C. § 653a.

Multistate Employers. The New Hire Reporting Program includes a simplified reporting method for multistate employers. The statute defines *multistate employers* as employers with employees in two or more states and that file new hire reports either electronically or magnetically. The federal statute permits multistate employers to designate one state to which they will transmit all of their reports twice per month, rather than filing new hire reports in each state. An employer that designates one state must notify the Secretary of the U.S. Department of Health and Human Services (HHS) in writing. When notifying the HHS, the multistate employer must include the following information:

- Federal Employer Identification Number (FEIN);
- employer's name, address, and telephone number related to the FEIN;
- state selected for reporting purposes;
- other states in which the company has employees;
- 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.[51] 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 Kentucky's new hire reporting law.[52]

Who Must Be Reported. Employers must report all new hires, rehires, or those returning to work after being laid-off, furloughed, separated, granted a leave without pay, or terminated from employment.[53]

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

[52] KY. REV. STAT. ANN. § 405.435.

[53] KY. REV. STAT. ANN. § 405.435(1).

Report Timeframe. Employers must provide the information within 20 days of the hiring or return to work.[54]

Information Required. Employers must include the employee's name, address, and Social Security Number, as well as the employer's name, address, and tax identification numbers, and date the employee began working.[55]

Form & Submission of Report. An employer must report the required information by submitting a copy of the employee's federal Form W-4 or, at the option of the employer, an equivalent form provided by the state. The report may be submitted by mail, fax, diskette, magnetically, or electronically.[56]

Location to Send Information.

Kentucky New Hire Reporting Center
PO Box 138007
Sacramento, CA 95813-8007
(800) 817-2262
(800) 817-0099 (fax)
https://ky-newhire.com/#/public/public-landing

2.3 Restrictive Covenants, Trade Secrets & Protection of Business Information

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

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

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

Protections against trade secret misappropriation are also available to employers. Until 2016, trade secrets were the only form of intellectual property (*i.e.*, copyrights, patents, trademarks) not predominately governed by federal law. However, the Defend Trade Secrets Act of 2016 (DTSA) now provides a federal court civil remedy and original (but not exclusive) jurisdiction in federal court for claims

[54] KY. REV. STAT. ANN. § 405.435(2).

[55] KY. REV. STAT. ANN. § 405.435(2).

[56] *See* KY. REV. STAT. ANN. § 405.435(3).

of trade secret misappropriation.[57] 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*

Kentucky does not have a general statute of applicability regarding restrictive covenants. Noncompete covenants are allowed so long as they are reasonable, not unduly oppressive, serve a legitimate business purpose, and are limited in time and territory. A court will consider the employer's interest against the employee's and the public interest.[58]

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

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

In Kentucky, where the noncompete is part of the agreement from the onset and not an afterthought later added, the doctrine of mutuality only requires that both parties to the contract be bound to perform.[59] However, a noncompete signed after employment begins must be supported by consideration—some sort of change in the employment relationship, such as additional specialized training or an employment contract.[60] Continued employment is likely acceptable consideration so long as the employment continues for an appreciable period of time.[61]

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

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[57] 18 U.S.C. §§ 1832 *et seq.*

[58] *Crowell v. Woodruff*, 245 S.W.2d 447 (Ky. 1951).

[59] *See Alph C. Kaufman, Inc. v. Cornerstone Indus. Corp.*, 540 S.W.3d 803 (Ky. Ct. App. 2017).

[60] *Charles T. Creech, Inc. v. Brown*, 433 S.W.3d 345 (Ky. 2014); *Higdon Good Service, Inc. v. Walker*, 641 S.W.2d 750 (Ky. 1982) (mid-employment noncompete agreement "altered the terms of the employment relationship" because employer "was not compelled to keep Walker as an employee or to 'rehire' Walker, the fact that it did so was sufficient consideration to support the contract").

[61] *Central Adjustment Bureau v. Ingram Assoc.*, 622 S.W.2d 681 (Ky. Ct. App. 1981).

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 Kentucky, if the covenant is overbroad, the courts will enforce the contract to the extent reasonable.[62]

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

Definition of a Trade Secret. Kentucky has adopted the Uniform Trade Secrets Act, which serves to protect the secrecy and value of certain types of business information.[63] Under the Kentucky Trade Secrets Act, a *trade secret* is defined as:

> [I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process that:
>
> (a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other person who can obtain economic value from its disclosure or use, and
> (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[64]

Misappropriation of a Trade Secret. An employer may have a cause of action if a trade secret is misappropriated. *Misappropriation* means:

1. Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
2. Disclosure or use of a trade secret of another without express or implied consent by a person who:
    a. Used improper means to acquire knowledge of the trade secret; or
    b. At the time of the disclosure or use, knew or had reason to know that his knowledge of the trade secret was:
        i. Derived from or through a person who had utilized improper means to acquire it;
        ii. Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
        iii. Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
    c. before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.[65]

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[62] *Hammons v. Big Sandy Claims Serv.*, 567 S.W.2d 313, 315 (Ky. Ct. App. 1978).

[63] KY. REV. STAT. ANN. §§ 365.880 *et seq.*

[64] KY. REV. STAT. ANN. § 365.880.

[65] KY. REV. STAT. ANN. § 365.880.

If a party is found to have misappropriated or threatens to misappropriate a trade secret, a court may issue an injunction. In extreme cases, an injunction may require payment of a reasonable royalty if the prohibitive injunction is inequitable.[66] Additionally, a claimant may be entitled to damages.[67]

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

Kentucky does not have any 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.

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.[68]
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.[69]
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.[70]

[66] KY. REV. STAT. ANN. § 365.882.

[67] KY. REV. STAT. ANN. § 365.884.

[68] 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.

[69] 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.

[70] 29 C.F.R. § 516.4. This poster is available in English, Spanish, Chinese, Russian, Thai, Hmong, Vietnamese, Korean, Polish, and Haitian Creole at http://www.dol.gov/whd/regs/compliance/posters/flsa.htm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
Family & Medical Leave Act (FMLA)	Employers must conspicuously post, where employees are employed, a notice explaining the FMLA's provisions and providing information on filing complaints of violations.[71]
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.[72]
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.[73]
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.[74]
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.[75]
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

[71] 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.

[72] 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.

[73] 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.

[74] 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.

[75] 20 C.F.R. app. § 1002. This poster is available at http://www.dol.gov/vets/programs/userra/poster.htm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	numerous grounds.[76] 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.[77]
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.[78]
Employee Rights Under the Service Contract or Walsh-Healey Public Contracts Acts Poster	Employers performing work covered by the McNamara-O'Hara Service Contract Act ("Service Contract Act") or the Walsh-Healey Public Contracts Act ("Walsh-Healey Act") must prominently post notice, where accessible to employees, summarizing all required compensation and other entitlements. To comply, employers may notify employees by attaching a notice to the contract, or may post the notice at the worksite.[79]
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.[80]
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

[76] 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.

[77] 41 C.F.R. §§ 60-300.44, 60-741.44.

[78] 29 C.F.R. § 5.5(a)(l)(i). This poster is available at https://www.dol.gov/whd/regs/compliance/posters/davis.htm.

[79] 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.

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

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	finds it inappropriate to post this notice, directly providing the poster to its employees is sufficient.[81]
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.[82]
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.[83]
Paid Sick Leave Under Executive Order No. 13706	Certain government contractors must prominently post notice, where accessible to employees at the worksite, informing employees of their right to earn and use paid sick leave. Notice may be provided electronically if customary to the employer.[84] **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).[85]

[81] 29 C.F.R. § 525.14. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/disab.htm.

[82] 29 C.F.R. § 471.2. This poster is available at https://www.dol.gov/olms/regs/compliance/EO13496.htm.

[83] 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.

[84] 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.

[85] 29 C.F.R. § 13.5.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
Pay Transparency Nondiscrimination Provision	Employers covered by Executive Order No. 11246 must either post a copy of this nondiscrimination provision in conspicuous places available to employees and applicants for employment, or post the provision electronically. Additionally, employers must distribute the nondiscrimination provision to their employees by incorporating it into their existing handbooks or manuals.[86]
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.[87]

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: Abstract	Employers that employ minors under the age of 18 must conspicuously post an abstract of the Kentucky child labor law.[88]
Child Labor: Schedule of Hours	Employers that employ minors under the age of 18 must conspicuously post the minors' schedule, by notice "stating the working hours per day for each day in the week required of them."[89]
Fair Employment Practices: Equal Opportunity	All employers must post and maintain a notice informing employees about the various state prohibitions on employment discrimination. Notice must be posted where easily accessible, in well-lighted locations

[86] 41 C.F.R. § 60-1.35(c). This poster is available at https://www.dol.gov/agencies/ofccp/posters.

[87] 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.

[88] KY. REV. STAT. ANN. § 339.400. This poster is available at https://labor.ky.gov/Documents/KY Child Labor Poster English.pdf. Additional information, including some posters in Spanish, are available at https://elc.ky.gov/workplace-standards/Pages/Wages-and-Hours.aspx.

[89] KY. REV. STAT. ANN. § 339.400.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
	and near or at employees' worksites. It must be readily apparent to all employees and applicants.[90]
Fair Employment Practices: Equal Pay	Employers (with two or more employees in the state, for each of 20 weeks or more in the current or preceding year) must post and maintain conspicuous notice informing employees of their right to equal pay regardless of sex.[91]
Fair Employment Practices: The Kentucky Pregnant Workers Act	Employers with 15 or more employees must conspicuously post written notice of the right to be free from discrimination in relation to pregnancy, childbirth, and related medical conditions, including the right to reasonable accommodations, in the employer's place of business in an area accessible to employees.[92]
Unemployment Compensation	All employers must post and maintain conspicuous notice informing employees about eligibility for unemployment benefits and how to apply. Notice must be displayed where readily accessible, at the premises where payroll records are maintained.[93]
Wages, Hours & Payroll	All employers must post and maintain a conspicuous notice at all workplaces, summarizing the state wage and hour laws.[94]
Workers' Compensation	All covered employers must post notice, at a principal office as well as all locations where employees report for payroll and personnel matters, identifying the workers' compensation carrier and informing employees what to do if they are injured at work or if they require assistance.[95] If an employer voluntarily provides workers' compensation coverage for

[90] KY. REV. STAT. ANN. § 344.190; 104 KY. ADMIN. REGS. 1:010. This poster is available at https://kchr.ky.gov/Resources/Brochures%20and%20Posters/FINALEqualEmploymentOpportunityPoster2024.pdf. Additional information, including some posters in Spanish, are available at https://kchr.ky.gov/Resources/Pages/Brochures-and-Posters.aspx.

[91] KY. REV. STAT. ANN. § 337.433. This poster is available at https://elc.ky.gov/workplace-standards/Documents/KY%20Wage%20Discrimination%20Poster%20English.pdf. Additional information, including some posters in Spanish, are available at https://elc.ky.gov/workplace-standards/Pages/Wages-and-Hours.aspx.

[92] KY. REV. STAT. ANN. § 344.040(3)(b). This poster is available at https://kchr.ky.gov/Resources/Brochures%20and%20Posters/FINALEqualEmploymentOpportunityPoster2024.pdf.

[93] KY. REV. STAT. ANN. § 341.400; 787 KY. ADMIN. REGS. 1:040. This poster is available at http://kcc.ky.gov/Documents/ui_ben5_1_0108.pdf. Additional information, including some posters in Spanish, are available at https://elc.ky.gov/workplace-standards/Pages/Wages-and-Hours.aspx.

[94] KY. REV. STAT. ANN. § 337.325. This poster is available at https://elc.ky.gov/workplace-standards/Pages/Wages-and-Hours.aspx. Additional information, including some posters in Spanish, are available at https://elc.ky.gov/workplace-standards/Pages/Wages-and-Hours.aspx.

[95] KY. REV. STAT. ANN. § 342.610. This poster is available at https://kchr.ky.gov/Resources/Brochures%20and%20Posters/FINALEqualEmploymentOpportunityPoster2024.pdf. Additional information, including some posters in Spanish, are available at https://elc.ky.gov/workplace-standards/Pages/Wages-and-Hours.aspx.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
	employees who are otherwise exempt, it must post notice of its voluntary coverage.[96]
Workplace Safety: Safety & Health on the Job	All employers must post and maintain conspicuous notice, where such notices are customarily posted, the Kentucky occupational safety and health poster, which informs employees of their rights and responsibilities. Employers must ensure that the poster is not covered, altered, or defaced.[97]

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

[96] KY. REV. STAT. ANN. § 342.660. This poster is available at https://elc.ky.gov/Workers-Compensation/Workers%20Compensation/Workers%20Comp%20Posting%20Notice.pdf.

[97] KY. REV. STAT. ANN. § 338.161; 803 KY. ADMIN. REGS. 2:060. This poster is available at https://kysafe.ky.gov/Documents/OSH%20Poster-%20English%20-%20Sept2021.pdf. Additional information, including some posters in Spanish, are available at https://elc.ky.gov/workplace-standards/Pages/Wages-and-Hours.aspx.

[98] 29 U.S.C. § 626; 29 C.F.R. § 1627.3(a).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• test papers completed by applicants which disclose the results of any employment test considered by the employer; • results of any physical examination considered by the employer in connection with a personnel action; and • any advertisements or notices relating to job openings, promotions, training programs, or opportunities to work overtime.[99]	
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.[100]	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.[101]	At least 1 year from the date the records were made, or from the date of the personnel action involved, whichever is later.
Title VII & the Americans with Disabilities Act (ADA): Complaints of Discrimination	*When a charge of discrimination has been filed or an action brought against the employer, it must:* • make and keep such records relevant to the determination of whether unlawful employment practices have been or are being committed, including personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person; and • retain application forms or test papers completed by unsuccessful applicants or candidates for the position.[102]	Until final disposition of the charge or action (*i.e.*, until the statutory period for bringing an action has expired or, if an action has been brought, the date the

[99] 29 C.F.R. § 1627.3(b).

[100] 29 C.F.R. § 1627.3(b).

[101] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[102] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
		litigation is terminated).
Title VII & the Americans with Disabilities Act (ADA): Other	An employer must keep and maintain its Employer Information Report (EEO-1).[103]	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.[104]	At least 3 years following the date on which the polygraph examination was conducted.
Employee Retirement Income Security Act (ERISA)	Employers that sponsor an ERISA-qualified plan must maintain records that provide in sufficient detail the information from which any plan description, report, or certified information filed under ERISA can be verified, explained, or checked for accuracy and completeness. This includes vouchers, worksheets, receipts, and applicable resolutions.[105]	At least 6 years after documents are filed or would have been filed but for an exemption.

[103] 29 C.F.R. § 1602.7.

[104] 29 U.S.C. §§ 2001 *et seq.*; 29 C.F.R. § 801.30.

[105] 29 U.S.C. § 1027.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Equal Pay Act	Covered employers must maintain the records required to be kept by employers under the Fair Labor Standards Act (29 C.F.R. part 516).[106]	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.[107]	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; • total additions to or deductions from wages paid each pay period, including employee purchase orders or wage assignments; • total wages paid each pay period;	3 years from the last day of entry.

[106] 29 C.F.R. § 1620.32(a).

[107] 29 C.F.R. § 1620.32(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• date of payment and the pay period covered by the payment; • records of retroactive payment of wages, including the amount of such payment to each employee, the period covered by the payment, and the date of the payment; and • for employees working on a fixed schedule, the schedule of daily and weekly hours the employee normally works (instead of hours worked each day and each workweek).[108] 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.[109]	
Fair Labor Standards Act (FLSA): White Collar Exemptions	*For bona fide executive, administrative, and professional employees, and outside sales employees (e.g., white collar employees) the following information must be maintained:* • full name and any identifying symbol used in place of name on time or payroll records; • home address with zip code;	3 years from the last day of entry.

[108] 29 C.F.R. §§ 516.2, 516.5.

[109] 29 C.F.R. § 516.28.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• 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.[110]	
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.[111]	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.[112]	At least 2 years from the date of last entry.
Family and Medical Leave Act (FMLA)	*Covered employers must make, keep, and maintain records pertaining to their compliance with the FMLA, including:* • basic payroll and identifying employee data, including name, address, and occupation; • rate or basis of pay and terms of compensation; • daily and weekly hours per pay period;	At least 3 years.

[110] 29 C.F.R. §§ 516.2, 516.3. Presumably the regulation's reference to "prerequisites" is an error and should refer to "perquisites."

[111] 29 C.F.R. § 516.5.

[112] 29 C.F.R. § 516.6.

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

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	FLSA) an employer does not need to keep a record of actual hours worked, provided that: • FMLA eligibility is presumed for any employee employed at least 12 months; and • with respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written, maintained record. *Medical records also must be retained.* Specifically, records and documents relating to certifications, re-certifications, or medical histories of employees or employees' family members, created for purposes of FMLA, must be maintained as confidential medical records in separate files/records from the usual personnel files. If the ADA is also applicable, such records must be maintained in conformance with ADA-confidentially requirements (subject to exceptions). If the Genetic Information Nondiscrimination Act of 2008 (GINA) is applicable, records and documents created for purposes of FMLA containing family medical history or genetic information as defined in GINA must be maintained in accordance with the confidentiality requirements of Title II of GINA.[113]	
Federal Insurance Contributions Act (FICA)	*Employers must keep FICA records, including:* • copies of any return, schedule, or other document relating to the tax; • records of all remuneration (cash or otherwise) paid to employees for employment services. The records must show with respect to each employee receiving such remuneration: ▪ name, address, and account number of the employee and additional information when the employee does not provide a Social Security card; ▪ total amount and date of each payment of remuneration (including any sum withheld as tax or for any other reason) and the period of services covered by such payment;	At least 4 years after the date the tax is due or paid, whichever is later.

[113] 29 U.S.C. § 2616; 29 C.F.R. § 825.500.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	▪ amount of each such remuneration payment that constitutes wages subject to tax; ▪ amount of employee tax, or any amount equivalent to employee tax, collected with respect to such payment, and, if collected at a time other than the time such payment was made, the date collected; and ▪ if the total remuneration payment and the amount thereof which is taxable are not equal, the reason for this; • the details of each adjustment or settlement of taxes under FICA; and • records of all remuneration in the form of tips received by employees, employee statements of tips under section 6053(a) (unless otherwise maintained), and copies of employer statements furnished to employees under section 6053(b).[114]	
Immigration	Employers must retain all completed Form I-9s.[115]	3 years after the date of hire or 1 year following the termination of employment, whichever is later.
Income Tax: Accounting Records	*Any taxpayer required to file an income tax return must maintain accounting records that will enable the filing of tax returns correctly stating taxable income each year, including:* • regular books of account or records, including inventories, sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown by such person in any return of such tax or information.[116]	Required to be maintained for "so long as the contents [of the records] may become material in the administration of any internal revenue law;" this could be as long as 15 years in some cases.

[114] 26 C.F.R. §§ 31.6001-1, 31.6001-2.

[115] 8 C.F.R. § 274a.2.

[116] 26 U.S.C. § 3402; 26 C.F.R. § 1.6001-1.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Income Tax: Employee Payment Records	*Employers are required to maintain records reflecting all remuneration paid to each employee, including:* • employee's name, address, and account number; • total amount and date of each payment; • the period of services covered by the payment; • the amount of remuneration that constitutes wages subject to withholding; • the amount of tax collected and, if collected at a time other than the time the payment was made, the date collected; • an explanation for any discrepancy between total remuneration and taxable income; • the fair market value and date of each payment of noncash remuneration for services performed as a retail commissioned salesperson; and • other supporting documents relating to each employee's individual tax status.[117]	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.[118]	As long as it is in effect and at least 4 years thereafter.
Unemployment Insurance	*Employers are required to maintain all relevant records under the Federal Unemployment Tax Act, including:* • total amount of remuneration paid to employees during the calendar year for services performed; • amount of such remuneration which constitutes wages subject to taxation; • amount of contributions paid into state unemployment funds, showing separately the payments made and not deducted from the remuneration of its employees, and payments made and deducted or to be deducted from employee remuneration; • information required to be shown on the tax return and the extent to which the employer is liable for the tax; • an explanation for any discrepancy between total remuneration paid and the amount subject to tax; and • the dates in each calendar quarter on which each employee performed services not in the course of the	At least 4 years after the later of the date the tax is due or paid for the period covered by the return.

[117] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

[118] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	employer's trade or business, and the amount of the cash remuneration paid for those services.[119]	
Workplace Safety / the Fed-OSH Act: Exposure Records	*Employers must preserve and retain employee exposure records, including:* • environmental monitoring or measuring of a toxic substance or harmful physical agent, including personal, area, grab, wipe, or other form of sampling, as well as related collection and analytical methodologies, calculations, and other background data relevant to an interpretation of the results obtained; • biological monitoring results which directly assess the absorption of a toxic substances or harmful physical agent by body specimens; and • Material Safety Data Sheets (MSDSs), or in the absence of these documents, a chemical inventory or other record reveling the identity of a toxic substances or harmful physical agent and where and when the substance or agent was used. *Exceptions to this requirement include:* • background data to workplace monitoring need only be retained for 1 year provided that the sampling results, collection methodology, analytic methods used, and a summary of other background data is maintained for 30 years; • MSDSs need not be retained for any specified time so long as some record of the identity of the substance, where it was used and when it was used is retained for at least 30 years; and • biological monitoring results designated as exposure records by a specific Fed-OSH Act standard should be retained as required by the specific standard.[120]	At least 30 years.
Workplace Safety / the Fed-OSH Act: Medical Records	*Employers must preserve and retain "employee medical records," including:* • medical and employment questionnaires or histories; • results of medical examinations and laboratory tests;	Duration of employment plus 30 years.

[119] 26 C.F.R. § 31.6001-4.

[120] 29 C.F.R. § 1910.1020(d).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• medical opinions, diagnoses, progress notes, and recommendations; • first aid records; • descriptions of treatments and prescriptions; and • employee medical complaints. *"Employee medical record" does not include:* • physical specimens; • records of health insurance claims maintained separately from employer's medical program; • records created solely in preparation for litigation that are privileged from discovery; • records concerning voluntary employee assistance programs, if maintained separately from the employer's medical program and its records; and • first aid records of one-time treatment which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job, if made on-site by a nonphysician and maintained separately from the employer's medical program and its records.[121]	
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.[122]	At least 30 years.
Workplace Safety: Injuries and Illnesses	*Employers must preserve and retain records of employee injuries and illnesses, including:* • OSHA 300 Log; • the privacy case list (if one exists); • the Annual Summary; • OSHA 301 Incident Report; and • old 200 and 101 Forms.[123]	5 years following the end of the calendar year that the record covers.

[121] 29 C.F.R. § 1910.1020(d).

[122] 29 C.F.R. § 1910.1020(d).

[123] 29 C.F.R. §§ 1904.33, 1904.44.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Additional record-keeping requirements apply to government contractors. The list below, while nonexhaustive, highlights some of these obligations.		
Affirmative Action Programs (AAP)	*Contractors required to develop written affirmative action programs must maintain:* • current AAP and documentation of good faith effort; and • AAP for the immediately preceding AAP year and documentation of good faith effort.[124]	Immediately preceding AAP year.
Equal Employment Opportunity: Personnel & Employment Records	*Government contractors covered by Executive Order No. 11246 and those required to provide affirmative action to persons with disabilities and/or disabled veterans and veterans of the Vietnam Era must retain the following records:* • records pertaining to hiring, assignment, promotion, demotion, transfer, lay off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship; • other records having to do with requests for reasonable accommodation, the results of any physical examination, job advertisements and postings, applications, resumes; and • any and all expressions of interest through the internet or related electronic data technologies as to which the contractor considered the individual for a particular position, such as on-line resumes or internal resume databases, records identifying job seekers contacted regarding their interest in a particular position, regardless of whether the individual qualifies as an internet applicant under 41 C.F.R. § 60–1.3, tests and test results, and interview notes; ▪ for purposes of record keeping with respect to internal resume databases, the contractor must maintain a record of each resume added to the database, a record of the date each resume was added, the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used and the date of the search;	3 years recommended; regulations state "not less than two years from the date of the making of the record or the personnel action involved, whichever occurs later." If the contractor has fewer than 150 employees or does not have a contract of at least $150,000, the minimum retention period is one year from the date of making the record or the personnel action, whichever occurs later.

[124] 41 C.F.R. § 60-1.12(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	▪ for purposes of record keeping with respect to external resume databases, the contractor must maintain a record of the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used, the date of the search, and the resumes of job seekers who met the basic qualifications for the particular position who are considered by the contractor). *Additionally, for any record the contractor maintains pursuant to 41 C.F.R. § 60-1.12, it must be able to identify:* • gender, race, and ethnicity of each employee; and • where possible, the gender, race, and ethnicity of each applicant or internet applicant.[125]	
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.[126]	Until final disposition of the complaint, compliance review or action.
Minimum Wage Under Executive Orders Nos. 13658 (contracts entered into on or after January 1, 2015), 14026 (contracts entered into on or after January 30, 2022)	*Covered contractors and subcontractors performing work must maintain for each worker:* • name, address, and Social Security number; • occupation(s) or classification(s); • rate or rates of wages paid; • number of daily and weekly hours worked; • any deductions made; and • total wages paid. These records must be available for inspection and transcription by authorized representatives of the Wage and Hour Division (WHD) of the U.S. Department of Labor.	3 years.

[125] 41 C.F.R. §§ 60-1.12, 60-300.80, and 60-741.80.

[126] 41 C.F.R. §§ 60-1.12, 60-741.80.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	The contractor must also permit authorized representatives of the WHD to conduct interviews with workers at the worksite during normal working hours.[127]	
Paid Sick Leave Under Executive Order No. 13706	*Contractors and subcontractors performing work subject to Executive Order No. 13706 must keep the following records:* • employee's name, address, and Social Security number; • employee's occupation(s) or classification(s); • rate(s) of wages paid (including all pay and benefits provided); • number of daily and weekly hours worked; • any deductions made; • total wages paid (including all pay and benefits provided) each pay period; • a copy of notifications to employees of the amount of accrued paid sick leave; • a copy of employees' requests to use paid sick leave (if in writing) or (if not in writing) any other records reflecting such employee requests; • dates and amounts of paid sick leave used by employees (unless a contractor's paid time off policy satisfies the EO's requirements, leave must be designated in records as paid sick leave pursuant to the EO); • a copy of any written responses to employees' requests to use paid sick leave, including explanations for any denials of such requests; • any records relating to the certification and documentation a contractor may require an employee to provide, including copies of any certification or documentation provided by an employee; • any other records showing any tracking of or calculations related to an employee's accrual and/or use of paid sick leave; • the relevant covered contract; • the regular pay and benefits provided to an employee for each use of paid sick leave; and • any financial payment made for unused paid sick leave upon a separation from employment intended to	During the course of the covered contract as well as after the end of the contract.

[127] 29 C.F.R. § 23.260.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	relieve a contractor from its reinstatement obligation.[128]	
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.[129]	At least 3 years after the work.
Service Contract Act	*Service Contract Act contractors or subcontractors must maintain the following records with respect to each employee:* • name, address, and Social Security number; • work classification; • rates of wage; • fringe benefits; • total daily and weekly compensation; • the number of daily and weekly hours worked; • any deductions, rebates, or refunds from daily or weekly compensation; • list of wages and benefits for employees not included in the wage determination for the contract; • any list of the predecessor contractor's employees which was furnished to the contractor by regulation; and	At least 3 years from the completion of the work records containing the information.

[128] 29 C.F.R. § 13.25.

[129] 29 C.F.R. § 5.5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• a copy of the contract.[130]	
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.[131]	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: Apprenticeship & Training	*Employers that participate in an apprenticeship or training program must keep:* • a list of applicants, according to race, national origin, sex, and age; and • a list of requests for reasonable accommodation by persons with disabilities.[132] The lists must be maintained in chronological order.	2 years.
Fair Employment Practices: Personnel Records	*All employers must maintain employment records, including:* • requests for reasonable accommodation; • application forms; and	1 year from the date of making the record or taking the personnel action involved, whichever is later.

[130] 29 C.F.R. § 4.6.

[131] 41 C.F.R. § 50-201.501.

[132] 104 KY. ADMIN. REGS. 1:070.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• other records relating to hiring, promotion, demotion, transfer, layoff, termination, and terms of compensation.[133]	
Fair Employment Practices: Complaint of Discrimination	*Employers that have received a complaint of discrimination must preserve all "records relevant to the determination," which includes:* • "personnel or employment records relating to the complainant;" • personnel or employment records concerning "other employees holding positions similar to that held or sought by the complainant;" and • application forms or test papers completed by the complainant and other applicants for the same position.[134]	Until final disposition of the complaint.
Unemployment Compensation	*All employing units must keep true and accurate records, for all workers, including:* • name and Social Security number; • wages paid, showing separately cash payments, the reasonable cash value of noncash payments, date on which payments were made, and pay period during which the services so remunerated were performed; • total wages payable for each calendar quarter; • date of hire, rehire, or return to work; and • date of separation from covered employment; *In addition to the above, employers must maintain records, for each worker, covering each 7-day period*: • amount of wages earned; • number of hours worked; • number of hours of additional work available which was not accepted; and • rate of pay for additional work. *All employing units must also keep records for each pay period, including:* • the beginning and ending date of the pay period; • total amount of wages paid for covered employment in the pay period; and	Not less than 6 years; except for the subset of records for each worker covering a 7-day period, which must be kept for not less than 2 years.

[133] KY. REV. STAT. ANN. § 344.250; 104 KY. ADMIN. REGS. 1:030.

[134] 104 KY. ADMIN. REGS. 1:030.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• largest number of workers in covered employment in any one day of each calendar week.[135]	
Wages, Hours & Payroll	*All employers must keep and maintain payroll records, which must include for each employee:* • full name, and any identifying symbol used in place of name on payroll records; • Social Security number; • home address, including zip code; • date of birth, if under 18; • gender and occupation; • time of day, and day of week, on which the employee's workweek begins; • hours worked each workday and each work week; • regular rate of pay and total straight-time earnings for the workweek; • total overtime compensation for the workweek; • total additions and deductions from wages; • total wages paid each pay period and date of payment; and • records of any retroactive payments made.[136] If an employer's employees all have a workweek beginning at the same time on the same day, the employer may use a single notation of the time and day of the beginning of the workweek for the entire workforce. However, if an employee or group of employees has a workweek beginning or ending at different times, the employer must keep separate notation for them.[137]	At least one year after entry.
Workers' Compensation	*All covered employers must keep records of all injuries, fatal or otherwise, received by employees in the course of business. Records must include:* • name, nature, and location of the business of the employer; • name, age, sex, wages, and occupation of the injured employee; • date and hour of the accident causing the injury; and	None specified.

[135] KY. REV. STAT. § 341.190(1); 787 KY. ADMIN. REGS. 1:180(1), (2).

[136] KY. REV. STAT. ANN. § 337.320; 803 KY. ADMIN. REGS. 1:068.

[137] 803 KY. ADMIN. REGS. 1:068.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• the nature and cause of the injury.[138]	
Workplace Safety: Hazardous Communication	All employers must maintain records of their activities monitoring any employee exposure to toxic substances or harmful physical agents in the workplace.[139]	None specified. See federal requirement.
Workplace Safety: Illnesses & Injuries	*All employers must comply with Fed-OSHA's requirements, including maintenance of:* • OSHA 300 Log; • privacy case list (if one exists); • annual summary; and • OSHA 301 incident report.[140]	5 years following the end of the calendar year that the record covers.

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*

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

3.2 Privacy Issues for Employees

3.2(a) *Background Screening of Current Employees*

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

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

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

As noted in 1.3, Kentucky places no statutory restrictions on a private employer's use of criminal records for current employees. Moreover, there are no statutory restrictions on an employer's access to employee credit history or social media, or on an employer's use of polygraph examinations.

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).

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[138] KY. REV. STAT. ANN. § 342.038.

[139] 803 KY. ADMIN. REGS. 2:062.

[140] 803 KY. ADMIN. REG. 2:181; 29 C.F.R. § 1904.

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

Although Kentucky does not specifically regulate drug testing of employees by statute, Kentucky employers are encouraged to adopt a drug-free workplace program. An employer that voluntarily implements a Drug-Free Workplace Program will be granted a 5% discount on employee compensation insurance premium.[141]

Drug and alcohol testing during employment is permissible under certain circumstances. Circumstances that warrant drug and alcohol testing of employees include: (a) reasonable suspicion; (b) post-accident investigation; and (c) post-rehabilitation evaluation. All records of drug and alcohol tests must be kept highly confidential.[142] For more information on drug and alcohol testing of employees, see 1.3(e)(ii).

3.2(c) *Marijuana Laws*

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

Under federal law, it is illegal to possess or use marijuana.[143]

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

Medical Marijuana: Effective January 1, 2025, Kentucky law legalizes the medical use of cannabis by qualified patients with specified medical conditions.[144] Qualified patients, including visiting patients, must register to become cardholders authorized to purchase and use cannabis. However, employers may establish policies and procedures to limit the use of cannabis in the workplace, and an employer cannot be penalized for employing a cardholder.[145]

Specifically, employers are not required to permit or accommodate the use, consumption, possession, transfer, display, transportation, distribution, sale, or growing of medicinal cannabis in the workplace, nor on any property that the employer occupies, owns, or controls. Employers may include provisions in employment contracts that prohibit the use of medicinal cannabis by employees. Employers may implement policies promoting workplace health and safety by restricting the use of medicinal cannabis by employees, particularly when using equipment, machinery, or power tools that the employer believes the use by a cardholding employee would pose an unreasonable safety risk.[146]

Employers may establish a drug testing policy, drug-free workplace policy, or zero-tolerance drug policy and are authorized to make a good faith determination of impairment of cardholding employees. A good faith determination of impairment must include behavioral assessments of impairment and a secondary step of testing a cardholding employee for the presence of cannabis by an established method.[147] If an employer determines that the employee is impaired by the use of cannabis from the behavioral

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[141] KY. REV. STAT. ANN. § 304.13-167.

[142] 803 KY. ADMIN. REGS. 25:280.

[143] 21 U.S.C. §§ 811-12, 841 *et seq*.

[144] S.B. 47 (Ky. 2023).

[145] S.B. 47 § 7 (Ky. 2023).

[146] S.B. 47 § 7 (Ky. 2023).

[147] Note that a qualified patient will not be considered to be under the influence of medicinal cannabis solely because of the presence of tetrahydrocannabinol metabolites, including the cannabinoid carboxy THC (also known as THC-COOH). S.B. 47 § 2(2)(c) (Ky. 2023).

assessment and testing, the burden of proving non-impairment shifts to the employee to refute the employer's findings.[148]

Employees are not afforded a private cause of action against the employer for wrongful discharge or discrimination based on the medicinal cannabis law. An employee discharged from employment for consuming medicinal cannabis in the workplace, working while under the influence of medicinal cannabis, or testing positive for a controlled substance will not be eligible to receive state unemployment benefits if the employee's actions were in violation of an employment contract or established personnel policy.[149] Moreover, a government medical assistance program, private health insurer or workers' compensation carrier, or a self-funded employer providing workers' compensation benefits is not required to reimburse a cardholder for costs associated with the use of medicinal cannabis.[150]

Limited Medical Marijuana: Certain cannabinoid and cannabidiol products are permitted under Kentucky's controlled substances statute.[151] A federal court granted summary judgment to an employer on a former employee's wrongful termination claim. The judge held that Kentucky Revised Statute section 218A.010, which provides that marijuana does not include cannabidiol, when transferred, dispensed, or administered per written orders of a physician practicing at a hospital or associated clinic affiliated with a Kentucky public university having a college or school of medicine, did not "discuss[] an employee's ability to use CBD oil outside of the workplace without consequences" or "prohibit[] an employer from terminating an employee for using CBD oil."[152] Additionally, it held "there is no indication that the Kentucky General Assembly intended to prevent South Kentucky from terminating Amox for failing a drug test stemming from his use of CBD oil."[153]

3.2(d) *Data Security Breach*

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

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

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

[148] S.B. 47 § 7 (Ky. 2023).

[149] S.B. 47 § 7 (Ky. 2023).

[150] S.B. 47 § 29 (Ky. 2023).

[151] KY. REV. STAT. ANN. § 218A.010. In addition, on November 15, 2022, Kentucky's governor issued Executive Order 2022-798, which, for certain qualifying reasons, decriminalizes medical marijuana.

[152] *Amox v. S. Ky. Rural Elec. Coop. Corp.*, 2020 WL 1542341 (W.D. Ky. Mar. 31, 2020).

[153] 2020 WL 1542341.

- 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.[154]

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.[155]

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

Kentucky law requires that when a covered entity becomes aware of a computer security breach involving unencrypted personally identifiable information, they must notify the affected class.[156]

Covered Entities & Information. All *information holders* are covered, which is defined to include any person or business that conducts business in Kentucky, except for those subject to the Gramm-Leach Bliley Act or any Kentucky agency, local government, or political subdivision.[157] Under the statute, *personally identifiable information* means:

> an individual's first name or first initial and last name in combination with any one or more of the following data elements, when the name or data element is not redacted:
>
> 1. Social Security number;
> 2. driver's license number; or
> 3. account number or credit or debit card number, in combination with any required security code, access code, or password to permit access to an individual's financial account.[158]

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

- written notice;
- electronic notice, if it is compliant with the federal e-sign act; or
- substitute notice if the covered entity demonstrates that:
  - the cost of providing notice would exceed $250,000;
  - the affected class of persons to be notified exceeds 500,000; or

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[154] 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.

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

[156] KY. REV. STAT. ANN. § 365.732.

[157] KY. REV. STAT. ANN. § 365.732(8).

[158] KY. REV. STAT. ANN. § 365.732(1)(c).

- the information holder does not have sufficient contact information.[159]

Substitute notice must consist of all of the following:

- email notice when the information holder has an email address for the subject persons;
- conspicuous posting of the notice on the website of the covered entity if the information holder maintains a website; and
- notification by statewide media.[160]

Timing of Notice. Notice must be given in the most expedient time possible and without unreasonable delay. However, the notification may be delayed if law enforcement indicates notification would impede a criminal investigation.[161]

Additional Provisions. If more than 1,000 individuals will be notified of a security breach, then the information holder must also notify all nationwide consumer reporting agencies of the timing, distribution, and content of the notices.[162]

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.[163] 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.[164]

Tipped employees are paid differently. If an employee earns sufficient tips, an employer may take a maximum tip credit of up to $5.12 per hour. Therefore, the minimum cash wage that a tipped employee must be paid is $2.13 per hour. Note that if an employee does not make $5.12 in tips per hour, an employer must make up the difference between the wage actually made and the federal minimum wage

[159] KY. REV. STAT. ANN. § 365.732(5).

[160] KY. REV. STAT. ANN. § 365.732(5)(c).

[161] KY. REV. STAT. ANN. § 365.732(3), (4).

[162] KY. REV. STAT. ANN. § 365.732(7).

[163] 29 U.S.C. § 218(a).

[164] 29 U.S.C. § 206.

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.[165]

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.[166]

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

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

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

The minimum wage in Kentucky is currently $7.25 per hour for most nonexempt employees. Kentucky law requires payment of at least the federal minimum wage.[168]

3.3(b)(ii) *Tipped Employees*

Tipped employees are paid differently. Where the employer and employee are subject to state law and the FLSA, if an employee earns tips, an employer may take a maximum tip credit of up to $5.12 per hour for wait staff. A tipped employee must receive a minimum cash wage of $2.13 per hour.[169] Note that if a member of the wait staff does not make $5.12 in tips per hour, the employer must make up the difference between the wage actually earned and the minimum wage, which is currently $7.25. 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.[170]

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

Kentucky's minimum wage provisions do not apply to:

- employees of retail stores, service industries, hotels, motels, and restaurant operations whose average annual gross volume of sales is less than $95,000 for the five preceding years exclusive of excise taxes at the retail level;
- any individual employed in agriculture;
- any individual employed in a *bona fide* executive, administrative, supervisory, or professional capacity, or in the capacity of outside salesman or outside collector;
- any individual employed by the United States;
- any individual employed in domestic service in a private home;

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165 29 U.S.C. §§ 203, 206.

166 29 U.S.C. § 3(m)(2)(B).

167 29 U.S.C. § 207.

168 KY. REV. STAT. ANN. § 337.275.

169 KY. REV. STAT. ANN. § 337.275.

170 KY. REV. STAT. ANN. § 337.275.

- an individual employed in domestic service in an employer's home, if they are the sole domestic servant regularly employed;
- any individual classified and given a certificate by the state labor commissioner showing a status of learner, apprentice, worker with a disability, sheltered workshop employee, and student;
- any individual employed as a babysitter in an employer's home, or an individual employed as a companion by a sick, convalescing, or elderly person or by the person's immediate family, and whose principal duties do not include housekeeping;
- any individual engaged in the delivery of newspapers to consumers;
- certain emergency employees who receive overtime pay rates;
- any employee of an organized nonprofit camp, religious, or nonprofit educational conference center, if it does not operate for more than seven months in any calendar year;
- any employee whose function is to provide 24-hour residential care on the employer's premises in a parental role to children who are primarily dependent, neglected, and abused and who are in the care of private, nonprofit childcaring facilities licensed by the Cabinet for Health and Family Services; or
- any individual whose function is to provide 24-hour residential care in the individual's own home as a family caregiver and who is approved to provide family caregiver services to an adult with a disability through a contractual relationship with a community board for mental health or individuals with an intellectual disability, or is certified or licensed by the Cabinet for Health and Family Services to provide adult foster care.[171]

3.3(c) *State Guidelines on Overtime Obligations*

Kentucky employers must pay employees one-and-a-half times their regular rate for all hours worked over 40 in a week.[172] In addition, an employer that permits an employee to work seven days in any one workweek must pay time and one-half for all hours worked on the seventh day of work. However, an employer may credit the premium paid to employees for work on the seventh day toward meeting its overtime pay obligations.[173] The requirement to pay premium pay for a seventh day of work does not apply to certain types of employees.[174]

3.3(d) *State Guidelines on Overtime Exemptions*

Before turning to some of the overtime exemptions under Kentucky law, it is important to reiterate that federal wage and hour laws do not preempt state laws[175] and that the law most beneficial to the employee will apply. Therefore, even if an employee meets one of the exemptions discussed below under state law, if they do not meet the requirements of the federal exemption (or vice versa), including the salary thresholds, then the employee will not qualify as exempt.

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171 KY. REV. STAT. ANN. § 337.010(2)(a).

172 KY. REV. STAT. ANN. § 337.285.

173 KY. REV. STAT. ANN. § 337.050(1).

174 KY. REV. STAT. ANN. § 337.050(2).

175 29 U.S.C. § 218(a).

The Kentucky overtime provisions do not apply to the following categories of employees:

- employees of retail stores engaged in work connected with selling, purchasing, and distributing goods;
- employees of restaurant, hotel, and motel operations;
- employees as defined and exempted from the overtime provisions of the FLSA;
- sales persons, parts persons, and mechanics engaged in servicing or selling automobiles, trailers, boats, or aircraft in certain circumstances;
- drivers employed by an employer that are engaged in operating a taxi cab;
- employees whose function is to provide 24-hour residential care on the employer's premises in a parental role to children who are primarily dependent, neglected, and abused and who are in the care of private nonprofit childcaring facilities licensed by the Cabinet for Health and Family Services; or
- any individual who is employed by a third-party employer or agency other than the family or household using their services to provide in-home companionship services for a sick, convalescing, or elderly person.[176]

3.3(d)(i) *Executive Exemption*

Under Kentucky law, an employee is covered by the executive exemption if they meet all of the following requirements:

- paid on a salary basis at least $684 per week, exclusive of board, lodging, or other facilities ($1,368 biweekly; $1,482 semi-monthly; $2,964 monthly); and
- meet the criteria established in title 29, sections 541.100(a)(2) – (a)(4), 541.101 of the Code of Federal Regulations (Business Owner)..[177]

Kentucky also has an exemption for individuals employed in a "*bona fide* supervisory capacity." An employee is covered by the supervisor exemption if they meet all the following requirements:

- paid on a salary basis at least $684 per week, exclusive of board lodging, or other facilities ($1,368 biweekly; $1,482 semi-monthly; $2,964 monthly); and
- meet the criteria established in title 29, section 541.104 of the Code of Federal Regulations.[178]

3.3(d)(ii) *Administrative Exemption*

An employee is covered by the administrative exemption in Kentucky if they meet all the following requirements:

- paid on a salary or fee basis at least $684 per week, exclusive of board, lodging, or other facilities ($1,368 biweekly; $1,482 semi-monthly; $2,964 monthly); and

[176] KY. REV. STAT. ANN. § 337.285(2); 803 KY. ADMIN. REGS. 1:076(4).

[177] 803 KY. ADMIN. REGS. 1:071(2).

[178] 803 KY. ADMIN. REGS. 1:071.

- meet the criteria established in title 29, sections 541.200(a)(2) – (a)(3) of the Code of Federal Regulations. [179]

3.3(d)(iii) *Professional Exemption*

Under Kentucky law, an employee is covered by the professional exemption if they meet all the following requirements:

- paid on a salary or fee basis at least $684 per week, exclusive of board, lodging, or other facilities ($1,368 biweekly; $1,482 semi-monthly; $2,964 monthly); and
- meet the criteria established in title 29, section 541.300(a)(2) of the Code of Federal Regulations.[180]

The state also recognizes exemptions for both learned professionals and creative professionals, as established in title 29, section 541.301 and 541.302 of the Code of Federal Regulations.[181] The salary requirements do not apply to licensed attorneys and doctors, or to teachers.[182]

3.3(d)(iv) *Computer Employee Exemption*

An employee is covered by the computer professional exemption in Kentucky if they are either:

- paid a salary of not less than $684 per week ($1,368 biweekly; $1,482 semi-monthly; $2,964 monthly); or
- paid on an hourly basis of $27.63 per hour.[183]

The exemption applies to any computer employee established in title 29, sections 541.400(b) and 541.402 of the Code of Federal Regulations.[184] While job titles are not determinative of whether an employee is covered by the exemption, the regulations do state that computer system analysts, computer programmers, software engineers, and other similarly skilled workers in the computer field are covered. Employees working in computer manufacture and repair are not covered by the exemption.[185]

3.3(d)(v) *Commissioned Sales Exemption*

Kentucky's overtime provisions do not apply to employees of retail stores "engaged in work connected with selling, purchasing, and distributing merchandise, wares, goods, articles, or commodities."[186]

3.3(d)(vi) *Outside Sales Exemption*

Kentucky's overtime provisions do not apply to an individual employed "in the capacity of outside salesman," which is defined as an employee:

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[179] 803 KY. ADMIN. REGS. 1:071(3).

[180] 803 KY. ADMIN. REGS. 1:071(4).

[181] 803 KY. ADMIN. REGS. 1:071.

[182] 803 KY. ADMIN. REGS. 1:071.

[183] 803 KY. ADMIN. REGS. 1:071.

[184] 803 KY. ADMIN. REGS. 1:071.

[185] 803 KY. ADMIN. REGS. 1:071.

[186] KY. REV. STAT. ANN. § 337.285.

- whose primary duty is making sales or obtaining orders or contracts for services or for the use of facilities for which consideration will be paid by the client or customer; and
- who is customarily and regularly engaged away from the employer's place or places of business in performing the employee's primary duty.[187]

Kentucky also recognizes an overtime exemption for "outside collectors." *Outside collector* means any employee who is employed for the purpose of and who is customarily and regularly engaged away from the employer's place or places of business and whose primary duty is:

- collecting money for goods or services previously or presently furnished by the employer; or
- collecting money for an account placed in the hands of the employer for collection.[188]

In determining an outside collector's primary duty, work performed incidental to and in conjunction with the employee's outside collection activities is regarded as exempt work. The salary requirements for most exempt employees do not apply to outside collector employees.[189]

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

Federal law contains no generally applicable rest period requirements for adults. Under the FLSA, rest periods of short duration, running from five to 20 minutes, must be counted as "hours worked" and must be paid.[191]

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.

[187] 803 KY. ADMIN. REGS. 1:071(6).

[188] 803 KY. ADMIN. REGS. 1:071(7).

[189] 803 KY. ADMIN. REGS. 1:071(7).

[190] 29 C.F.R. § 785.19.

[191] 29 C.F.R. § 785.18.

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.[192] 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.[193] 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.[194] Exemptions apply for smaller employers and air carriers.[195]

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.[196] Lactation is considered a related medical condition.[197] 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.[198] For more information on these topics, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

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

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

Meal Periods. Kentucky employers must provide a "reasonable period for lunch … as close to the middle of the employee's work shift as possible."[199] Employees cannot be required to take a lunch period sooner than three hours into the shift or later than five hours after their shift begins.[200]

Rest Periods. No employer shall require any employee to work without a rest period of at least 10 minutes during each four hours worked. This is in addition to the regularly scheduled lunch period. Rest periods must be paid.[201]

Exempt Employees. Employers covered under the federal Railway Labor Act are excluded from the meal and rest period requirements.[202] However, the meal and rest period requirements do apply to exempt

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192 29 U.S.C. § 218d.

193 29 U.S.C. § 218d(b)(2).

194 29 U.S.C. § 218d(a).

195 29 U.S.C. § 218d(c), (d).

196 42 U.S.C. § 2000gg–1.

197 29 C.F.R. § 1636.3.

198 29 C.F.R. § 1636.3.

199 KY. REV. STAT. ANN. § 337.355.

200 KY. REV. STAT. ANN. § 337.355.

201 KY. REV. STAT. ANN. § 337.365.

202 KY. REV. STAT. ANN. § 337.355; KY. REV. STAT. ANN. § 337.365.

employees. The statute does not define the term "employee." However, the accompanying regulation refers to the general wage and hour statutory definition, which defines the term as "any person employed by or suffered or permitted to work for an employer," and contains limited exceptions.[203]

A collective bargaining agreement will control when it provides for at least 10 minutes of rest for each four hours of work. If a collective bargaining agreement does not contain provisions allowing rest periods, the employer must allow a rest period of at least 10 minutes for each four hours worked.[204]

Meal Period Waiver. The meal period statute is not to be construed to negate any provision of a mutual agreement between the employee and employer.[205] Therefore, waivers are allowed.

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

Minors under 18 years of age cannot be required to work without a rest period of at least 10 minutes for each four hours worked. In addition, minors under 18 years of age may not work for more than five hours continuously without an interval of at least 30 minutes for a lunch period. Any period of less than 30 minutes is compensable work time.[206]

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

Any employer that violates the rest period provisions will be assessed a civil penalty of between $100 and $1,000.[207] There are no express penalties for violations of the meal period provisions.

Violations of the meal period requirements for minors are punishable by a civil penalty of between $100 and $1,000. Additionally, employers that continue to unlawfully employ minors after being notified by the state will be assessed a civil penalty of $100 for each day the violation continues. The unlawful employment of each minor is a separate and distinct offense.[208]

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

In Kentucky, a mother may breast feed her baby or express breast milk in any public or private location where she is otherwise authorized to be.[209] In addition, the Kentucky Pregnant Workers' Act requires employers of 15 or more employees to provide reasonable accommodations for any employee with limitations related to pregnancy, childbirth, or a related medical condition who requests an accommodation, including but not limited to the need to express breast milk.[210] *Related medical condition* includes but is not limited to lactation or the need to express breast milk for a nursing child.[211] *Reasonable*

[203] 803 KY. ADMIN. REGS. 1:067 (referring to KY. REV. STAT. ANN. § 337.010).

[204] KY. REV. STAT. ANN. § 337.365.

[205] KY. REV. STAT. ANN. § 337.355.

[206] KY. REV. STAT. ANN. § 339.270.

[207] KY. REV. STAT. ANN. § 337.990.

[208] KY. REV. STAT. ANN. § 339.990.

[209] KY. REV. STAT. ANN. § 211.755.

[210] KY. REV. STAT. ANN. §§ 344.030, 344.040.

[211] KY. REV. STAT. ANN. § 344.030.

accommodation includes but is not limited to providing a private space that is not a bathroom for expressing breast milk.[212]

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.[213] Therefore, courts and agency regulations have developed a body of law looking at whether an activity—such as on-call, training, or travel time—is or is not "work." In addition, the Portal-to-Portal Act of 1947 excluded certain preliminary and postliminary activities from "work time."[214]

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

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

In Kentucky, an employee must be paid for all time that they are "suffered or permitted to work."[215] Kentucky follows federal law in determining the requirements applicable to on-call time, travel time, and training time.[216]

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.[217] Additional latitude is also granted where minors are employed by their parents.

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[212] KY. REV. STAT. ANN. § 344.030.

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

[214] *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").

[215] KY. REV. STAT. ANN. § 337.010(1); 803 KY. ADMIN. REGS. 1:067(2).

[216] 803 KY. ADMIN. REGS. 1:067.

[217] 29 C.F.R. §§ 570.36, 570.50.

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

3.6(b) *State Guidelines on Child Labor*

Kentucky's statutes regulating minors in the workplace are very similar to the provisions of the FLSA. Kentucky's child labor laws apply to virtually all employment situations, regardless of the volume of sales, size of business, number of employees, or federal coverage. Unless there is a specific exemption for a particular situation, state law will apply.

Kentucky restricts the employment of persons under the age of 18 by age and by the type of job.

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

General Restrictions. The restrictions on employment of minors are roughly broken down by age and type of work. Table 9 summarizes the state restrictions on type of employment by age.

Table 9. State Restrictions on Type of Employment by Age

Age Range	Restrictions
Ages 16 to 18	Minors between the ages of 16 and 18 cannot work in occupations the U.S. Secretary of Labor deems hazardous, or at certain establishments involved in alcohol manufacturing, sales, etc.[219]
Ages 14 to 16	*Minors between the ages of 14 and 16 cannot perform the following types of work or occupations:* • manufacturing, mining, or processing occupations; • operation of hoisting apparatus or power-driven machinery; • operation of motor vehicles, or service as helpers on such vehicles; • public messenger service; • occupations in connection with transportation of property by rail, highway, air, water, pipeline, or other means; • warehousing and storage; • communications and public utilities; • construction; or • occupations the U.S. Labor Secretary deems hazardous to minors.[220] *Minors between the ages of 14 and 16 also cannot perform the following work in retail, food service, or gas stations:* • work in connection with maintenance or repair of the establishment, machines, or equipment;

[218] 29 C.F.R. § 570.6.

[219] KY. REV. STAT. ANN. § 339.220; 803 KY. ADMIN. REGS. 1:100(3).

[220] 803 KY. ADMIN. REGS. 1:100(2).

Table 9. State Restrictions on Type of Employment by Age	
Age Range	**Restrictions**
	• outside window washing that involves working from window sills, and all work requiring the use of ladders, scaffolds, or their substitutes; • cooking (except at soda fountains, lunch counters, snack bars, or cafeteria serving counters) and baking; • occupations that involve operating, setting up, adjusting, cleaning, oiling, or repairing power-driven food slicers and grinders, food choppers, and cutters, and bakery-type mixers; • work in freezers and meat coolers and preparing meats for sale; or • loading and unloading goods to and from trucks, railroad cars, or conveyors.[221] *However, minors between the ages of 14 and 16 are* permitted *to perform the following work in retail, food service, or gas stations:* • office and clerical work, including the operation of office machines; • cashiering, selling, modeling, artwork, work in advertising departments, window trimming, and comparative shopping; • price marketing and tagging by hand or by machine, assembling orders, packing, and shelving; • bagging and carrying out customer's orders; • errand and delivery work by foot, bicycle, and public transportation; • clean-up work (does not include the use of power-driven mowers, or cutters), including the use of vacuum cleaners and floor waxers, and grounds maintenance; • kitchen work and other work involved in preparing and serving food and beverages, including the operation of machines and devices used to perform work, including but not limited to dishwashers, toasters, dumb-waiters, popcorn poppers, milk shake blenders, and coffee grinders; • work in connection with cars and trucks if confined to dispensing gasoline and oil, courtesy service, washing, cleaning, and polishing; or • cleaning vegetables and fruits, and wrapping, sealing, labeling, weighing, pricing, and stocking goods if performed in areas physically separate from freezers and meat coolers.[222]
Under Age 14	Minors under age 14 cannot be employed, except in connection with a program supervised and sponsored by a school or school district.[223]

Restrictions on Selling or Serving Alcohol. In Kentucky, an employer with an alcoholic beverage license cannot employ minors under age 20 unless the person is at least 18 and under the supervision of a person age 20 or older. However, a person under age 20 may not have duties that include bartending.

[221] 803 KY. ADMIN. REGS. 1:100(2).

[222] 803 KY. ADMIN. REGS. 1:100(2).

[223] KY. REV. STAT. ANN. § 339.220.

Additionally, a person who is at least 18 may work in a warehouse of a wholesaler or distributor if there is an employee on the premises who is age 21 or older, and the employment does not include the sale or service of alcohol.[224]

Individuals aged 18 or 19 can work at businesses with restaurant and/or alcohol licenses if their duties are strictly confined to restaurant operations and do not involve handling, selling, or serving alcohol.[225] Minors under age 18 cannot work where alcohol is distilled, rectified, compounded, brewed, manufactured, bottled, sold for consumption, or dispensed, unless permitted by state alcohol control board rules. However, such minors may be employed in places where the sale of alcohol by the package is merely incidental to the main business actually conducted, or in a pool or billiard room.[226]

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

On school days, minors aged 16 and 17 cannot work:

- more than six hours per day, or 6.5 hours per day if a parent or guardian gives permission in writing;
- more than 30 hours per week; or
- between 10:30 P.M. (or 11:00 P.M. if a parent or guardian gives permission in writing) and 6:00 A.M. on days preceding a school day.[227]

However, such minors may work 40 hours per week with a parent or guardian's written permission and certification from their principal that they have at least a 2.0 grade point average.[228] Similarly, a minor may work 32.5 hours in any one week if a parent or guardian gives permission in writing to work between 6:00 a.m. and 11:00 p.m. on days preceding a school day. On nonschool days, minors aged 16 and 17 cannot work:

- more than eight hours a day; or
- between 1:00 A.M. and 6:00 A.M. on days preceding a nonschool day when school is in session.[229]

The above restrictions do not apply to minors who have graduated from high school.[230]

When school is in session, minors aged 14 and 15 cannot work:

- more than three hours in a day or eight hours on a nonschool day;
- 18 hours in a week;
- between 7:00 P.M. and 7:00 A.M.; or

[224] KY. REV. STAT. ANN. § 244.090.

[225] Ky. Op. Att'y Gen. 62-172.

[226] KY. REV. STAT. ANN. § 339.230.

[227] 803 KY. ADMIN. REGS. 1:100(3).

[228] 803 KY. ADMIN. REGS. 1:100(3).

[229] 803 KY. ADMIN. REGS. 1:100(3).

[230] 803 KY. ADMIN. REGS. 1:100(3).

- during school hours, with limited exceptions.[231]

When school is not in session, minors aged 14 and 15 cannot work more than eight hours in a day or more than 40 hours in a week. Between June 1 and Labor Day, such minors may work until 9:00 P.M. Special rules apply to minors enrolled in a school-supervised and administered work experience or work exploration program.[232]

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

Kentucky's child labor laws do not apply to the employment of minors by their own parents or guardians in occupations other than manufacturing, mining, or those deemed hazardous by the state labor department.[233]

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

Kentucky has no work permit requirement. Employers are required to maintain proof of age on file for each minor under 18 years of age. A copy of a birth certificate, a driver's license, or school identification is acceptable.[234]

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

In conjunction with the U.S. Department of Labor, the Kentucky Education and Labor Cabinet's Department of Workplace Standards is responsible for the administration and enforcement of Kentucky's child labor laws. The Department of Workplace Standards has the authority to enter and inspect at any time any place or establishment covered by the child labor laws, and to request access to age certificates kept on file by the employer and such other records as may aid in the enforcement of the laws. School directors of pupil personnel are likewise empowered to visit and inspect places where minors may be employed and must report any cases of employment that they find in violation to the Department of Workplace Standards.[235]

Anyone who employs or permits or suffers any minor to be employed or to work in violation of the Kentucky child labor laws may be assessed a civil penalty of not less than $100 nor more than $1,000. An employer that continues to employ a minor in violation of these laws after being notified by the Department of Workplace Standards will incur a civil penalty of $100 for each day the violation continues. The employment of any minor in violation of these laws will, with respect to each minor unlawfully employed, constitute a separate and distinct offense.[236]

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[231] 803 KY. ADMIN. REGS. 1:100(2).

[232] 803 KY. ADMIN. REGS. 1:100(2).

[233] KY. REV. STAT. ANN. § 339.210.

[234] KY. REV. STAT. ANN. § 339.450.

[235] KY. REV. STAT. ANN. § 339.450.

[236] KY. REV. STAT. ANN. § 339.990.

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).[237]

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

> The payment of wages through direct deposit into an employee's bank account is an acceptable method of payment, provided employees have the option of receiving payment by cash or check directly from the employer. As an alternative, the employer may make arrangements for employees to cash a check drawn against the employer's payroll deposit account, if it is at a place convenient to their employment and without charge to them.[238]

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.[239]

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.[240] 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.[241]

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

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[237] 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").

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

[239] 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.

[240] 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/.

[241] 12 C.F.R. § 1005.2(b)(3)(i)(A).

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.[242] As part of the disclosures, employees must: (1) receive a statement of pay card fees; (2) have ready access to a statement of all fees and related information; and (3) receive periodic statements of recent account activity or free and easy access to this information online. Under the prepaid rule, employees have limited responsibility for unauthorized charges or other unauthorized access, provided they have registered their payroll card accounts.[243]

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.[244]

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.[245]

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.

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[242] 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.

[243] 12 C.F.R. § 1005.18.

[244] *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.

[245] 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.

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.[246] Because the FLSA requires an employer to pay minimum wage and overtime premiums "free and clear," the employer must reimburse employees for expenses that are primarily for the benefit of the employer if those expenses would reduce the applicable required minimum wage or overtime compensation.[247] Accordingly, among other items, an employer may be required to reimburse an employee for expenses related to work uniforms,[248] tools and equipment,[249] and business transportation and travel.[250] 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.[251]

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;[252]

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[246] *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).

[247] 29 C.F.R. §§ 531.35, 531.36, and 531.37.

[248] 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.

[249] 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).

[250] 29 C.F.R. § 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c04.

[251] 29 C.F.R. § 778.217.

[252] 29 C.F.R. § 531.38.

- 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);[253]
- 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);[254]
- 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;[255]
- 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;[256] 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.[257]

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.[258]

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[253] 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*.

[254] 29 C.F.R. § 531.40.

[255] 29 C.F.R. § 531.40.

[256] 29 U.S.C. § 203. However, the cost cannot be treated as wages if prohibited under a collective bargaining agreement.

[257] 29 C.F.R. § 825.213.

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

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.[259] 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.[260]

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.[261]

During overtime workweeks, deductions can be made on the same basis in overtime weeks as in non-overtime weeks if the amount deducted does not exceed the amount which could be deducted if the employee had not worked overtime during the workweek. Deductions that exceed this amount for articles that are not "facilities" are prohibited. There is no limit on the amount that can be deducted for qualifying deductions for "board, lodging, or other facilities." However, deductions made only in overtime weeks, or increases in prices charged for articles or services during overtime workweeks will be scrutinized to determine whether they are manipulations to evade FLSA overtime requirements.[262]

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.[263]

3.7(b) *State Guidelines on Wage Payment*

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

Authorized Instruments. In Kentucky, wages may be paid in cash, check, payroll card, or mandatory direct deposit, provided there is no fee. Paychecks must be convertible into cash on demand at full face value, subject to lawful deductions.[264]

Direct Deposit. Kentucky's wage payment statute provides that wages are payable by direct deposit, as long as they are convertible into cash on demand at full face value.[265] The law does not explicitly address

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[259] 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.

[260] 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.

[261] 29 C.F.R. § 531.36.

[262] 29 C.F.R. § 531.37.

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

[264] KY. REV. STAT. ANN. § 337.010(1)(c)(1).

[265] KY. REV. STAT. ANN. § 337.010(1)(c)(1).

whether an employer can require direct deposit. However, based on guidance from the Kentucky Education and Labor Cabinet, an employer can require direct deposit if employees have the ability to withdraw their entire net pay without having to pay a fee to the financial institution.[266]

Payroll Debit Card. Kentucky employers may pay their employees using a payroll debit card, subject to certain exceptions regarding card account fees. An employer cannot charge an employee an activation fee to use a payroll card. An employer must allow the employee to make at least one withdrawal per pay period for any amount up to and including the full account balance, without charge.[267]

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

Every employer doing business in Kentucky must, at least semi-monthly, pay its employees all wages or salary earned not more than 18 days prior to the date of that payment. Any employee who is absent on payday, or who, for any other reason, is not paid at that time, must be paid within six days of making a demand for payment.[268]

An employer may pay the following employees on a monthly basis: individuals employed in a *bona fide* executive, administrative, supervisory, or professional capacity, or in the capacity of outside salesperson, or as an outside collector.[269]

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

An employee who is discharged from employment or who leaves employment voluntarily must be paid in full no later than the next normal pay period following the date of separation, or 14 days following that date, whichever occurs last.[270]

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

Kentucky employers with 10 or more employees must provide to each employee, at the time of payment, a statement showing the amount of each deduction from wages and the general purpose for which each deduction was made.[271]

An employer is permitted to issue wage statements on paper or electronically. If an employer provides an employee with an electronic statement, the employer must also provide access to a computer and printer for the employee to review and print the statement.[272]

3.7(b)(v) *Wage Transparency*

Kentucky 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.

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[266] Kentucky Education and Labor Cabinet, *Frequently Asked Questions*.

[267] KY. REV. STAT. ANN. § 337.010.

[268] KY. REV. STAT. ANN. § 337.010.

[269] KY. REV. STAT. ANN. §§ 337.010, 337.020.

[270] KY. REV. STAT. ANN. § 337.055.

[271] KY. REV. STAT. ANN. § 337.070.

[272] KY. REV. STAT. ANN. § 337.070.

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

Changing Regular Paydays. There is no requirement in Kentucky that an employer notify its employees regarding a change in payday. However, it is recommended that employees receive advance written notice before a change occurs.

Changing Pay Rate. With respect to a change in pay rate, an employer may make a change if it notifies its employees before the change occurs. Pay rate changes cannot be applied retroactively.

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

In Kentucky, there is no general obligation to indemnify an employee for business expenses. However, specific requirements exist concerning whether an employee may be required to pay for, uniforms, tools, and equipment.

Uniforms. The cost of a uniform and laundering, where the nature of the business requires employees to wear a uniform, are considered to be of primary benefit to the employer, and therefore cannot be counted as wages for purposes of complying with minimum wage and overtime laws.[273]

Tools & Equipment. Like uniforms, tools of the trade and other materials and services incidental to carrying on the employer's business are considered be of primary benefit to the employer, and therefore cannot be counted as wages for purposes of complying with minimum wage and overtime laws.[274]

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

Permissible Deductions. An employer cannot withhold from an employee's wages any part of the agreed wage rate unless:

- the employer is required to do so by local, state, or federal law;
- the deduction is expressly authorized in writing by the employee to cover insurance premiums, hospital, or medical dues;
- the deduction is expressly authorized in writing by the employee and does not amount to a rebate or a deduction from the standard wage arrived at by collective bargaining or pursuant to wage agreement or statute; or
- the deduction is for union dues and such deductions are authorized by joint wage agreements or collective bargaining contracts negotiated between employers and employees or their representatives.[275]

Kentucky recently enacted, as part of the state's new right-to-work law, an amendment to the portion of the statute addressing deductions for union dues. The new law prohibits deductions from any employee's earnings for union dues or fees without the employee's written or electronic consent. Further, an employee cannot be discharged or denied employment because they signed, or refused to sign, union membership authorization, or consented to, or refused to consent to, authorization for union dues deductions. Likewise, an employee may not be required to sign or not sign such an authorization as a

[273] 803 KY. ADMIN. REGS. 1:081.

[274] 803 KY. ADMIN. REGS. 1:081.

[275] KY. REV. STAT. ANN. § 337.060.

condition of employment. The law affects any collective bargaining agreement entered into, opted in, extended, or renewed on or after its effective date of January 9, 2017.[276]

Prohibited Deductions. An employer cannot take deductions for:

- fines;
- cash shortages in a common money till, cash box, or register used by two or more people;
- breakage;
- losses due to an employee accepting a check which later is dishonored, if the employee is given discretion to reject or accept checks; or
- losses due to defective or faulty workmanship, lost or stolen property, customer credit default, or nonpayment for goods or service received by customers, if the losses are not attributable to the employee's willful or intentional disregard of the employer's interest.[277]

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

Orders of Support. Upon receipt of a court-issued income withholding order for child or spousal support, the employer must begin withholding and paying over a portion of the employee's earnings to the Kentucky Cabinet for Health and Family Services.[278] The amount of an employee's income to withhold cannot exceed the limits set under the federal Consumer Credit Protection Act.[279] The employer may also deduct an administrative fee of $1.00 per deduction and payment.[280] The employer is required to inform the Cabinet if an employee subject to an income withholding order terminates employment, and must provide the Cabinet with the terminated employee's last known address and the name and address of the terminated employee's new employer, if known.[281] An employer is prohibited from dismissing, refusing to hire, or taking disciplinary action against an individual because they are subject to income withholding for support.[282]

Debt Collection. An order of garnishment of earnings creates a lien on all of a debtor-employee's nonexempt earnings earned during the pay period in which the order is served on the employer and all subsequent pay periods designated in the order.[283] When the order is served on the employer, the employer must:

- provide a copy of the order to the debtor-employee, retain a copy of the order for the employer's records, and return a copy to the court;

[276] KY. REV. STAT. ANN. §§ 336.135, 337.060.

[277] KY. REV. STAT. ANN. § 337.060.

[278] KY. REV. STAT. ANN. § 405.465.

[279] KY. REV. STAT. ANN. § 405.467; 15 U.S.C. § 1673(b).

[280] KY. REV. STAT. ANN. § 405.465.

[281] KY. REV. STAT. ANN. § 405.465.

[282] KY. REV. STAT. ANN. § 405.465.

[283] KY. REV. STAT. ANN. § 425.506.

- on the court's copy, provide a written statement of the employee's gross earnings and the nonexempt amount of disposable earnings for the designated pay periods subject to the order; and
- return the court's copy of the order along with the written statement.[284]

Disposable earnings means the portion of the employee's earnings remaining after the deduction from those earnings of any amounts required by law to be withheld.[285] The maximum deduction from an employee's earnings cannot exceed the lesser of 25% of the employee's weekly disposable earnings or the amount by which those disposable earnings exceed 30 times the federal minimum wage currently in effect.[286] As with garnishments for support, an employer may not terminate an employee because the employee's wages have been subjected to a garnishment for indebtedness.[287]

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

An employee may bring a civil action against an employer for failure to comply with the Kentucky minimum wage, overtime, and wage payment provisions.[288] **Effective July 15, 2024**, an aggrieved individual has three years to bring action under these provisions.[289]

If the employee prevails, they may recover all unpaid wages, liquidated damages, and reasonable attorneys' fees and costs. The employer can avoid an award of liquidated damages if it can establish that it acted in good faith and that the employer had reasonable grounds for believing that the act or omission at issue was not a violation of the Kentucky wage and hour laws.[290] The statute permits an employee to bring an individual or a class action. Alternatively, the employee may assign a wage claim to the Commissioner of the Department of Workplace Standards, which can bring an action on the employee's behalf.[291]

Violation of the Kentucky wage and hour laws may also result in civil penalties. An employer will be assessed a civil penalty between $100 and $1,000 for the following violations:

- violating the minimum wage and overtime provisions;
- paying or agreeing to pay less than the minimum wage or overtime rate;
- engaging in unlawful tip retention or tip pooling;
- failing to pay premium pay for hours worked on the seventh consecutive day of work;
- failing to keep and preserve required records as required;
- failing to comply with the regular and final wage payment requirements;

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[284] KY. REV. STAT. ANN. § 425.506.

[285] KY. REV. STAT. ANN. § 427.005.

[286] KY. REV. STAT. ANN. § 427.010.

[287] KY. REV. STAT. ANN. § 427.140.

[288] KY. REV. STAT. ANN. § 337.385.

[289] KY. REV. STAT. ANN. § 337.385, as amended by Kentucky HB 320 (2024); previously the general five-year statute, KY. REV. STAT. ANN. § 413.120, applied.

[290] KY. REV. STAT. ANN. § 337.385.

[291] KY. REV. STAT. ANN. § 337.385.

- taking unlawful deductions from wages;
- failing to comply with the wage statement requirements;
- failing to post the wage and hour posters; or
- firing or discriminating against an employee for complaining about minimum wage and/or overtime violations, or exercising rights under those laws.[292]

Further, a lien may be placed on all property, both real and personal, of an employer that has been assessed civil penalties for violations of the wage and hours provisions, but not before all administrative and judicial appeals have been exhausted. The lien is in favor of the state Education and Labor Cabinet in an amount totaling the unpaid wages and penalties due, together with interest at a rate of 12% per annum from the date the notice of the violation is final. The lien will be attached to all property and rights to property owned or subsequently acquired by the employer.[293]

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).[294] 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.[295] Further, the U.S. Supreme Court, in *Massachusetts v. Morash*, noted that extensive state regulation of vesting, funding, and participation rights of vacation benefits may provide greater protections for employees than ERISA and, as a result, the court was reluctant to have ERISA preempt state law in situations where it was not clearly indicated.[296]

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

In Kentucky, the definition of *wages* includes vested vacation pay and any other similar advantages agreed upon by the employer and the employee or provided to employees as an established policy.[297] Nonetheless, Kentucky law does not require employers to provide vacation pay, sick pay, or other personal time off. However, once an employer does establish a policy and promises vacation pay and other types of additional compensation, the employer may not arbitrarily withhold or withdraw these fringe benefits retroactively, and the employer must apply the vacation policy in a nondiscriminatory manner. Therefore, employers should draft clear, precise, and complete policies and procedures regarding these benefits, as

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[292] KY. REV. STAT. ANN. § 337.990.

[293] KY. REV. STAT. ANN. § 337.075.

[294] 29 U.S.C. § 1002.

[295] 29 C.F.R. § 2510.3-1; *see also* U.S. Dep't of Labor, *Advisory Opinion 2004-10A* (Dec. 30, 2004), *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2004-10a; U.S. Dep't of Labor, *Advisory Opinion 2004-08A* (July 2, 2004), *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2004-08a; U.S. Dep't of Labor, *Advisory Opinion 2004-03A* (Apr. 30, 2004), *available at* https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/2004-03a.

[296] 490 U.S. 107, 119 (1989).

[297] KY. REV. STAT. ANN. § 337.010.

they can become contractual obligations and subject the employer to liability if withheld or reduced without notice. Because vacation pay is a matter of contract or employer policy in Kentucky, it is likely that an employer may establish a vacation policy with a cap on accrual, a "use-it-or-lose-it" provision, or require forfeiture of unused vacation time when employment ends.[298]

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*

In Kentucky, an employee cannot be compelled to work Sunday unless the work is:

- ordinary household duties;
- of necessity or charity; or
- required to maintain or operate a public service or public utility plant or system.[299]

However, members of a religious society that observe Sabbath on a day other than Sunday do not violate the Sunday work law if they observe as a Sabbath one day in each seven. Moreover, the restriction does not apply to:

- amateur sports or athletic games;
- grocery stores whose principal business is selling groceries and related food items;
- drug stores whose principal business is selling drugs and related items;
- gift and souvenir shops;
- fishing tackle and bait shops;
- movie theaters;
- gas stations; and
- operas.[300]

Additionally, the restriction does not apply to employers using continuous work scheduling, provided each employee is permitted at least one day of rest each calendar week. The Kentucky Supreme Court has stated that *continuous work scheduling* means "every day rather than every hour, and that an employer who routinely operates his business for a substantial period of time each and every day of the week may operate it on Sundays if each of his employees is allowed at least one full day off during each calendar week."[301]

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[298] *See Berrier v. Bizer*, 57 S.W.3d 271 (Ky. 2001) (pay out of accrued vacation pay was not required where the employer's policy provided that an employee's termination under certain circumstances would result in forfeiture).

[299] KY. REV. STAT. ANN. § 436.160.

[300] KY. REV. STAT. ANN. § 436.160.

[301] *Commonwealth v. Southerland*, 601 S.W.2d 908 (Ky. 1990).

Further, state law allows retail sales and activities on Sundays to be restricted at the city or county level.[302]

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.[303] 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).[304] However, under COBRA, only an employee and the employee's spouse and dependent children are considered "qualified beneficiaries."[305] 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*

Kentucky does not recognize either domestic partnerships or civil unions. Accordingly, state law does not address the issue of whether an employee's civil union partner or domestic partner would be considered an eligible dependent for purposes of employee benefits.

3.9 Leaves of Absence

3.9(a) *Family & Medical Leave*

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

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

- for the birth or placement of a child for adoption or foster care;[306]

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302 KY. REV. STAT. ANN. § 436.165.

303 29 U.S.C. § 1144.

304 29 U.S.C. § 1161.

305 29 U.S.C. § 1167(3).

306 29 C.F.R. §§ 825.102, 825.112, 825.113, 825.120, and 826.121.

- to care for an immediate family member (spouse, child, or parent) with a serious health condition;[307]
- to take medical leave when the employee is unable to work because of a serious health condition;[308]
- 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.[309] 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.[310] 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*

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

3.9(b) *Paid Sick Leave*

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

Federal law does not require private employers (that are not government contractors) to provide employees paid sick leave. Executive Order No. 13706 requires certain federal contractors and subcontractors to provide employees with a minimum of 56 hours of paid sick leave annually, to be accrued at a rate of at least one hour of paid sick leave for every 30 hours worked.[311] 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*

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

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[307] 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).

[308] 29 C.F.R. §§ 825.112, 825.113.

[309] 29 U.S.C. § 2611(4); 29 C.F.R. §§ 825.104 to 825.109.

[310] 29 U.S.C. § 2611(2); 29 C.F.R. §§ 825.110 to 825.111.

[311] 80 Fed. Reg. 54,697-54,700 (Sept. 10, 2015).

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.[312] 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.[313] FMLA leave may also be used for the birth or placement of a child; however, the use of intermittent leave (as opposed to leave taken on an intermittent or reduced schedule) is subject to the employer's approval.

Americans with Disabilities Act (ADA). Pregnancy-related impairments may constitute disabilities for purposes of the ADA. The federal Equal Employment Opportunity Commission (EEOC) takes the position that leave is a reasonable accommodation for pregnancy-related impairments, and may be granted in addition to what an employer would normally provide under a sick leave policy for reasons related to the impairment.[314] 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

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[312] 42 U.S.C. § 2000e(k); *see also* 29 C.F.R. § 1604.10.

[313] 29 C.F.R. § 825.202.

[314] 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.

3.11(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*

Kentucky law does not specifically address pregnancy leave for private-sector employees. However, employers with eight or more employees must treat individuals affected by pregnancy, childbirth, or related medical conditions the same for all employment-related purposes (including receipt of benefits under fringe benefit programs) as they treat other persons not so affected but similar in their ability or inability to work.[315]

In addition, the Kentucky Pregnant Workers' Act requires employers of 15 or more employees to provide reasonable accommodations for any employee with limitations related to pregnancy, childbirth, or a related medical condition who requests an accommodation.[316] "Reasonable accommodation" includes but is not limited to providing time off to recover from childbirth.[317]

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*

Employers in Kentucky are required to grant employees leave for up to six weeks for the adoption of a child under 10 years of age upon written request.[318] Further, the law requires that if the employer has a policy that permits time off for birth parents that exceeds six weeks, the permissible time period set forth in the policy will also be the minimum amount of leave available to adoptive parents. If an employer provides paid leave or any other benefits to employees who are birth parents following the birth of a child, the employer must also provide the same type, amount, and duration of paid leave and other benefits to employees following the adoption of a child. These provisions do not apply in the case of a child adopted by a family member.[319]

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*

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

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[315] KY. REV. STAT. ANN. § 344.030(8).

[316] KY. REV. STAT. ANN. §§ 344.030, 344.040.

[317] KY. REV. STAT. ANN. § 344.030.

[318] KY. REV. STAT. ANN. § 337.015.

[319] KY. REV. STAT. ANN. § 337.015.

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*

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

3.9(g) *Voting Time*

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

There is no federal law concerning time off to vote.

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

Kentucky employers must provide an employee who is entitled to vote with at least four hours of time to: (1) request an application for, or execute, an absentee ballot during the office of the clerk's normal business hours; or (2) to vote on election day.[320] An employee must apply for leave the day before leave will be taken. An employer may specify when leave may be taken and the leave can be unpaid.[321]

Generally, an employer cannot penalize an employee for taking leave. However, an employer may discipline an employee who takes time off to vote and fails to do so.[322]

Election Officer. An employee who is an election officer must be provided with an entire day to attend training or to serve as an election officer. An employer may designate the hours leave may be taken and the leave can be unpaid. An employer cannot discharge, discriminate, or penalize an employee for taking leave.[323]

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*

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

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[320] KY. REV. STAT. ANN. § 118.035.

[321] KY. REV. STAT. ANN. § 118.035(2).

[322] KY. REV. STAT. ANN. § 118.035(3).

[323] KY. REV. STAT. ANN. § 118.035(4).

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.[324] 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.[325] 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. Kentucky employers may not discharge, threaten, or coerce an employee because an employee receives a jury duty summons, responds to the summons, attends court for prospective jury service, or serves as a juror. There is no requirement to compensate an employee who is absent due to jury service.[326]

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*

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

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[324] 28 U.S.C. § 1875.

[325] *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).

[326] KY. REV. STAT. ANN. § 29A.160.

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.[327]

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.328 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.329 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. Kentucky requires employers to grant leave to employees in the National Guard who are performing active military duty or training.[330] Furthermore, an employer must reinstate the

[327] 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)).

[328] 29 C.F.R. § 825.126(a).

[329] 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).

[330] KY. REV. STAT. ANN. § 38.238.

employees to their former position when they return from service. The employer, however, is not required to pay the employees while they are on leave.[331]

Kentucky also proscribes preventing a person to enlist in the National Guard and forbids discrimination against anyone who enlists, serves, or has served in the National Guard. The antidiscrimination and leave of absence provisions apply to members of the National Guard of any state in addition to members of the Kentucky National Guard or active militia.[332]

Other Military-Related Protections: Spousal Unemployment. No otherwise eligible worker shall be disqualified from unemployment benefits for leaving work to accompany the worker's spouse to a different state, military base of assignment, or duty station that is 100 road miles or more, as measured on a one-way basis, from the worker's home when the spouse is reassigned by the military.[333]

3.9(l) *Other Leaves*

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

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

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

Volunteer Emergency Responder Leaver. An employer may not terminate an employee who is a volunteer firefighter, rescue squad member, emergency medical technical, peace officer, or a member of an emergency management agency who: (1) is absent or late from work in order to respond to an emergency; or (2) takes leave following a critical incident. *Critical incident* means any event that has a stressful impact sufficient to overwhelm the individual's usual coping strategies.[334] The leave may be unpaid.[335]

An employer may request a written statement from an officer or director of the agency stating that the employee was responding to an emergency and listing the time and date of the emergency. An employer may also not terminate such an employee who takes up to 12 months of leave due to an injury sustained while responding to an emergency. The agency must provide the employer a written statement indicating when the injury occurred and a written statement from a physician indicating when the employee will return to work.[336]

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

[331] KY. REV. STAT. ANN. § 38.238.

[332] KY. REV. STAT. ANN. § 38.460.

[333] KY. REV. STAT. ANN. § 341.370(1)(c)(4).

[334] KY. REV. STAT. ANN. § 337.100(1).

[335] KY. REV. STAT. ANN. § 337.100(2).

[336] KY. REV. STAT. ANN. § 337.100(4).

employees.[337] Employers are also required to comply with all applicable occupational safety and health standards.[338] To enforce these standards, the federal Occupational Safety and Health Administration ("Fed-OSHA") is authorized to carry out workplace inspections and investigations and to issue citations and assess penalties. The Fed-OSH Act also requires employers to adopt reporting and record-keeping requirements related to workplace accidents. For more information on this topic, see **LITTLER ON WORKPLACE SAFETY**.

Note that the Fed-OSH Act encourages states to enact their own state safety and health plans. Among the criteria for state plan approval is the requirement that the state plan provide for the development and enforcement of state standards that are at least as effective in providing workplace protection as are comparable standards under the federal law.[339] 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*

Kentucky, under agreement with Fed-OSHA, operates its own state occupational safety and health program in accordance with section 18 of the Fed-OSH Act.[340] Thus, Kentucky is a so-called "state plan" jurisdiction, with its own detailed rules for occupational safety and health that parallel, but are separate from, Fed-OSHA standards. The Kentucky Occupational Safety and Health Law (KOSHA), which applies to all employers and employees (except the federal government), protects the right of an employee not to be exposed to known work hazards that could cause serious bodily harm.[341] The Kentucky Occupational Safety and Health Administration enforces the law and also protects Kentucky employees from discharge or retaliation when reporting safety and health violations.

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*

Kentucky law restricts a driver from operating a motor vehicle while writing, sending, or reading a text-based communication to manually communicate with any person using a text-based communication, including text messages, instant messages, or electronic mail.[342] 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.

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[337] 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.

[338] 29 U.S.C. § 654(a)(2).

[339] 29 U.S.C. § 667(c)(2).

[340] 29 U.S.C. § 667.

[341] KY. REV. STAT. ANN. §§ 338.011 *et seq*.

[342] KY. REV. STAT. ANN. §§ 189.292 to 189.294.

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. A private employer may prohibit employees and other persons from carrying concealed weapons on company property, other than parking lots.[343] If the building or the premises are open to the public, the employer or business enterprise must post signs on or about the premises if carrying concealed weapons is prohibited.[344] The statute does not provide specific requirements for the contents of the signs.

Firearms in Company Parking Lots. An employer may not prohibit employees from carrying or storing legally concealed weapons in a vehicle on company property. An employer that fires, disciplines, demotes, or otherwise punishes an employee who is lawfully exercising a right guaranteed by this section, and who is engaging in conduct in compliance with this statute, is liable for civil damages.[345]

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*

Kentucky law does not address smoking in the workplace.

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*

Kentucky 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*

Kentucky law does not address employer workplace violence protection orders.

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[343] KY. REV. STAT. ANN. § 237.110(17).

[344] KY. REV. STAT. ANN. § 237.110(17).

[345] KY. REV. STAT. ANN. § 237.106.

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");[346] (2) the Americans with Disabilities Act (ADA);[347] (3) the Age Discrimination in Employment Act (ADEA);[348] (4) the Equal Pay Act;[349] (5) the Genetic Information Nondiscrimination Act of 2009 (GINA);[350] (6) the Civil Rights Acts of 1866 and 1871;[351] and (7) the Civil Rights Act of 1991. As a result of these laws, federal law prohibits discrimination in employment on the basis of:

- race;
- color;
- national origin (includes ancestry);
- religion;
- sex (includes pregnancy, childbirth, or related medical conditions, and pursuant to the U.S. Supreme Court's decision in *Bostock v. Clayton County, Georgia*, includes sexual orientation and gender identity);[352]
- 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.[353] 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.[354]

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[346] 42 U.S.C. §§ 2000e *et seq.* Title VII applies to employers with 15 or more employees. 42 U.S.C. § 2000e(b).

[347] 42 U.S.C. §§ 12101 *et seq.* The ADA applies to employers with 15 or more employees. 42 U.S.C. § 12111(5).

[348] 29 U.S.C. §§ 621 *et seq*. The ADEA applies to employers with 20 or more employees. 29 U.S.C. § 630.

[349] 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.

[350] 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)).

[351] 42 U.S.C. §§ 1981, 1983.

[352] 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.

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

[354] 29 C.F.R. § 1601.13. Note that for ADEA charges, only state laws extend the filing limit to 300 days. 29 C.F.R. § 1626.7.

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

Kentucky's broadest FEP protections fall under the Kentucky Civil Rights Act (KCRA). The KCRA prohibits discrimination on the basis of the following:

- race;
- color;
- religion;
- sex (includes pregnancy, childbirth, or related medical conditions);
- national origin;
- age (40);
- disability; or
- status as a smoker or nonsmoker.[355]

Covered Employers. The KCRA covers employers that are persons or agents of persons with eight or more employees within the state for 20 or more calendar weeks in the current or preceding calendar year.[356] However, for purposes of the law's prohibition against disability discrimination, a covered employer is a person, or the agent of a person, engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year.[357] The definition of *person* includes individuals, labor unions, joint apprenticeship committees, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees in bankruptcy, receivers, and other legal or commercial entities.[358]

There are exclusions for certain religious organizations, private membership clubs, and Indian tribes.[359]

Covered Individuals. The KCRA protects employees, individuals applying for employment,[360] individuals applying for employment referral,[361] individuals applying for licenses, labor organization members, applicants for labor organization membership,[362] and individuals applying for admission to or employment in training programs.[363] *Employees* are defined as individuals employed by an employer, but the definition does not include individuals employed by parents, spouses, or children, or individuals employed as

[355] KY. REV. STAT. ANN. §§ 344.030, 344.040, 344.050, 344.060, 344.070, and 344.080.

[356] KY. REV. STAT. ANN. § 344.030(2).

[357] KY. REV. STAT. ANN. § 344.030(2).

[358] KY. REV. STAT. ANN. § 344.010(1).

[359] KY. REV. STAT. ANN. §§ 344.030(2); 344.090.

[360] KY. REV. STAT. ANN. § 344.040(1).

[361] KY. REV. STAT. ANN. §§ 344.050(1), 344.060(2).

[362] KY. REV. STAT. ANN. § 344.050(2).

[363] KY. REV. STAT. ANN. § 344.060.

domestic workers in the homes of employers.[364] Further, neither a franchisee nor employees of a franchisee are considered to be employees of the franchisor.[365]

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

The Kentucky Commission on Human Rights (KCHR or Commission) enforces the KCRA. An individual who claims to have been the subject of unlawful discrimination may file a complaint with the Commission within 180 days after the alleged unlawful discrimination. Filing with the Commission is not required to pursue a discrimination claim directly in court.[366] The statute of limitations to bring a civil action directly to court is within five years after the alleged unlawful discrimination.[367]

Investigation & Conciliation. In connection with an investigation of a complaint, the Commission or its designated representative at any reasonable time may request access to premises, records, and documents relevant to the complaint and the right to examine, photograph, and copy evidence.[368]

The Commission or its designated representative must determine within 30 days after the complaint has been filed whether there is probable cause to believe the respondent has engaged in an unlawful practice. If the Commission determines that there is probable cause to believe that the respondent has engaged in an unlawful practice, the Commission staff will endeavor to eliminate the alleged unlawful practice by conference, conciliation, and persuasion.[369]

Hearing. If there is no conciliation, then within 60 days after an employment discrimination complaint the Commission must serve a copy of the complaint to the respondent and require the respondent to answer the allegations at a hearing. The respondent must file an answer with the Commission by certified mail within 20 days after receipt of the complaint. No final order shall be issued unless the respondent has had the opportunity of a hearing on the complaint.[370]

If the Commission determines that the respondent has not engaged in an unlawful practice, it will issue a final order dismissing the complaint.[371] Alternatively, if the Commission determines that the respondent has engaged in an unlawful practice, it will issue a final order requiring the respondent to cease and desist from the unlawful practice and to take "affirmative action" to carry out the purposes of the KCRA.[372]

Affirmative action ordered may include, but is not limited to:

- Hiring, reinstatement, or upgrading of employees with or without back pay. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against operate to reduce the back pay otherwise allowable.

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[364] KY. REV. STAT. ANN. § 344.030(5).

[365] KY. REV. STAT. ANN. § 337.010.

[366] KY. REV. STAT. ANN. § 344.450.

[367] KY. REV. STAT. ANN. §§ 413.120; *Kentucky Comm'n on Human Rights v. City of Owensboro*, 750 S.W.2d 422, 423 (Ky. 1988).

[368] KY. REV. STAT. ANN. § 344.250.

[369] KY. REV. STAT. ANN. § 344.200.

[370] KY. REV. STAT. ANN. § 344.210.

[371] KY. REV. STAT. ANN. § 344.230.

[372] KY. REV. STAT. ANN. § 344.230.

- Reporting as to the manner of compliance.
- Posting notices in conspicuous places in the respondent's place of business in a form prescribed by the Commission.
- Payment to the complainant of damages for injury caused by an unlawful practice including compensation for humiliation and embarrassment, and for other costs actually incurred by the complainant as a direct result of an unlawful practice.[373]

Confidentiality. Except for the terms of the conciliation agreement, neither the Commission nor any officer or employee is allowed to make public, without the written consent of the complainant and the respondent, information concerning efforts in a particular case to eliminate an unlawful practice by conference, conciliation, or persuasion whether or not there is a determination of probable cause or a conciliation agreement.[374] However, the Commission may publish or cause to be published the names of persons who have been determined to have engaged in an unlawful practice after a hearing and final order.[375]

Exclusivity of Remedy. A state court does not have jurisdiction over a pending claim before the Commission.[376]

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

HIV Status. The Kentucky Equal Opportunities Act prohibits discrimination against any person with acquired immunodeficiency syndrome (AIDS), acquired immunodeficiency syndrome-related complex (ARC), or HIV, as well as discrimination based on results of HIV-related tests, and status as a licensed health care professional who treats or provides patient care to persons infected with HIV.[377]

Military Status. As noted in **3.9(k)(ii)**, Kentucky forbids discrimination against anyone who enlists, serves, or has served in the National Guard.[378]

Tobacco Products. The KCRA prohibits employers from requiring as a condition of employment that applicants or employees abstain from the use of tobacco products outside the course of employment, as long as the person complies with any workplace policy concerning smoking.[379]

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

In addition to the federal and state laws, employers with operations in Louisville-Jefferson County and Lexington-Fayette County are subject to local fair employment practices ordinances.

- **Louisville-Jefferson County.** An employer (and its agent) with two or more employees in each of four or more calendar weeks in the current or preceding calendar year must extend antidiscrimination protections on the basis of: race; color; religion; national origin, including

[373] KY. REV. STAT. ANN. § 344.230.

[374] KY. REV. STAT. ANN. § 344.200(4).

[375] KY. REV. STAT. ANN. § 344.230(4).

[376] KY. REV. STAT. ANN. § 344.270.

[377] KY. REV. STAT. ANN. § 207.135.

[378] KY. REV. STAT. ANN. § 38.460.

[379] KY. REV. STAT. ANN. § 344.040(1)(c).

hair texture and hairstyle; age (40 and over); disability; sex; gender identity; and sexual orientation.[380] Any person or persons claiming to be aggrieved by an unlawful practice may file a written complaint with the Louisville/Jefferson County Human Relations Commission within 180 days after the alleged unlawful practice occurred.[381]

- **Lexington-Fayette County.** Protected classifications include: sexual orientation; gender identity; race (including traits historically associated with race, including but not limited to natural texture and color of hair; hair styles; whether or not hair is adorned by hair ornaments such as ribbon, headwraps, beads, or barrettes, and protective hairstyles); color; religion (including hair styles that are an expression of religious observance and practice, as well as belief); national origin (including traits related to national origin such as natural texture and color of hair, hair styles, and protective hair styles, including but not limited to braids, locs, twists, cornrows, Bantu knots, afros, whether or not hair extensions or treatments are used to create or maintain any such style, and whether or not hair is adorned by hair ornaments, beads, headwraps, or hair coverings, related to a person's place of birth or ancestry); sex; disability; and age (40 and older). The ordinance does not provide a definition of employer.[382] A person alleging discrimination in employment may file a complaint with the Lexington-Fayette Urban County Human Rights Commission within 180 days after the alleged unlawful practice occurred.[383]

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."[384] 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

[380] LOUISVILLE-JEFFERSON CTY., KY., CODE §§ 92.02 (definitions), 92.06 (including exceptions related to gender identity), and 92.07 (exceptions include certain religious and educational institutions).

[381] LOUISVILLE-JEFFERSON CTY., KY., CODE §§ 92.08, 92.09.

[382] LEXINGTON-FAYETTE CTY., KY., CODE OF ORDINANCES §§ 2-31 (adopting state law), 2-33 (exceptions related to gender identity and religious exemptions).

[383] LEXINGTON-FAYETTE CTY., KY., CODE OF ORDINANCES §§ 2-31(2), 2-32, and 2-33(3).

[384] 29 U.S.C. § 206(d)(1).

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.[385]

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

Employers of two or more employees are prohibited from discriminating between employees in the same establishment on the basis of sex by paying wages to any employee in any occupation at a rate less than the rate at which they pay any employee of the opposite sex for comparable work on jobs that have comparable requirements relating to skill, effort, and responsibility.[386] The prohibition does not apply to wage differentials paid pursuant to established seniority systems or merit increase systems and that do not discriminate on the basis of 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 may bring a civil action within six months of the alleged violation.[387]

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.[388]

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[385] 42 U.S.C. § 2000e-5.

[386] KY. REV. STAT. ANN. §§ 337.420, 337.423.

[387] KY. REV. STAT. ANN. §§ 337.427, 337.430.

[388] 42 U.S.C. § 2000gg-1. The regulations provide definitions of *pregnancy*, *childbirth*, and *related medical conditions*. 29 C.F.R. § 1636.3.

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).[389]

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

An employee seeking a reasonable accommodation must request an accommodation.[390] 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.[391] 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."[392]

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

[389] 29 C.F.R. § 1636.3.

[390] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1636.3.

[391] 29 C.F.R. § 1636.3.

[392] 29 C.F.R. § 1636.4.

- 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.[393]

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.[394]

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*

Under Kentucky law, employers with eight or more employees must treat individuals affected by pregnancy, childbirth, or related medical conditions the same for all employment-related purposes (including receipt of benefits under fringe benefit programs) as they treat other persons not so affected but similar in their ability or inability to work.[395]

In addition, the Kentucky Pregnant Workers' Act requires employers of 15 or more employees to provide reasonable accommodations for any employee with limitations related to pregnancy, childbirth, or a related medical condition who requests an accommodation, including but not limited to the need to express breast milk.[396] Reasonable accommodation is required unless the employer can demonstrate that the accommodation would impose an undue hardship on the employer's program, enterprise, or business. In determining whether undue hardship exists, the following factors will be considered: (1) the duration of the requested accommodation, and (2) whether similar accommodations are required by policy to be made, have been made, or are being made for other employees due to any reason.[397]

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393 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1630.2(p).

394 29 C.F.R. § 1636.3.

395 KY. REV. STAT. ANN. § 344.030(8).

396 KY. REV. STAT. ANN. §§ 344.030, 344.040.

397 KY. REV. STAT. ANN. § 344.040.

If the employer has a policy to provide, would be required to provide, is currently providing, or has provided a similar accommodation to other classes of employees, then a rebuttable presumption is created that the accommodation does not impose an undue hardship on the employer.

Reasonable accommodation includes but is not limited to:

- more frequent or longer breaks;
- time off to recover from childbirth;
- acquisition or modification of equipment;
- appropriate seating;
- temporary transfer to a less strenuous or less hazardous position;
- job restructuring;
- light duty;
- modified work schedule; and
- private space that is not a bathroom for expressing breast milk.[398]

The Act further requires an employer to engage in a timely, good faith, and interactive process with the employee to determine effective reasonable accommodations. An employer cannot require an employee to take leave from work if another reasonable accommodation can be provided.[399]

An employer must provide written notice of the right to be free from discrimination in relation to pregnancy, childbirth, and related medical conditions, including the right to reasonable accommodations, to new employees at the commencement of employment.[400]

An employer must also conspicuously post a written notice of the right to be free from discrimination in relation to pregnancy, childbirth, and related medical conditions, including the right to reasonable accommodations, at the employer's place of business in an area accessible to employees.[401]

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.[402] Multiple decisions of the U.S. Supreme Court[403] and subsequent lower court decisions have made clear that an employer that does not conduct effective training: (1) will be unable to assert the

[398] KY. REV. STAT. ANN. § 344.030.

[399] KY. REV. STAT. ANN. § 344.040.

[400] KY. REV. STAT. ANN. § 344.040.

[401] KY. REV. STAT. ANN. § 344.040.

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

[403] *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).

affirmative defense that it exercised reasonable care to prevent and correct harassment; and (2) will subject itself to the risk of punitive damages. EEOC guidance on employer liability reinforces the important role that training plays in establishing a legal defense to harassment and discrimination claims.[404] 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 Kentucky.

3.12 Miscellaneous Provisions

3.12(a) *Whistleblower Claims*

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

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

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

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

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)[405] and the Railway Labor Act (RLA)[406] 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

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[404] 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.

[405] 29 U.S.C. §§ 151 to 169.

[406] 45 U.S.C. §§ 151 *et seq*.

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*

Kentucky's right-to-work law provides that no employee may be automatically enrolled in a union unless that individual has affirmatively requested union membership.[407] In addition, the law prohibits deductions from any employee's earnings for union dues or fees without the employee's written or electronic consent. Further, the law provides employee protection for those who exercise their rights under the Act. For example, an employee cannot be discharged or denied employment because they signed, or refused to sign, union membership authorization, or consented to, or refused to consent to, union dues deduction authorizations. Employees cannot waive—and importantly, cannot be asked to waive—the authorization requirements.

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).[408] 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.[409] 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*

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

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[407] KY. REV. STAT. ANN. § 336.135. A lawsuit was filed challenging the constitutionality of Kentucky's right-to-work law. The suit alleged that the law constituted an unlawful taking of union money without compensation. *Zuckerman v. Commonwealth*, Ky. Cir. Ct., No. 17-CI-574 (May 25, 2017). The Kentucky Supreme Court upheld the 2017 Right to Work Act, holding that it does not violate the state constitution. *Zuckerman v. Bevin*, 565 S.W.3d 580 (Ky. 2018).

[408] 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.

[409] 20 C.F.R. §§ 639.4, 639.6.

4.1(c) *State Mass Layoff Notification Requirements*

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

4.2 Documentation to Provide When Employment Ends

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

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

Table 10. Federal Documents to Provide at End of Employment

Category	Notes
Health Benefits: Consolidated Omnibus Budget Reconciliation Act (COBRA)	Under COBRA, the administrator of a covered group health plan must provide written notice to each covered employee and spouse of the covered employee (if any) of the right to continuation coverage provided under the plan.[410] 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.[411]

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.	For group policies, the insurer must give written notice of the right to continue group health insurance coverage to any member entitled to

[410] 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.

[411] See the section "Notice given to participants when they leave a company" at https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-notices.

Table 11. State Documents to Provide at End of Employment	
Category	**Notes**
	continue coverage upon notice from the group policyholder that the group member has terminated membership in the group.[412]
Unemployment Notice	**Generally.** Kentucky does not require that employees be provided notice about unemployment benefits when employment ends. Nonetheless, the employer generally must post in places readily accessible to individuals, a notice concerning benefit rights, claims for benefits, and other matters relating to unemployment.[413] Accordingly, it is recommended that an employer provide a copy of the unemployment notice when employment ends. **Multistate Workers.** If a multistate designation has been made under federal law, Kentucky does not require that employees be notified as to the jurisdiction under whose unemployment compensation law services have been covered. It is recommended, however, that an employer provide notice of the jurisdiction where services will be covered for unemployment purposes. Additionally, employers should follow that state's general notice requirement, if applicable.

4.3 Providing References for Former Employees

4.3(a) *Federal Guidelines on References*

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

4.3(b) *State Guidelines on References*

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

[412] KY. REV. STAT. ANN. § 304.18-110(7).

[413] KY. REV. STAT. ANN. § 341.400; 787 KY. ADMIN. REGS. 1:040. This notice is available at http://kcc.ky.gov/Documents/ui_ben5_1_0108.pdf.