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STATE

Littler on

Maryland 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 Maryland 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 Maryland, 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 Maryland Department of Labor, Licensing and Regulation (DLLR), Division of Unemployment Insurance, and the DLLR, Division of Labor and Industry have 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]

Maryland Workplace Fraud Act. Although Maryland does not have a general law addressing misclassification, the Maryland Workplace Fraud Act ("Fraud Act"), covers misclassification in the construction services and landscaping services industries.[6] The Fraud Act creates a presumption that individuals providing services to construction and landscaping businesses are employees rather than independent contractors.[7] Furthermore, the Fraud Act mandates an award of back pay to affected employees and penalizes employers that "knowingly" misclassify workers as independent contractors.[8]

The requirements for independent contractor status under the Fraud Act are similar to the ABC test. To classify an individual as an independent contractor, the employer must show:

- the individual is free from control and direction over the individual's performance both in fact and under the contract;

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[3] Under the hybrid test, a court evaluates the entity's right to control the individual's work process, but also looks at additional factors related to the worker's economic situation—such as how the work relationship may be terminated, whether the worker receives yearly leave or accrues retirement benefits, and whether the entity pays social security taxes on the worker's behalf. *Wilde v. County of Kandiyohi*, 15 F.3d 103, 105 (8th Cir. 1994). Because the hybrid test focuses on traditional agency notions of control, as a general rule, it results in a narrower definition of employee than under a pure economic realities test. *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 347 (5th Cir. 2008).

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

[5] More information about the DOL Misclassification Initiative is available at https://www.dol.gov/whd/workers/misclassification/#stateDetails. The Memorandum of Understanding (MOU) is available at https://www.dol.gov/whd/workers/MOU/md.pdf and Amendment No. 1 to the MOU at https://www.dol.gov/whd/workers/MOU/md_1.pdf.

[6] MD. CODE ANN., LAB. & EMPL. §§ 3-901 *et seq*.

[7] MD. CODE ANN., LAB. & EMPL. § 3-903(c)(1).

[8] MD. CODE ANN., LAB. & EMPL. §§ 3-903, 3-907.

- the individual customarily is engaged in an independent business or occupation of the same nature as that involved in the work; and
- the work is outside of the usual course of business of the person for whom the work is performed or performed outside of any place of business of the person for whom the work is performed.[9]

The employer must also provide to each individual classified as an independent contractor or exempt person a written notice as set forth in the statute.[10] If an employer fails to rebut the presumption of an employment relationship, the DLLR may impose a civil penalty for each misclassified employee and order restitution to any individual improperly classified.[11]

Table 1. State Tests for Classifying Workers

Purpose of Determining Employee Status	State Agency	Test to Apply
Fair Employment Practices Laws	Commission on Civil Rights	For purposes of the state's fair employment practices law, an employee is an individual employed by an employer as well as individuals working as independent contractors for an employer.[12]
Income Taxes	Comptroller of Maryland	There are no statutory definitions or case law identifying a test for independent contractor status in this context.

[9] MD. CODE ANN., LAB. & EMPL. § 3-903(c).

[10] MD. CODE ANN., LAB. & EMPL. § 3-903.1.

[11] MD. CODE ANN., LAB. & EMPL. § 3-908(b).

[12] MD. CODE ANN., STATE GOV'T § 20-601. In one case decided by the Maryland Court of Special Appeals—before the Maryland fair employment practices law was amended and re-codified—the court applied a hybrid common law agency and economic realities test to determine whether an employment relationship existed. *State Comm'n on Human Relations v. Suburban Hosp., Inc.*, 686 A.2d 706 (Md. Ct. Spec. App. 1996), *vacated on procedural grounds*, 704 A.2d 445 (Md. 1998).

Consideration of all of the circumstances surrounding the relationship is essential, and no one factor is determinative. Nevertheless, the extent of the employer's right to control the "means and manner" of the worker's performance is the most important factor to review here, as it is at common law and in the context of several other federal statutes . . . [Additional factors to consider include:] (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the "employer" or the individual in question furnishes the equipment used or the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated; *i.e.,* by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer"; (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties.

Suburban Hosp., Inc., 696 A.2d at 719 (quoting *Spirides v. Reinhardt*, 613 F.2d 826, 831 (D.C. Cir. 1979)).

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
Unemployment Insurance	DLLR, Division of Unemployment Insurance	Statutory test, adopting an ABC test. Generally, an individual is considered to be an independent contractor, not an employee, if the individual satisfies *each* of the following three requirements: A. the individual must be free from control and direction over the performance of the work, both in fact and under the contract; B. the individual must be engaged customarily in an independent business of the same nature involved in the work; and C. the work must be performed either: (1) outside the usual course of business of the person for whom the work is performed; or (2) performed outside of any place of business of the person for whom the work is performed.[13] Employment is presumed under the unemployment insurance law "regardless of whether the employment is based on the common law relation of master and servant;" to overcome the presumption, the employer must establish the individual is an independent contract or specifically exempted.[14]

[13] MD. CODE ANN., LAB. & EMPL. § 8-205(a). The employer has the burden of proving that each of these three elements of the independent contractor exception, which are stated in the conjunctive, has been met. *See, e.g.*, *Department of Labor v. Fox*, 697 A.2d 478, 480 (Md. 1997); *Blue Bird Cab Co. v. Maryland Dep't of Emp't Sec.*, 248 A.2d 331, 334 (Md. 1968). The Maryland Court of Special Appeals has held that in determining whether a worker is an independent contractor, "courts must acknowledge that the general trend in Maryland has been to narrowly define 'independent contractor' and to protect employee access to unemployment insurance, workers' compensation insurance, and other benefits." *Injured Workers' Ins. Fund v. Orient Express Delivery Serv., Inc.*, 988 A.2d 1120, 1132 (Md. Ct. Spec. App. 2010).

[14] MD. CODE ANN., LAB. & EMPL. § 8-201; *see also* MD. CODE REGS. 09.32.01.18. The Code of Maryland Regulations sets forth a framework for overcoming the presumption that the relationship is that of employer-employee. Factors evidencing that an individual meets the three requirements of the ABC test for independent contractor status include, but are not limited to, the following:

(a) The person has been and will continue to be free from the employing unit's control or direction:

(i) The employing unit does not require the person to comply with detailed instructions about when, where, and how the person is to work,

(ii) The employing unit does not train the person to perform the service in a particular manner or using a particular method determined by the employing unit,

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
Wage & Hour Laws	DLLR, Division of Labor and Industry, Employment Standards Service	Right to control and economic realities tests are applied.[15] When determining whether an individual was an employee under the Maryland Wage Payment and Collection Act, the Maryland Court of Appeal examined the following factors:

(iii) The employing unit does not establish set hours of work for the person performing the services,

(iv) The employing unit does not establish a schedule or routine for the person performing the service,

(v) The employing unit may not discharge the person for failure to obey the employing unit's specific instructions on how the service is to be performed;

(b) The service is outside the usual course of business of the employing unit:

(i) The person performs the work off the employing unit's premises,

(ii) The person performs work that is not integrated into the employing unit's operation,

(iii) The service performed is unrelated to the employing unit's business;

(c) The person performing the service is customarily engaged in an independently established business:

(i) Maintains a business listing in the telephone directory,

(ii) Has his or her own place of business,

(iii) Has a financial investment in a related business and can incur a loss in the performance of the service,

(iv) Has his or her own equipment needed to perform the service,

(v) Determines the price of the service to be performed,

(vi) Employs others to perform the service,

(vii) Carries his or her own liability or workers' compensation insurance, or both,

(viii) Performs the service for more than one unrelated employer at the same time,

(ix) Sets his or her own hours,

(x) Is paid by the job.

MD. CODE REGS. 09.32.01.18.

[15] The right of control is one of the most critical factors. According to the Division of Labor and Industry of Maryland's Department of Labor, Licensing and Regulation, "many factors are considered, and no one factor by itself is controlling." The division has explained that "[g]enerally, the employer/employee relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished." Maryland Dep't of Labor, Licensing & Regulation, *Maryland Guide to Wage Payment and Employment Standards – Factors in Making the Distinction Between an Employee and Independent Contractor*, *available at* http://www.dllr.state.md.us/labor/wagepay/wpfactors.shtml.

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
		"1. Whether the employer actually exercised or had the right to exercise control over the performance of the individual's work; 2. Whether the individual's service is either outside all the usual course of business of the enterprise for which such service is performed; 3. Whether the individual is customarily engaged in an independently established trade, occupation, profession, or business; 4. Whether it is the employer or the employee who supplies the instrumentalities, tools, and location for the work to be performed; 5. Whether the individual receives wages directly from the employer or from a third party for work performed on the employer's behalf; and 6. Whether the individual held an ownership interest in the business such that the individual had the ability and discretion to affect the general policies and procedures of the business."[16]
Workers' Compensation	Maryland Workers' Compensation Commission	Right to control test. Generally, under the workers' compensation law, an individual is presumed to be a covered employee. To overcome the presumption, an employer must establish that the individual is an independent contractor under common law or is specifically exempted from coverage.[17]

[16] *Baltimore Harbor Charters, Ltd. v. Ayd*, 780 A.2d 303, 318-19 (Md. 2001). Similarly, in *Heath v. Perdue Farms, Inc.*, 87 F. Supp. 2d 452, 457 (D. Md. 2000), a Maryland federal court, examining whether an employment relationship existed under the Fair Labor Standards Act (FLSA) and Maryland's wage and hour law, applied a 6-factor economic realities test, which examined the following:

1. the degree of control which the putative employer has over the manner in which the work is performed;
2. the opportunities for profit or loss dependent upon the managerial skill of the worker;
3. the putative employee's investment in equipment or material;
4. the degree of skill required for the work;
5. the permanence of the working relationship; and
6. whether the service rendered is an integral part of the putative employer's business.

[17] MD. CODE ANN., LAB. & EMPL. § 9-202.

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
		Under the common law, "the most important and really decisive common law test is whether there is a *right* to control and direct the worker in the performance and manner of doing the work."[18] Other factors Maryland courts have considered in evaluating the relationship of parties at common law include: 1. selection and hiring of the worker; 2. wage payment; 3. the power to discharge the worker; 4. the skill required; 5. whether the work is part of the employer's regular business; 6. whether the parties believe they were creating an employee-employee relationship; and 7. whether the employer has the ability to control the worker's conduct.[19]
Workplace Safety	DLLR, Maryland Occupational Safety and Health (MOSH)	While Maryland has an approved state plan under the federal Occupational Safety and Health Act, 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

[18] *Edith A. Anderson Nursing Homes, Inc. v. Walker*, 194 A.2d 85, 86 (Md. 1963) (emphasis original).

[19] *See Injured Workers' Ins. Fund v. Orient Express Delivery Serv.*, 988 A.2d 1120, 1129 (Md. Ct. Spec. App. 2010); *Edith A. Anderson Nursing Homes, Inc.*, 194 A.2d at 86. Moreover, in *Elms v. Renewal by Andersen*, 96 A.3d 175 (Md. 2014), the Maryland Court of Appeals noted various ways "control" could be demonstrated: (1) instructions; (2) the ability to assign a worker to other duties; (3) supervision and direction of worker's actions and rate of work; and (4) the amount and type of employee rules and regulations that are imposed upon a worker.

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

Although IRCA requires employers to review specified documents establishing an individual's eligibility to work, it provides no way for employers to verify the documentation's legitimacy. Accordingly, the federal government established the "E-Verify" program to allow employers to verify work authorization using a computerized registry. Employers that choose to participate in the program must enter into a Memorandum of Understanding with the Department of Homeland Security (DHS) which, among other things, specifically prohibits employers from using the program as a screening device. Participation in E-Verify is generally voluntary, except for federal contractors with prime federal contracts valued above the simplified acquisition threshold for work in the United States, and for subcontractors under those prime contracts where the subcontract value exceeds $3,500.[20]

Federal legislative attempts to address illegal immigration have been largely unsuccessful, leading some states to enact their own immigration initiatives. Whether states have the constitutional power to enact immigration-related laws or burden interstate commerce with requirements in addition to those imposed by IRCA largely depends on how a state law intends to use an individual's immigration status. Accordingly, state and local immigration laws have faced legal challenges.[21] An increasing number of states have enacted immigration-related laws, many of which mandate E-Verify usage. These state law E-Verify provisions, most of which include enforcement provisions that penalize employers through license suspension or revocation for knowingly or intentionally employing undocumented workers, have survived constitutional challenges.[22]

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

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

Maryland does not have a generally applicable employment eligibility or verification statute. Therefore, private-sector employers in Maryland 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

[20] 48 C.F.R. §§ 22.1803, 52.212-5, and 52.222-54 (contracts for commercially available off-the-shelf items and contracts with a period of performance of less than 120 days are excluded from the E-Verify requirement). For additional information, see LITTLER ON GOVERNMENT CONTRACTORS & EQUAL EMPLOYMENT OPPORTUNITY OBLIGATIONS.

[21] *See, e.g.*, *Lozano v. Hazelton*, 496 F. Supp. 2d 477 (E.D. Pa. 2007), *aff'd*, 724 F.3d 297 (3d Cir. 2013) (striking down a municipal ordinance requiring proof of immigration status for lease and employment relationship purposes).

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

guidance pursuant to its authority under Title VII of the Civil Rights Act of 1964 ("Title VII").[23] While there is uncertainty about the level of deference courts will afford the EEOC's guidance, employers should consider the EEOC's guidance related to arrest and conviction records when designing screening policies and practices. The EEOC provides employers with its view of "best practices" for implementing arrest or conviction screening policies in its guidance. In general, the EEOC's positions are:

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

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

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

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

In Maryland, an employer or prospective employer may not require a person to inspect or challenge any criminal history record information relating to that person for the purpose of obtaining a copy of the person's record to qualify for employment.[24] The statute does not distinguish between arrest and conviction records.

Maryland has also enacted a ban-the-box statute. The law applies to private employers of 15 or more full-time employees and prohibits such employers from:

- requiring an applicant for employment to disclose whether the applicant has a criminal record, or has had criminal accusations brought against them, before the first in-person interview has occurred; however, the employer may require the applicant to disclose a criminal record or criminal accusations during the first in-person interview; or
- taking or refusing to take a personnel action or otherwise retaliating or discriminating against an applicant or employee as a reprisal for the individual having claimed a violation of the statute.[25]

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[23] EEOC, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e et seq.* (Apr. 25, 2012), *available at* https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

[24] MD. CODE ANN., CRIM. PROC. § 10-228; *see also* MD. CODE ANN., CRIM. PROC. § 10-201(d).

[25] MD. CODE ANN., LAB. & EMPL. §§ 3-1503, 3-1504.

Employment means any work for pay and any form of vocational or educational training, with or without pay, and also includes contractual, temporary, seasonal, or contingent work, and work through the services of a temporary or other employment agency.[26]

The prohibition on requiring an applicant to disclose criminal history does not prohibit an employer from making an inquiry or taking other action that the employer is required or expressly authorized to take by another applicable state or federal law. Further, the statute does not apply to an employer that provides programs, services, or direct care to minors or vulnerable adults.[27]

With respect to enforcement, if the state labor commissioner determines that an employer has violated the statute, the labor commissioner must issue an order compelling compliance. For a subsequent violation, the labor commissioner may assess a civil penalty of up to $300 for each applicant or employee with respect to whom the employer violated the law. In determining the amount of penalty to impose, the labor commissioner must consider the employer's size, the gravity of the violation, the employer's good faith, and whether the employer has previous violations.[28]

1.3(a)(iii) *Local Guidelines on Employer's Use of Arrest Records*

In addition to the statewide "ban-the box" law covering private employers, Baltimore, Montgomery County, and Prince George's County have enacted local ban the box ordinances. The statewide law expressly does not preempt the local laws, so these remain applicable to private employers with operations in those cities and counties.[29]

Baltimore. In the City of Baltimore, a covered employer may not require an applicant to disclose a criminal record or criminal accusations against him/her, conduct a criminal background check, or otherwise make an inquiry about the applicant's criminal history until a conditional offer of employment has been extended. Additionally, an employer may not take or refuse to take a personnel action or otherwise retaliate or discriminate against a person as reprisal for the person's having claimed a violation of this law. *Covered employers* are those doing business in the City of Baltimore with 10 or more full-time equivalent employees; governmental entities are not covered. *Conditional offer* means an offer that is conditioned solely on the results of the employer's subsequent inquiring into or gathering information about an applicant's criminal record, or another contingency expressly communicated to the applicant at the time of the offer. The prohibitions and requirements of the ban-the-box law do not apply: (1) if the inquiries prohibited are required or expressly authorized by an applicable federal, state, or county law or regulation; or (2) to an employer that provides programs, services, or direct care to minors or vulnerable adults.[30]

Montgomery County. In Montgomery County, covered employers may not make such inquiries prior to extending a conditional offer to an applicant. *Covered employers* are those doing business in Montgomery County (including the County itself) that have one or more employees. The definition of employer does not include federal, state, and other local governments. Employers are prohibited from requiring an applicant or potential applicant to disclose on an employment application the existence or details of the

[26] MD. CODE ANN., LAB. & EMPL. § 3-1501.

[27] MD. CODE ANN., LAB. & EMPL. § 3-1502.

[28] MD. CODE ANN., LAB. & EMPL. § 3-1505.

[29] MD. CODE ANN., LAB. & EMPL. § 3-1502.

[30] BALTIMORE CITY, MD., CODE art. 11, § 15.

applicant's or potential applicant's arrest record. Further, an employer cannot at any time until a conditional offer of employment has been extended: (1) require the applicant to disclose whether the applicant has an arrest record or otherwise has been accused of a crime; (2) conduct a criminal record check on the applicant; or (3) inquire of the applicant or others about whether the applicant has an arrest record or otherwise has been accused of a crime. *Inquiry* or *inquire* means any direct or indirect conduct intended to gather information, using any mode of communication, but does not include: (1) a question about the applicant's arrest record, if the applicant voluntarily discloses the existence of the arrest record; or (2) a question about an applicant's employment history as shown on the applicant's resume or employment application.

If an employer intends to rescind a conditional offer of employment based on an item or items in the applicant's arrest record, before rescinding the offer, the employer must:

- provide the applicant with a copy of any criminal record report;
- notify the applicant of the intention to rescind the conditional offer of employment and the items that are the basis for the intention to rescind the offer; and
- delay rescinding the conditional offer of employment for seven days to permit the applicant an opportunity to give the employer notice of inaccuracy of an item or items on which the intention to rescind the offer is based.

Any rescission of the conditional offer must be made in writing.

The prohibitions and requirements of this law do not apply to inquiries otherwise required or expressly authorized by law, and to certain positions.[31]

In addition, an employer cannot not prevent enforcement or compliance with this law, or retaliate against any person for lawfully opposing any violation of the law or for filing a complaint, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under this law.

Prince George's County. Likewise, a covered employer in Prince George's County may not make such criminal history inquiries until the conclusion of the first employment interview. Covered employers are employers doing business in Prince George's County (including the County itself) that have 10 or more full-time employees. The definition of employer does not include federal, state, and other local governments.

Employers are prohibited from requiring an applicant or potential applicant to disclose on an employment application the existence or details of the applicant's or potential applicant's conviction record. Further, an employer cannot not, at any time until the conclusion of a first interview: (1) require the applicant to disclose whether the applicant has a conviction record; (2) conduct a criminal record check on the applicant; or (3) inquire of the applicant or others about whether the applicant has a conviction record. At no time may an employer ask about or consider (1) convictions for a nonviolent felony or a misdemeanor where the related sentence was completed at least 60 months or 30 months prior respectively; (2) arrests that did not result in a conviction unless the result was probation before judgment; or (3) arrests of convictions for possession of marijuana unless there was an intent to distribute.

[31] MONTGOMERY COUNTY, MD., CODE § 27-71.

In making an employment decision based on an applicant's conviction record, an employer must conduct an individualized assessment, considering only specific offenses that may demonstrate unfitness to perform the duties of the position sought by the applicant, the time elapsed since the specific offenses, and any evidence of inaccuracy in the record.

If an employer intends to rescind an offer of employment based on an item or items in the applicant's conviction record, the employer must do so in writing. Before rescinding the offer of employment, the employer must take the same three steps identified above in Montgomery County—provide a copy of the criminal record report, notify the intention to rescind and the basis for the decision, and delay rescinding the offer for seven days to permit a response.

The prohibitions and requirements of this law do not apply to inquiries otherwise required or expressly authorized by law, and to certain positions.[32]

An employer must not prevent enforcement or compliance with this law, or retaliate against any person for lawfully opposing any violation of the law or for filing a complaint, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under this law.

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

The restrictions on use of criminal records described in **1.3(a)(ii)** apply to both arrest and conviction records. The Maryland Office of Fair Practices takes the position that an employer may ask about convictions that bear a direct relationship to the job and that have not been expunged or sealed; however, consideration should be given to nature, recency, and rehabilitation.[33]

Likewise, the local "ban-the-box" ordinances cover both arrest and conviction records. For a discussion of those ordinances, see **1.3(a)(ii)**.

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

An employer may not require an applicant or employee to disclose expunged information about criminal charges in an application, interview, or otherwise. Moreover, the refusal of an applicant to disclose information about criminal charges that have been expunged may not be the sole reason for an employer to discharge or refuse to hire the person.[34]

The Maryland Second Chance Act. The Second Chance Act[35] allows a person to petition to have the court and police records for one or more convictions "shielded" no earlier than three years after the person satisfies the sentence imposed for all convictions for which shielding is requested, including parole, probation, or mandatory supervision.[36] *Shield* means to render a court record and police record relating

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[32] PRINCE GEORGE'S COUNTY, MD., CODE § 2-231.

[33] Maryland Dep't of Labor, Licensing & Regulation, Office of Fair Practices, *Guidelines for Pre-Employment Inquiries Technical Assistance Guide: Interviews and Applications for Employment*.

[34] MD. CODE ANN., CRIM. PROC. § 10-109.

[35] MD. CODE ANN., CRIM. PROC. §§ 10-301 *et seq*.

[36] MD. CODE ANN., CRIM. PROC. § 10-303.

to the conviction of a crime inaccessible by members of the public.[37] Only certain offenses are eligible to become shielded convictions:

- disorderly conduct;
- disturbing the peace;
- failure to obey a reasonable and lawful order;
- malicious destruction of property;
- trespass on posted property;
- possessing or administering a controlled dangerous substance;
- possessing or administering a noncontrolled substance;
- possession with intent to use drug paraphernalia;
- driving without a license, while uninsured, or while driving privileges are canceled, suspended, refused, or revoked; and
- a prostitution offense, if the conviction is for prostitution and not assignation.[38]

However, a person is ineligible for shielding if the person is convicted of a new crime during the three year period, unless the new conviction becomes eligible for shielding, or the person is a defendant in a pending criminal proceeding. If a person is ineligible for shielding for one conviction in a unit, the person is ineligible for shielding for any other conviction in the unit. A unit is two or more convictions that arise from the same incident, transaction, or set of facts.[39]

Employers are prohibited from requiring a job applicant to disclose shielded information about criminal charges on an application, during an interview, or otherwise. Employers are further prohibited from discharging or refusing to hire a person solely because the person refused to disclose information about criminal charges that have been shielded.[40]

Shielded records remain accessible to certain employers: (1) criminal justice units; (2) employers or licensing agencies subject to a statutory or regulatory requirement that mandates and authorizes criminal background checks; (3) a person who uses volunteers to care for or supervise children; and (4) a person who attests under penalty of perjury that the person employs or seeks to employ an individual to care for or supervise a minor or vulnerable adult.[41]

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

An employer that violates the prohibition on inspection or challenge of criminal records may be found guilty of a misdemeanor, and subject to a fine, imprisonment, or both for each violation.[42] An employer is

[37] MD. CODE ANN., CRIM. PROC. § 10-301(e).

[38] MD. CODE ANN., CRIM. PROC. § 10-301(f).

[39] MD. CODE ANN., CRIM. PROC. § 10-303.

[40] MD. CODE ANN., CRIM. PROC. § 10-306(b)(1).

[41] MD. CODE ANN., CRIM. PROC. § 10-302.

[42] MD. CODE ANN., CRIM. PROC. § 10-228(b).

subject to the same penalties if it violates the provisions regarding disclosure of expunged criminal records.[43]

1.3(a)(vii) *Local Enforcement, Remedies & Penalties*

A violation of the Baltimore City ordinance is a misdemeanor, which is punishable by a fine, imprisonment, or both. Additionally, the Baltimore Community Relations Commission may award a complainant back pay, reinstatement, attorneys' fees, and compensatory damages, including damages for emotional distress and expenses incurred in seeking other employment.[44] Additionally, effective September 22, 2023, an employer is prohibited from making any inquiry about an applicant's HIV or AIDS status before employing the applicant. This prohibition extends to applications for employment that ask applicants questions about these protected categories, and to job listings that indicate any preference, limitation, specification, or discrimination based on an applicant's membership in a protected class.[45]

Employers that violate the Montgomery County "ban-the-box" law are liable for civil penalties. The Ordinance does not create a private right of action.[46]

The Prince George's County ordinance allows aggrieved individuals to file a complaint with the Prince George's County Office of Human Relations.[47]

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[48] governs an employer's acquisition and use of virtually any type of information gathered by a "consumer reporting agency"[49] 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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[43] MD. CODE ANN., CRIM. PROC. § 10-109(b)(1).

[44] BALTIMORE CITY, MD., CODE art. 11, § 15.

[45] BALTIMORE CITY, MD., CODE art. 4, §§ 1-1, 3-1 – 3-5.

[46] MONTGOMERY COUNTY, MD., CODE § 27-71.

[47] PRINCE GEORGE'S COUNTY, MD., CODE § 2-231.

[48] 15 U.S.C. §§ 1681 *et seq*.

[49] 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]."[50]

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

Maryland law restricts the use of credit reports and credit history information by covered employers unless certain specified conditions are satisfied. Employers cannot use an applicant's or employee's credit report or credit history when: (1) denying employment to an applicant; (2) discharging an employee; or (3) determining compensation or the terms, conditions, or privileges of employment.[51]

However, an employer can request or use an applicant's or employee's credit report or credit history if the applicant has received an offer of employment and either the credit report or credit history will be used for a nonprohibited purpose or the employer has a *bona fide* purpose for requesting or using information in the credit report or credit history that is substantially job-related, and disclosed in writing to the employee or applicant.[52]

The positions for which an employer has a *bona fide* purpose that is substantially job-related for requesting or using the restricted information include:

- positions that are managerial and involve setting the direction or control of a business, department, division, unit, or agency of a business;
- positions that involve access to personal information, except for personal information customarily provided in a retail transaction;
- positions that involve fiduciary responsibility to the employer, including issuing payments, collecting debts, transferring money, or entering into contracts;
- positions that will be provided an expense account or a corporate credit card; and
- positions with access to trade secret or other confidential business information.[53]

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

[51] MD. CODE ANN., LAB. & EMPL. § 3-711(b).

[52] MD. CODE ANN., LAB. & EMPL. § 3-711(c)(1).

[53] MD. CODE ANN., LAB. & EMPL. § 3-711(c)(2).

Moreover, employers are not prohibited from performing an employment-related background investigation that: (1) includes use of a consumer report or investigative consumer report; (2) is authorized under the Fair Credit Reporting Act; and (3) does not involve investigation of credit information.[54]

The law does not define the term *employer*, but expressly excludes four categories of businesses from coverage: (1) an employer that is required to inquire into an applicant's or employee's credit report or credit history under federal law or any provision of state law for the purposes of employment; (2) a financial institution that accepts deposits that are insured by a federal agency (including an affiliate of the financial institution); (3) a credit union share guaranty corporation that is approved by the Maryland Commissioner of Financial Regulation; and (4) an entity (or its affiliates) that is registered as an investment advisor with the U.S. Securities and Exchange Commission.[55]

Maryland's Mini-FCRA. Maryland's mini-FRCA law allows employers to access consumer reports for employment purposes.[56] However, an employer cannot procure or cause to be prepared an investigative consumer report unless:

- it clearly and accurately discloses that a report, including information as to character, general reputation, personal characteristics, and mode of living, whichever are applicable, may be made, and the disclosure:
  - is in writing, mailed, or otherwise delivered, not later than three days after the report request date; and
  - includes a statement concerning the individual's right to request the additional disclosures provided; or
- the report is to be used for employment purposes for which the individual has not specifically applied.[57]

Moreover, upon an individual's written request made within a reasonable period of time after receiving the disclosure, an employer must provide a complete an accurate disclosure of the nature and scope of the investigation requested. This disclosure must be written and mailed, or otherwise delivered, not later than five days after the disclosure request receipt date or the date the report was first requested, whichever is later.[58]

Consumer report means any written, oral, or other communication of any information by a consumer reporting agency bearing on an individual's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used for the purpose of serving as a factor in establishing the individual's eligibility for employment purposes. *Investigative consumer report* means a consumer report in which information on an individual's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, associates, or acquaintances of the individual. However, the information does not include specific factual information on an individual's credit record obtained directly from a creditor of the individual or from a

[54] MD. CODE ANN., LAB. & EMPL. § 3-711(e).

[55] MD. CODE ANN., LAB. & EMPL. § 3-711(a).

[56] MD. CODE ANN., COM. LAW § 14-1202(a)(3)(ii).

[57] MD. CODE ANN., COM. LAW § 14-1204.

[58] MD. CODE ANN., COM. LAW § 14-1204.

consumer reporting agency when the information was obtained directly from a creditor of the individual or from the individual.[59]

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

If an employer violates the provisions regarding use of credit reports and history, an employee or applicant may file a written complaint with the Maryland Commissioner of Labor and Industry. If, after an investigation, the commissioner determines that the employer has willfully or negligently violated the law, the commissioner will try to resolve the matter informally. Absent an informal resolution, the commissioner may: (1) assess a civil penalty of up to $500 for an initial violation, or $2,500 for a repeat violation; and (2) send an order to pay the civil penalty to the applicant or employee and the employer.[60]

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*

Maryland employers are prohibited from requiring, or even asking, that applicants or employees disclose their usernames, passwords, or other means for accessing any personal account or service through an electronic communications device.[61] *Electronic communications device* means any device that uses electronic signals to create, transmit, and receive information; includes computers, telephones, personal digital assistants, and other similar devices.[62]

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[59] MD. CODE ANN., COM. LAW § 14-1201.

[60] MD. CODE ANN., LAB. & EMPL. § 3-711(d).

[61] MD. CODE ANN., LAB. & EMPL. § 3-712(b)(1).

[62] MD. CODE ANN., LAB. & EMPL. § 3-712(a)(3).

In addition, an employer cannot: (1) threaten to or actually discharge, discipline, or otherwise penalize an employee for an employee's refusal to disclose any protected information; or (2) fail or refuse to hire any applicant because the applicant refuses to disclose protected information.[63]

Exceptions. The law does not preclude an employer from conducting an investigation to ensure that the employee is complying with securities or financial law, or regulatory requirements based on the receipt of information about the use of a personal website, internet website, web-based account, or similar account by an employee for business purposes.[64]

Moreover, the law prohibits an employee from downloading unauthorized employer proprietary information or financial data to the employee's personal website, an internet website, a web-based account, or a similar account.[65] If an employer receives information that an employee has downloaded such information in violation of the law, an employer may conduct an investigation into the suspected misconduct.[66]

Employers may also require that employees disclose login credentials "for accessing nonpersonal accounts or services that provide access to the employer's internal computer or information systems."[67]

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

Whenever the Commissioner of Labor and Industry determines that the social media law has been violated, the commissioner will try to resolve any issue involved in the violation informally by mediation. Alternatively, the commissioner may ask the attorney general to bring an action on behalf of the applicant or employee. The attorney general may bring an action for injunctive relief, damages, or other relief.[68]

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

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

- for refusing to take a lie detector test;
- based on the results of such a test; and

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[63] MD. CODE ANN., LAB. & EMPL. § 3-712(c).

[64] MD. CODE ANN., LAB. & EMPL. § 3-712(e)(1).

[65] MD. CODE ANN., LAB. & EMPL. § 3-712(d).

[66] MD. CODE ANN., LAB. & EMPL. § 3-712(e)(2).

[67] MD. CODE ANN., LAB. & EMPL. § 3-712(b)(2).

[68] MD. CODE ANN., LAB. & EMPL. § 3-712(f).

[69] 29 U.S.C. §§ 2001 to 2009; *see also* U.S. Dep't of Labor, *Other Workplace Standards: Lie Detector Tests*, *available at* https://webapps.dol.gov/elaws/elg/eppa.htm.

- for taking any actions to preserve employee rights under the law.

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

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

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

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

An employer may not require or demand, as a condition of employment, prospective employment, or continued employment, that an individual submit to or take a polygraph examination or similar test.[70] All persons engaged in a business, industry, profession, trade, or other enterprises in Maryland are subject to this law; there are no private employer exceptions.[71]

Each application for employment must set out, in boldface, uppercase type, the following notice:

> UNDER MARYLAND LAW, AN EMPLOYER MAY NOT REQUIRE OR DEMAND, AS A CONDITION OF EMPLOYMENT, PROSPECTIVE EMPLOYMENT, OR CONTINUED EMPLOYMENT, THAT AN INDIVIDUAL SUBMIT TO OR TAKE A POLYGRAPH EXAMINATION OR SIMILAR TEST. AN EMPLOYER WHO VIOLATES THIS LAW IS GUILTY OF A MISDEMEANOR AND SUBJECT TO A FINE NOT EXCEEDING $100.[72]

Each application must have a space for the applicant to sign an acknowledgment of this required notice, and each applicant must sign the acknowledgment.[73]

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

If an employer violates the polygraph provisions, an applicant for employment or prospective employment may submit a written complaint to the Commissioner of Labor and Industry.[74] Whenever the commissioner determines that the law has been violated, they may take either of the following actions: (1) use informal mediation to try to resolve any issue related to the violation; or (2) ask the attorney general to bring an action on behalf of the applicant or employee. The attorney general may bring an

[70] MD. CODE ANN., LAB. & EMPL. § 3-702(c).

[71] *See* MD. CODE ANN., LAB. & EMPL. § 3-702(a), (b).

[72] MD. CODE ANN., LAB. & EMPL. § 3-702(d)(1).

[73] MD. CODE ANN., LAB. & EMPL. § 3-702(d)(2), (e).

[74] MD. CODE ANN., LAB. & EMPL. § 3-702(f).

action for injunctive relief, damages, or other relief in the county in which the violation allegedly occurred.[75]

Moreover, an employer that violates any provision of the polygraph law is guilty of a misdemeanor, and upon conviction, is subject to a fine.[76]

Maryland courts have held that these remedies are exclusive and that employees who are required to take an unlawful test cannot sue their employers for damages. Instead, the employee must file a written complaint with the commissioner's office, and the commissioner can file suit.[77]

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.[78] The Drug-Free Workplace Act of 1988 also requires some federal contractors and all federal grantees (but not subcontractors or subgrantees) to certify to the appropriate federal agency that they are providing a drug-free workplace.[79] 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*

Maryland has a drug testing law that allows employers to voluntarily conduct job-related drug and alcohol testing on both applicants and employees. Employers that choose to drug and alcohol test must adhere to specific statutory requirements.

On-Site Testing. Employers may use a "preliminary testing procedure" to test job applicants. However, this provision does not apply to an employer with a collective bargaining agreement that prohibits the use of preliminary screening procedures to test applicants.[80] *Preliminary screening procedure* means a controlled dangerous substance test that uses a single-use test device that: is easily portable and can be

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[75] MD. CODE ANN., LAB. & EMPL. § 3-702(g).

[76] MD. CODE ANN., LAB. & EMPL. § 3-702(h).

[77] *See Weathersby v. Kentucky Fried Chicken Nat'l Mgmt. Co.*, 587 A.2d 569 (Md. Ct. Spec. App. 1991), *rev'd on other grounds*, 607 A.2d 8 (Md. 1992).

[78] 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.

[79] 41 U.S.C. §§ 8101 *et seq*.; *see also* 48 C.F.R. §§ 23.500 *et seq*.

[80] MD. CODE ANN., HEALTH-GEN. § 17-214(b)(2), (l).

administered at a work site or other appropriate collection site; meets the requirements of the federal Food and Drug Administration for commercial distribution; and, meets generally accepted cutoff levels such as those in the federal Substance Abuse and Mental Health Services Administration Guidelines for drug-free workplace testing programs.[81]

In the event that the applicant's on-site test is positive, the test must be confirmed by a certified laboratory.[82] If the confirmation test also is positive, the result must be reviewed by a physician or other qualified professional.[83] In addition, any person administering an on-site test for an employer must be trained to collect specimens and to perform the test.[84]

Specimen Collection. Maryland allows testing of urine and blood in all circumstances, provided that cutoff levels adopted by SAMHSA (Substance Abuse Mental Health Services Administration) for workplace drug-testing programs are used.[85] However, testing of hair is permitted for preemployment purposes only. A hair sample must be derived from the human body and be no longer than one and one-half inches measured from the human body. Moreover, a hair specimen may not be used for any purpose other than testing for controlled dangerous substances.[86]

Where an applicant voluntarily discloses that the applicant is taking legally prescribed medication, an employer may hire the applicant while awaiting confirmation of a positive test result by a medical laboratory and review by the employer's medical review officer.[87] Employers must notify workers who test positive for drugs or alcohol in conformance with the drug testing law.[88] These requirements are set forth in **3.2(b)**.

Additionally, employers that have drug and alcohol-free workplace policies can also qualify to receive a discount on workers' compensation premiums, if those policy meet the statutory requirements.[89]

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

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

1.3(f)(i) *State Restrictions on Inquiries Regarding Salary History*

Maryland prohibits pre-hire salary history inquiries. Specifically, an employer cannot:

- seek an applicant's wage history, whether orally or in writing, or through an employee or agent or from a current or former employer;

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[81] MD. CODE ANN., HEALTH-GEN. § 17-214(a)(9).

[82] MD. CODE ANN., HEALTH-GEN. § 17-214(b)(2).

[83] MD. CODE ANN., HEALTH-GEN. § 17-214(j).

[84] MD. CODE ANN., HEALTH-GEN. § 17-214(k).

[85] MD. CODE ANN., HEALTH-GEN. § 17-214.

[86] MD. CODE ANN., HEALTH-GEN. § 17-214(b)(3).

[87] MD. CODE ANN., HEALTH-GEN. § 17-214(b)(2)(iii).

[88] MD. CODE ANN., HEALTH-GEN. § 17-214(c).

[89] *See* MD. CODE ANN., INS. § 11-329.

- rely on an applicant's wage history to screen, select or determine the wages for the applicant; or
- refuse to interview, hire or employ, or otherwise retaliate against an applicant because the applicant did not provide wage history.[90]

The statute further requires that an employer must provide an applicant with the wage range for the job for which the applicant applied, and cannot retaliate against an applicant by refusing to hire or employ the applicant for requesting the wage range for the position sought.[91]

An applicant is not prohibited from providing their wage history to an employer voluntarily. If the applicant voluntarily provides a wage history, the employer – after making an initial offer of employment along with a compensation offer to the applicant – may rely on or seek to confirm the applicant's wage history to support a wage offer higher than the offer the employer originally extended, but only if the higher compensation offer would not create an unlawful pay differential based on a protected characteristic.[92]

2. TIME OF HIRE

2.1 Documentation to Provide at Hire

2.1(a) *Federal Guidelines on Hire Documentation*

Table 2 lists the documents that must be provided at the time of hire under federal law.

Table 2. Federal Documents to Provide at Hire

Category	Notes
Benefits & Leave Documents: Affordable Care Act (ACA)	Currently, employers covered under the Fair Labor Standards Act (FLSA) must provide to each employee, at the time of hire, written notice: • informing the employee of the existence of an insurance exchange, including a description of the services provided by such exchange, and the manner in which the employee may contact the exchange to request assistance; • that if the employer-plan's share of the total allowed costs of benefits provided under the plan is less than 60% of such costs, the employee may be eligible for a premium tax credit under section 36B of the Internal Revenue Code of 1986[93] and a cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act[94] if the employee purchases a qualified health plan through the exchange; and

[90] MD. CODE ANN., LAB. & EMPL. § 3-304.2.

[91] MD. CODE ANN., LAB. & EMPL. § 3-304.2.

[92] MD. CODE ANN., LAB. & EMPL. § 3-304.2.

[93] 26 U.S.C. § 36B.

[94] 42 U.S.C. § 18071.

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	• that if the employee purchases a qualified health plan through the exchange, the employee may lose the employer contribution (if any) to any health benefits plan offered by the employer and that all or a portion of such contribution may be excludable from income for federal income tax purposes.[95] 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.[96]
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.[97] Employers or plan administrators can send COBRA rights notices through first-class mail, electronic distribution, or other means that ensure receipt. If employees and their spouses live at the same address, employers or plan administrators can mail one COBRA rights notice addressed to both individuals; alternatively, if employees and their spouses do not live at the same address, employers or plan administrators must send separate COBRA rights notices to each address.[98]
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.[99] In either case, distribution may be accomplished electronically. Employers may use a format other than the FMLA poster as a model notice, if the

[95] 29 U.S.C. § 218b.

[96] 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.

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

[98] 29 C.F.R. § 2590.606-1.

[99] 29 C.F.R. § 825.300(a).

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	information provided includes, at a minimum, all of the information contained in that poster.[100] 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.[101]
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.[102] For additional information on these requirements, see LITTLER ON I-9 COMPLIANCE & WORK AUTHORIZATION VISAS.
Tax Documents	On or before the date employment begins, employees must furnish employers with a signed withholding exemption certificate (Form W-4) relating to their marital status and the number of withholding exemptions they claim.[103]
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.[104]

[100] 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.

[101] 29 C.F.R. § 825.300(a).

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

[103] 26 C.F.R. § 31.3402(f)(2)-1. The IRS provides this form at https://www.irs.gov/pub/irs-pdf/fw4.pdf.

[104] 38 U.S.C. § 4334. This notice is available at https://www.dol.gov/sites/dolgov/files/VETS/legacy/files/USERRA_Private.pdf.

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
Wage & Hour Documents	To qualify for the federal tip credit, employers must notify tipped employees: (1) of the minimum cash wage that will be paid; (2) of the tip credit amount, which cannot exceed the value of the tips actually received by the employee; (3) that all tips received by the tipped employee must be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and (4) that the tip credit will not apply to any employee who has not been informed of these requirements.[105]

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	The Family and Medical Leave Insurance Program requires employers to give written notice of rights and duties under the law to each employee at the time of hire and once per year thereafter. The Department of Labor has detailed the information that must be included in the notice.[106]
Benefits & Leave Documents: City of Baltimore Lactation Accommodation	Employers of two or more employees in the city of Baltimore must distribute a copy of their lactation policy to new employees upon hire, as well as include it in their employee handbook, if the company distributes one.[107]
Fair Employment Practices Documents	The Healthy Working Families Act requires that employers notify employees of their rights to earned sick and safe leave under the law. The notice must include: (1) how leave is accrued; (2) the purposes for which leave can be used; (3) prohibitions on an employer taking against adverse action against an employee for exercising a protected right and against an employee for making a complaint, bringing an action, or testifying in an action in bad faith; and, (4) the ability to report an alleged violation to the state labor department or to file a private lawsuit. **Method of Delivery.** The state labor department has created a poster and model notice that employers can use to comply with the notice

[105] 29 C.F.R. § 531.59.

[106] MD. CODE ANN., LAB. & EMPL. §§ 8.3-801 – 8.3-1001.

[107] BALTIMORE, MD. CITY CODE art. 11, §§ 16-1 – 16-30.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
	requirement.[108] The state labor department has also developed a model sick and safe leave policy that an employer may use as a sick and safe leave policy in an employee handbook or other written guidance to employees concerning employee benefits or leave provided by the employer.[109] The law does not specify when this notice must be provided.[110]
Tax Documents	At the time of employment, employees must sign and file with employers an exemption certificate that states the number of exemptions to which they are entitled.[111]
Wage & Hour Documents: Payday, Rates & Benefits	At the time of hiring, employers must give employees notice of: • pay rate; • regular paydays that the employer sets; and • leave benefits.[112]
Wage & Hour Documents: Tipped Employees	Employers that intend to take tip credits must meet certain criteria, including that they inform employees about any tip credit provisions.[113]

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.[114] State new hire reporting laws must include these minimum requirements:

[108] The notice is available online from the Maryland Department of Labor, Licensing and Regulation at http://www.dllr.state.md.us/paidleave/paidleaveposter.pdf.

[109] Model policies for use in employee handbooks and other employee benefits documents are available online from the Maryland Department of Labor, Licensing and Regulation at http://www.dllr.state.md.us/paidleave/paidleavemodel.pdf.

[110] MD. CODE ANN., LAB. & EMPL. § 3-1306.

[111] MD. CODE ANN., TAX-GEN. § 10-910. The Comptroller of Maryland provides Form MW507 (Employee's Maryland Withholding Exemption Certificate), which is available at https://www.marylandtaxes.gov/individual/income/forms/2023_Withholding_Forms.php.

[112] MD. CODE ANN., LAB. & EMPL. § 3-504.

[113] MD. CODE ANN., LAB. & EMPL. § 3-419.

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

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).[115]

These are only the minimum requirements that state new hire reporting laws must satisfy. States may enact new hire reporting laws that, for example, require additional information to be submitted or require a shorter reporting timeframe. Many states have also developed their own reporting form; however, its use is optional.

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

- Federal Employer Identification Number (FEIN);
- employer's name, address, and telephone number related to the FEIN;
- state selected for reporting purposes;
- other states in which the company has employees;
- 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:

[115] 42 U.S.C. § 653a.

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.[116] 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 Maryland's new hire reporting law.

Who Must Be Reported. An employer must report employees newly hired or those previously employed by the employer but separated from such employment for at least 60 consecutive days.[117]

Report Timeframe. Maryland employers must submit new hire information for employees within 20 days of remuneration. Employers submitting electronically or magnetically must report new employees, if any, twice each month, no less than 12 days or more than 16 days apart.[118]

Information Required. The report must include the employee's name, address, Social Security number, date of employment, starting wage, and availability of health insurance benefits. The report must also include the employer's name, address, federal employer identification number, and employer state unemployment insurance number.[119] While not statutorily mandated, the Maryland Department of Human Resources and the Department of Labor, Licensing, and Regulation states that pay frequency must also be reported.[120]

Form & Submission of Report. The information should be submitted via a federal Form W-4, the Maryland New Hire Reporting form, or a printed list. Reports may be submitted by mail, fax, magnetically, electronically, or another method as determined by the Maryland Secretary of Labor, Licensing, and Regulation.[121]

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

[117] MD. CODE ANN., LAB. & EMPL. § 8-626.1.

[118] MD. CODE ANN., LAB. & EMPL. § 8-626.1(b), (c)(2).

[119] MD. CODE ANN., LAB. & EMPL. § 8-626.1(b).

[120] Maryland State Directory of New Hire, *State and Federal Requirements*, *available at* https://www.mdnewhire.com/#/public/public-landing/login.

[121] MD. CODE ANN., LAB. & EMPL. § 8-626.1(c)(1).

Location to Send Information.

The Maryland New Hire Registry
P.O. Box 1316
Baltimore, MD 21203-1316
(410) 281-6000
(888) 634-4737
(410) 281-6004 (fax)
(888) 657-3534 (fax)
https://www.mdnewhire.com/#/public/public-landing/login

Multistate Employers. An employer that has employees who are employed in two or more states and that transmits reports magnetically or electronically may designate one state to which the employer transmits reports. Any multistate employer that elects to transmit all reports to one state must provide the Secretary of Labor, Licensing, and Regulation with the name of the state receiving the report.[122]

2.3 Restrictive Covenants, Trade Secrets & Protection of Business Information

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

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

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

Protections against trade secret misappropriation are also available to employers. Until 2016, trade secrets were the only form of intellectual property (*i.e.*, copyrights, patents, trademarks) not predominately governed by federal law. However, the Defend Trade Secrets Act of 2016 (DTSA) now provides a federal court civil remedy and original (but not exclusive) jurisdiction in federal court for claims of trade secret misappropriation.[123] 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).

[122] MD. CODE ANN., LAB. & EMPL. § 8-626.1(c)(3).

[123] 18 U.S.C. §§ 1832 *et seq.*

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

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

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

Noncompetition agreements are enforceable in Maryland if the agreements are reasonably necessary to protect the business of the employer and if they are reasonable in scope and duration. Noncompetition agreements are not favored, however, because competition is deemed to be socially desirable and furthers the public interest. Therefore, in determining whether to enforce a restrictive covenant, Maryland courts traditionally engage in a balancing test between the rights of the employer, the rights of the former employee, and the public interest.

The general rule in Maryland is that if a restrictive covenant in an employment contract is supported by adequate consideration and is ancillary to the employment contract, an employee's agreement not to compete with their employer upon leaving employment will be upheld "if the restraint is confined within limits which are no wider as to area and duration than are reasonably necessary for the protection of the business of the employer and do not impose undue hardship on the employee or disregard the interests of the public."[124] Any restriction on the ability of a former employee to engage in a competing business must be contained in a covenant-not-to-compete agreement.

Effective October 1, 2023, Maryland prohibits the use of non-compete agreements is prohibited as to employees who earn equal to or less than 150% of Maryland's minimum wage rate. This prohibition applies even if the employer did not enter into the contract in Maryland.[125]

Geographic Restrictions. A covenant not to compete will only be enforced if the geographic restriction contained in the covenant is confined within limits that are no wider than are reasonably necessary for the protection of the business of the employer, and does not pose an undue hardship on the employee or disregard the public interest.[126] The reasonableness of a particular geographic restriction is determined by the court on a case-by-case basis. However, some of the factors that the courts will consider include the following:

- whether the former employee is an unskilled worker whose services are not unique;
- whether the covenant is necessary to prevent the solicitation of customers or the use of trade secrets, assigned routes, or private customer lists;
- whether there is the possibility of the exploitation of personal contacts between the employee and former customers; and
- whether enforcement of the restriction would impose an undue hardship on the former employee or disregard the interest of the public.[127]

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[124] *Becker v. Bailey*, 299 A.2d 835, 838 (Md. 1973) (quoting *Ruhl v. F.A. Bartlett Tree Expert Co.*, 225 A.2d 288, 291 (Md. 1967)); *see also Corporate Healthcare Fin., Inc. v. BCI Holdings Co.*, 2006 WL 1997126, at *7 (D. Md. July 13, 2006).

[125] MD. CODE ANN., LAB. & EMPL. § 3-716, as amended by S.B. 591 (Md. 2023).

[126] *Tuttle v. Riggs-Warfield-Roloson, Inc.*, 246 A.2d 588, 590 (Md. 1968).

[127] *Budget Rent-A-Car, Inc. v. Raab*, 302 A.2d 11, 13 (Md. 1973) (citing *Ruhl*, 225 A.2d at 291).

In most cases, the critical inquiry is whether the former employee's personal contact with the employer's customers or clients poses a substantial risk of the employer losing business if the employee is permitted to compete within the geographic area of the employer's business.[128] On the other hand, the court will be less concerned about a geographic restriction if enforcement of the restrictive covenant would be likely to create or perpetuate a monopoly market situation.[129]

A covenant not to open a competing business is generally enforceable, so long as it is reasonable in duration and geographic scope, and so long as the employer can show that the restriction is directly linked to a legitimate interest of the employer. A court's willingness to prevent competition will diminish, however, if the competing work in question is of an unskilled nature.[130]

Time Restrictions. Maryland courts engage in the same type of analysis when determining the reasonableness of the period of time contained in a contractual restriction. The reasonableness of the restriction will be measured by the amount of time that an employer will require to reestablish a solid relationship with its customers or clients after the departure of the employee.[131] Thus, as a practical matter, the duration of the restriction generally should be related, in some reasonable manner, to the length of time that the individual was employed by the employer.

Voluntary Resignation vs. Involuntary Discharge. Another factor that may impact the enforceability of the restrictive covenant is whether the employee voluntarily left their employment or whether the employee was involuntarily discharged. Courts are more reluctant to enforce covenants when an employer is responsible for preventing the employee's continued employment. The enforceability of the covenant may depend upon whether the discharge of the employee constitutes a breach of the contract by the employer or, instead, whether the contract permits the employee to be discharged. For example, in *Ruhl v. F.A. Bartlett Tree Expert Co.*, the court enforced the restrictive covenant that was set forth in the employee's contract, but stated that, if the employee had been terminated by the employer through no fault of the employee, "a different legal situation might well have been presented."[132]

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

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

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[128] *Budget Rent-A-Car, Inc.*, 302 A.2d at 13; *see also Labor Ready, Inc. v. Abis*, 767 A.2d 936 (Md. Ct. Spec. App. 2001) (a brief 17-day technical violation of a geographic restriction was considered by the court to be harmless because there was no actual damage).

[129] *See, e.g.*, *Ruhl*, 225 A.2d 288.

[130] *See, e.g.*, *Becker v. Bailey*, 299 A.2d 835 (Md. 1973).

[131] *Becker*, 299 A.2d at 840.

[132] 225 A.2d 288, 293 (Md. 1967); *see also MacIntosh v. Brunswick Corp.*, 215 A.2d 222, 225-26 (Md. 1965) (restrictive covenant was overbroad because it was unlimited in geographic scope, and duration was also unenforceable because the employee had been "discharged through no fault of his own to reduce the number of employees for the benefit of the employer, and as a result, the employee had been unemployed for more than two months because his previous training and experience had necessarily limited the type of work he could skillfully perform for payment").

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.

Although Maryland courts have not specifically addressed the sufficiency of consideration for noncompetes entered into at the inception of employment, courts have upheld such agreements.[133] The courts reason that, since employment will be terminated in the absence of executing a noncompetition agreement, the employee's ability to continue working is a tangible benefit received for executing the noncompetition agreement. For the same reason, sufficient consideration will be found to exist where a noncompetition agreement is signed after an employee commences employment.[134]

On the other hand, if an employee is employed pursuant to a written contract that limits the employer's right to terminate the individual's employment and the employer seeks to add the restrictive covenant after the employee has executed the initial agreement, then the addition of this new term to the agreement requires some separate consideration in order to make the restrictive covenant enforceable.[135]

Enforceability Following Employee Discharge. In Maryland, noncompetes are likely not enforceable following an employee's termination.[136]

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

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

Maryland has adopted the blue-pencil rule.[137] What is unclear, however, is how strictly Maryland courts will limit their rewriting of contract language. Under a strict interpretation of the blue-pencil rule, the court is not permitted to rewrite the contract, but it is simply permitted to delete the offending language. Having deleted the offending language, the court may enforce the remainder of the restrictive covenant. In the example described above, the court may strike the noncompete language while keeping intact the limitation on contacting customers. On the other hand, the court may find that an enforceable restriction cannot be obtained by simply striking the language from the agreement and the court would have to substitute its own language in order to make the restriction enforceable. Although a number of states are

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[133] *Gill v. Computer Equip. Corp.*, 292 A.2d 54, 59 (Md. 1972).

[134] See *Simko Inc. v. Graymar Co.*, 464 A.2d 1104 (Md. Ct. Spec. App. 1983), *cert. denied*, 469 A.2d 452 (Md. 1983).

[135] *See Tuttle v. Riggs-Warfield-Roloson, Inc.*, 246 A.2d 588 (Md. 1968) (consideration based on salary continuance plan); *Ruhl v. F.A. Bartlett Tree Expert Co.*, 225 A.2d 288, 288 (Md. 1967) (adequate consideration existed where the addition of the restrictive covenant to the contract was accompanied by a new pay plan).

[136] *See, e.g.*, *Ruhl*, 225 A.2d 288; *Bethseda Asset Servs., Inc. v. Bank of New York*, 2005 WL 2106083 (D. Md. Aug. 30, 2005).

[137] *Fowler v. Printers II, Inc.*, 598 A.2d 794, 802 (Md. Ct. Spec. App. 1991).

willing to do that, Maryland courts typically are not. In *Fowler v. Printers II, Inc.*, the court stated that "such 'blue pencil' excision of offending contractual language *without supplementation or rearrangement of any language* is entirely in accord with Maryland law."[138] The court's use of the language "without supplementation or rearrangement" suggests a more narrow interpretation of the blue-pencil rule.

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

When an employee leaves a business, the individual will sometimes take valuable information of the business to use for competitive purposes. Maryland law provides means for employers to protect themselves from a recently departed employee's misuse of proprietary information acquired from the employer. In 1989, Maryland's General Assembly enacted the Maryland Uniform Trade Secrets Act (MUTSA).[139]

Definition of a Trade Secret. MUTSA defines a *trade secret* as information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

1. derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
2. is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[140]

To qualify as a trade secret under MUTSA, the information must: (1) hold independent economic value because it is not generally known to or readily ascertainable by others who stand to benefit economically if they use or disclose it; and (2) be the subject of reasonable efforts to maintain its secrecy.[141]

Misappropriation of a Trade Secret. Under the MUTSA, liability attaches if the trade secret is misappropriated. *Misappropriation* is defined as:

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:

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[138] 598 A.2d at 802 (emphasis added); *see also Deutsche Post Global Mail, Ltd. v. Conrad*, 116 F. App'x 435, 439 (4th Cir. 2004) (under Maryland's blue-pencil rule, a court may only remove an offending provision from a restrictive covenant if it is neatly severable; a court may not rearrange or supplement the language of a restrictive covenant).

[139] MD. CODE ANN., COM. LAW §§ 11-1201 *et seq*.

[140] MD. CODE ANN., COM. LAW § 11-1201(e); *see also DTM Research, L.L.C. v. AT&T Corp.*, 245 F.3d 327, 333 (4th Cir. 2001) ("fee simple ownership in its traditional sense is not an element of a trade secrets misappropriation claim in Maryland"); *Trandes Corp. v. Guy F. Atkinson Co.*, 996 F.2d 655, 661 (4th Cir. 1993)*, cert. denied*, 510 U.S. 965 (1993); *Montgomery County Ass'n of Realtors v. Realty Photo Master Corp.*, 878 F. Supp. 804, 814 (D. Md. 1995) (data in question derives its economic value not from secrecy, as required by MUTSA, but from being widely disseminated so a purchaser will know what properties are on the market and, therefore, do not constitute trade secrets, as defined by MUTSA), *aff'd*, 91 F.3d 132 (4th Cir. 1996); *Diamond v. T. Rowe Price Assocs.*, 852 F. Supp. 372, 412 n.191 (D. Md. 1994) (that a document is confidential does not automatically make it a trade secret); *Optic Graphics, Inc. v. Agee*, 591 A.2d 578, 585 (Md. Ct. Spec. App. 1991).

[141] *Optic Graphics, Inc.*, 591 A.2d at 585; *Diamond*, 852 F. Supp. at 411 n.188.

a. used improper means to acquire knowledge of the trade secret; or

b. at the time of disclosure or use, knew or had reason to know that his 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.[142]

The following factors, found in the Restatement of Torts, also provide helpful guidance in determining whether the information misappropriated in a given case constitutes a *trade secret*:

- the extent to which the information is known outside of the business;
- the extent to which the information is known by employees and others involved in the business;
- the extent to which the employer has taken measures to guard the secrecy of the information;
- the value of the information to the employer and to the employer's competitors;
- the amount of effort or money expended by the employer in developing the information; and
- the ease or difficulty with which the information could be properly acquired or duplicated by others.[143]

Maryland courts may enjoin the actual or threatened misappropriation of trade secrets.[144] The complainant may also be entitled to damages, both for the actual loss and any unjust enrichment caused by the misappropriation that is not covered by the actual loss.[145]

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

Maryland has no statutory authority addressing ownership of employee inventions and ideas.

[142] MD. CODE ANN., COM. LAW § 11-1201(c).

[143] *See Trandes Corp.*, 996 F.2d at 658 (the existence of a trade secret is a conclusion of law based upon the applicable facts); *Optic Graphics*, 591 A.2d at 584; *see, e.g.*, *Naturalawn of Am., Inc. v. West Grp., L.L.C.*, 484 F. Supp. 2d 392, 399 (D. Md. 2007) (applying the MUTSA and the Restatement factors finding computer software that has been customized, enhanced, and is uniquely used by the company can be a trade secret).

[144] MD. CODE ANN., COM. LAW § 11-1202; *Optic Graphics, Inc.*, 591 A.2d at 585.

[145] MD. CODE ANN., COM. LAW § 11-1203(b).

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.[146]
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.[147]
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.[148]
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.[149]
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

[146] 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.

[147] 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.

[148] 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.

[149] 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.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	common to migrant or seasonal agricultural workers who are not fluent or literate in English.[150]
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.[151]
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.[152]
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.[153]
In addition to the federal posters required for all employers, government contractors may be required to post the following posters.	
"EEO is the Law" Poster with the EEO is the Law Supplement	Employers subject to Executive Order No. 11246 must prominently post notice, where it can be readily seen by employees and applicants, explaining that discrimination in employment is prohibited on numerous grounds.[154] 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.[155]

[150] 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.

[151] 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.

[152] 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.

[153] 20 C.F.R. app. § 1002. This poster is available at http://www.dol.gov/vets/programs/userra/poster.htm.

[154] 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.

[155] 41 C.F.R. §§ 60-300.44, 60-741.44.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
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.[156]
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.[157]
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.[158]
Notice to Workers with Disabilities/Special Minimum Wage Poster	Employers of workers with disabilities under special minimum wage certificates authorized by the Service Contract Act or the Walsh-Healey Public Contracts Act must post notice, explaining the conditions under which the special minimum wages may be paid. Where an employer finds it inappropriate to post this notice, directly providing the poster to its employees is sufficient.[159]
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

[156] 29 C.F.R. § 5.5(a)(l)(i). This poster is available at https://www.dol.gov/whd/regs/compliance/posters/davis.htm.

[157] 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.

[158] 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.

[159] 29 C.F.R. § 525.14. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/disab.htm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	workforce is not proficient in English, the notice must be provided in the languages spoken by employees.[160]
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.[161]
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.[162] **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).[163]
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.[164]

[160] 29 C.F.R. § 471.2. This poster is available at https://www.dol.gov/olms/regs/compliance/EO13496.htm.

[161] 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.

[162] 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.

[163] 29 C.F.R. § 13.5.

[164] 41 C.F.R. § 60-1.35(c). This poster is available at https://www.dol.gov/agencies/ofccp/posters.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
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.[165]

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

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

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Benefits & Leave	Each employer must keep posted, in places readily accessible to its employees, a summary of the rights of certain employees for continuation of health benefits after separation from employment.[166]
Benefits & Leave: Maryland Healthy Working Families Act	Employers must notify their employees that they are entitled to earned sick and safe leave. The notice must include: • statement of how earned sick and safe leave is accrued; • purposes for which employee may use the leave; • statement regarding prohibition of an employer to take adverse action against an employee that exercises a right under the law; • information regarding the right of an employee to report an alleged violation of the law or bring a civil action.[167]
Child Labor	Employers employing minors must conspicuously post and maintain notice informing employees of the state restrictions on child labor.[168]

[165] 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.

[166] MD. CODE ANN., LAB. & EMPL. § 8-603. This poster is available at http://www.dllr.state.md.us/employment/empguide/healthinsposter.pdf.

[167] MD. CODE ANN., LAB. & EMPL. § 3-1306. The poster is available at https://www.dllr.state.md.us/paidleave/paidleaveposter.pdf.

[168] MD. CODE ANN., LAB. & EMPL. § 3-214. This poster is available at http://www.dllr.state.md.us/labor/wages/minorfactsheet.pdf.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Fair Employment Practices: Employment Discrimination	Employers with 15 or more employees must post notice ("Employment Discrimination is Unlawful") informing employees of the prohibition against discrimination and retaliation and how to file a complaint.[169]
Fair Employment Practices: Reasonable Accommodation & Leave for Pregnancy-Related Disability	An employer with 15 or more employees must post in a conspicuous location, and include in any employee handbook, information concerning an employee's rights to reasonable accommodations and to leave for a disability caused or contributed to by pregnancy.[170]
Fair Employment Practices: Equal Pay	Each employer must keep posted conspicuously, in each place of employment, a notice ("Equal Pay for Equal Work") informing employees about the provisions and protections of the equal pay law.[171]
Fair Employment Practices: Montgomery County	Employers with one or more individuals working in Montgomery County, either for compensation or as a volunteer, must post a workplace poster on the local antidiscrimination protections.[172]
Human Trafficking Resource Center Hotline	Certain employers are obligated to post notice about human trafficking and the hotline available for assistance. Such notice is required for bus stations, truck stops, certain hotels where arrests leading to convictions of prostitution, solicitation of a minor, or human trafficking have occurred, as well as all highway rest area restrooms. Notice must be placed in each restroom of bus stations and truck stops, including a sign on the inside of each stall and on the back of door to the restroom. Notices must be posted in English, Spanish, and any other languages required by the Voting Rights Act.[173]
Unemployment Compensation	All employers must post and maintain, where readily accessible to employees, notice summarizing the right to unemployment benefits, claims for benefits, the rights for continuation of health benefits, and

[169] MD. CODE ANN., STATE GOV'T §§ 20-601 to 20-609. This poster is available at https://mccr.maryland.gov/Documents/Employment Discrimination is Unlawful (Poster-Color).pdf.

[170] MD. CODE ANN., STATE GOV'T § 20-609. This poster is available at https://mccr.maryland.gov/Documents/Pregnant %26 Working (Poster-Color)%E2%80%8B.pdf.

[171] MD. CODE ANN., LAB. & EMPL. § 3-306. This poster is available at http://www.dllr.state.md.us/forms/equalpay.pdf.

[172] MONTGOMERY CNTY., MD., CODE § 27-20(a).

[173] MD. CODE ANN., BUS. REG. §§ 19-103, 15-207; MD. CODE ANN., TRANSP. § 8-655. This poster is available at http://dllr.state.md.us/forms/hthotlinefull.pdf. Privately owned bus stations, truck stops, and adult entertainment establishments must post the sign in each restroom, on the inside of each stall door, or on the back of the door at the restroom entrance. The poster must also be posted in each restroom at a rest area within the right-of-way on an interstate or state highway.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
	any other matter relating to the administration of unemployment insurance.[174]
Wages, Hours & Payroll: Maryland Minimum Wage	All employers must conspicuously post a summary of the wage and hour laws and regulations.[175]
Wages, Hours & Payroll: Tipped Employees	Employers with tipped employees must conspicuously post notice informing employees of the tip credit provisions.[176]
Workers' Compensation	Employers must conspicuously post notice, at all places of employment controlled or operated by the employer, notices provided to the employer by the commission or the employer's insurance carrier (or prepared by the employer, if self-insured), informing employees about benefits, identifying the insurance carrier, and instructing them what to do if injured on the job.[177] Employer must keep a sufficient supply of workers' compensation forms at all times.
Workplace Safety: Safety and Health Protection on the Job	All employers must post notice, where notices are normally posted, informing employees of the protections provided by the state occupational safety and health act and who to contact for assistance and information.[178]
Workplace Safety: No Smoking Signs & Smoking Permitted Signs	Generally, smoking in indoor workplaces in Maryland is prohibited.[179] All covered employers must ensure that indoor places of employment are smoke-free and must post at each entrance a sign stating that smoking is not permitted.[180] Where smoking is permitted, employers must prominently post and maintain signs that state "Smoking or Vaping Permitted in This Room."[181]

[174] MD. CODE ANN., LAB. & EMPL. § 8-603; MD. CODE REGS. 9.32.01.04. This poster is available at http://www.dllr.state.md.us/employment/empguide/uibenefitposter.pdf.

[175] MD. CODE ANN., LAB. & EMPL. § 3-423. Approved posters (in general, as well as for Prince George's and Montgomery Counties) in English and Spanish are available at https://www.dllr.state.md.us/labor/wages/wagehrfacts.shtml.

[176] MD. CODE ANN., LAB. & EMPL. § 3-713. This poster is available at https://www.dllr.state.md.us/forms/esstipinfo.pdf.

[177] MD. CODE ANN., LAB. & EMPL. §§ 9-105, 9-703; MD. CODE REGS. 14.9.01.10. This poster is available at http://www.wcc.state.md.us/PDF/Publications/C24_EmpNotice.pdf.

[178] MD. CODE ANN., LAB. & EMPL. § 5-104; MD. CODE REGS. 9.12.20.02. This poster is available at http://www.dllr.state.md.us/labor/mosh/pdf/moshprivatesectorposter.pdf.

[179] MD. CODE ANN., HEALTH-GEN. §§ 24-501 *et seq*.

[180] MD. CODE REGS. 09.12.23.03.

[181] MD. CODE ANN., HEALTH-GEN. § 24-506.

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.[182]	At least 3 years from the date of entry.
Age Discrimination in Employment Act (ADEA): Personnel Records	*Employers that maintain the following personnel records in the course of business are required by the ADEA to keep them for the specified period of time:* • job applications, resumes, or other forms of employment inquiry, including records pertaining to the refusal to hire any individual; • promotion, demotion, transfer, selection for training, recall, or discharge of any employee; • job orders submitted by the employer to an employment agency or labor organization for recruitment of personnel for job openings; • test papers completed by applicants which disclose the results of any employment test considered by the employer; • results of any physical examination considered by the employer in connection with a personnel action; and • any advertisements or notices relating to job openings, promotions, training programs, or opportunities to work overtime.[183]	At least 1 year from the date of the personnel action to which any records relate.
Age Discrimination in Employment (ADEA): Benefit Plan Documents	*Employer must keep on file any:* • employee benefit plans, such as pension and insurance plans; and • copies of any seniority systems and merit systems in writing.[184]	For the full period the plan or system is in effect, and for at least 1 year after its termination.

[182] 29 U.S.C. § 626; 29 C.F.R. § 1627.3(a).

[183] 29 C.F.R. § 1627.3(b).

[184] 29 C.F.R. § 1627.3(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
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.[185]	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.[186]	Until final disposition of the charge or action (*i.e.*, until the statutory period for bringing an action has expired or, if an action has been brought, the date the litigation is terminated).
Title VII & the Americans with Disabilities Act (ADA): Other	An employer must keep and maintain its Employer Information Report (EEO-1).[187]	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;	At least 3 years following the date on which the polygraph examination was conducted.

[185] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[186] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[187] 29 C.F.R. § 1602.7.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• 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.[188]	
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.[189]	At least 6 years after documents are filed or would have been filed but for an exemption.
Equal Pay Act	Covered employers must maintain the records required to be kept by employers under the Fair Labor Standards Act (29 C.F.R. part 516).[190]	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.[191]	At least 2 years.

[188] 29 U.S.C. §§ 2001 *et seq.*; 29 C.F.R. § 801.30.

[189] 29 U.S.C. § 1027.

[190] 29 C.F.R. § 1620.32(a).

[191] 29 C.F.R. § 1620.32(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Fair Labor Standards Act (FLSA): Payroll Records	*Employers must maintain the following records with respect to each employee subject to the minimum wage and/or overtime provisions of the FLSA:* • full name and any identifying symbol used in place of name on time or payroll records; • home address with zip code; • date of birth, if under 19; • sex and occupation in which employed; • time of day and day of week on which the employee's workweek begins; • regular hourly rate of pay for any workweek in which overtime compensation is due; • basis on which wages are paid (pay interval); • amount and nature of each payment excluded from the employee's regular rate; • hours worked each workday and total hours worked each workweek; • total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation; • total premium pay for overtime hours; • total additions to or deductions from wages paid each pay period, including employee purchase orders or wage assignments; • total wages paid each pay period; • date of payment and the pay period covered by the payment; • records of retroactive payment of wages, including the amount of such payment to each employee, the period covered by the payment, and the date of the payment; and • for employees working on a fixed schedule, the schedule of daily and weekly hours the employee normally works (instead of hours worked each day and each workweek).[192] 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.	3 years from the last day of entry.
Fair Labor Standards Act	*Employers must maintain and preserve all Payroll Records noted above as well as:*	

[192] 29 C.F.R. §§ 516.2, 516.5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
(FLSA): Tipped Employees	• 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.[193]	
Fair Labor Standards Act (FLSA): White Collar Exemptions	*For bona fide executive, administrative, and professional employees and outside sales employees (e.g., white collar employees) the following information must be maintained:* • full name and any identifying symbol used in place of name on time or payroll records; • home address with zip code; • date of birth if under 19; • sex and occupation in which employed; • time of day and day of week on which the employee's workweek begins; • total wages paid each pay period; • date of payment and the pay period covered by the payment; and • basis on which wages are paid in sufficient detail to permit calculation for each pay period of the employee's total remuneration for employment including fringe benefits and prerequisites.[194]	3 years from the last day of entry.
Fair Labor Standards Act (FLSA):	*In addition to payroll information, employers must preserve agreements and other records, including:*	At least 3 years from the last effective date.

[193] 29 C.F.R. § 516.28.

[194] 29 C.F.R. §§ 516.2, 516.3. Presumably the regulation's reference to "prerequisites" is an error and should refer to "perquisites."

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Agreements & Other Records	• 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.[195]	
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.[196]	At least 2 years from the date of last entry.
Family and Medical Leave Act (FMLA)	*Covered employers must make, keep, and maintain records pertaining to their compliance with the FMLA, including:* • basic payroll and identifying employee data, including name, address, and occupation; • rate or basis of pay and terms of compensation; • daily and weekly hours per pay period; • additions to or deductions from wages and total compensation paid; • dates FMLA leave is taken by FMLA-eligible employees (leave must be designated in records as FMLA leave, and leave so designated may not include leave required under state law or an employer plan not covered by FMLA); • if FMLA leave is taken in increments of less than one full day, the hours of the leave; • copies of employee notices of leave furnished to the employer under the FMLA, if in writing; • copies of all general and specific notices given to employees in accordance with the FMLA; • any documents that describe employee benefits or employer policies and practices regarding the taking of paid and unpaid leave;	At least 3 years.

[195] 29 C.F.R. § 516.5.

[196] 29 C.F.R. § 516.6.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• premium payments of employee benefits; and • records of any dispute between the employer and an employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and the disagreement. *Covered employers with no eligible employees must only maintain the following records:* • basic payroll and identifying employee data, including name, address, and occupation; • rate or basis of pay and terms of compensation; • daily and weekly hours worked per pay period; • additions to or deductions from wages; and • total compensation paid. *Covered employers in a joint employment situation must keep all the records required in the first series with respect to any primary employees, and must keep the records required by the second series with respect to any secondary employees.* *Also, if an FMLA-eligible employee is not subject to the FLSA record-keeping requirements for minimum wage and overtime purposes (i.e., not covered by, or exempt from FLSA) an employer does not need to keep a record of actual hours worked, provided that:* • FMLA eligibility is presumed for any employee employed at least 12 months; and • with respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written, maintained record. *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	

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	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.[197]	
Federal Insurance Contributions Act (FICA)	*Employers must keep FICA records, including:* • copies of any return, schedule, or other document relating to the tax; • records of all remuneration (cash or otherwise) paid to employees for employment services. The records must show with respect to each employee receiving such remuneration: ▪ name, address, and account number of the employee and additional information when the employee does not provide a Social Security card; ▪ total amount and date of each payment of remuneration (including any sum withheld as tax or for any other reason) and the period of services covered by such payment; ▪ amount of each such remuneration payment that constitutes wages subject to tax; ▪ amount of employee tax, or any amount equivalent to employee tax, collected with respect to such payment, and, if collected at a time other than the time such payment was made, the date collected; and ▪ if the total remuneration payment and the amount thereof which is taxable are not equal, the reason for this; • 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).[198]	At least 4 years after the date the tax is due or paid, whichever is later.

[197] 29 U.S.C. § 2616; 29 C.F.R. § 825.500.

[198] 26 C.F.R. §§ 31.6001-1, 31.6001-2.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Immigration	Employers must retain all completed Form I-9s.[199]	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.[200]	Required to be maintained for "so long as the contents [of the records] may become material in the administration of any internal revenue law;" this could be as long as 15 years in some cases.
Income Tax: Employee Payment Records	*Employers are required to maintain records reflecting all remuneration paid to each employee, including:* • employee's name, address, and account number; • total amount and date of each payment; • the period of services covered by the payment; • the amount of remuneration that constitutes wages subject to withholding; • the amount of tax collected and, if collected at a time other than the time the payment was made, the date collected; • an explanation for any discrepancy between total remuneration and taxable income; • the fair market value and date of each payment of noncash remuneration for services performed as a retail commissioned salesperson; and • other supporting documents relating to each employee's individual tax status.[201]	4 years after the return is due or the tax is paid, whichever is later.

[199] 8 C.F.R. § 274a.2.

[200] 26 U.S.C. § 3402; 26 C.F.R. § 1.6001-1.

[201] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Income Tax: W-4 Forms	Employers must retain all completed Form W-4s.[202]	As long as it is in effect and at least 4 years thereafter.
Unemployment Insurance	*Employers are required to maintain all relevant records under the Federal Unemployment Tax Act, including:* • total amount of remuneration paid to employees during the calendar year for services performed; • amount of such remuneration which constitutes wages subject to taxation; • amount of contributions paid into state unemployment funds, showing separately the payments made and not deducted from the remuneration of its employees, and payments made and deducted or to be deducted from employee remuneration; • information required to be shown on the tax return and the extent to which the employer is liable for the tax; • an explanation for any discrepancy between total remuneration paid and the amount subject to tax; and • the dates in each calendar quarter on which each employee performed services not in the course of the employer's trade or business, and the amount of the cash remuneration paid for those services.[203]	At least 4 years after the later of the date the tax is due or paid for the period covered by the return.
Workplace Safety / the Fed-OSH Act: Exposure Records	*Employers must preserve and retain employee exposure records, including:* • environmental monitoring or measuring of a toxic substance or harmful physical agent, including personal, area, grab, wipe, or other form of sampling, as well as related collection and analytical 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	At least 30 years.

[202] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

[203] 26 C.F.R. § 31.6001-4.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	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.[204]	
Workplace Safety / the Fed-OSH Act: Medical Records	*Employers must preserve and retain "employee medical records," including:* • medical and employment questionnaires or histories; • results of medical examinations and laboratory tests; • medical opinions, diagnoses, progress notes, and recommendations; • first aid records; • descriptions of treatments and prescriptions; and • employee medical complaints. *"Employee medical record" does not include:* • physical specimens; • records of health insurance claims maintained separately from employer's medical program; • records created solely in preparation for litigation that are privileged from discovery; • records concerning voluntary employee assistance programs, if maintained separately from the employer's medical program and its records; and • first aid records of one-time treatment which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job, if made on-site by a nonphysician and maintained	Duration of employment plus 30 years.

[204] 29 C.F.R. § 1910.1020(d).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	separately from the employer's medical program and its records.[205]	
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.[206]	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.[207]	5 years following the end of the calendar year that the record covers.
Additional record-keeping requirements apply to government contractors. The list below, while nonexhaustive, highlights some of these obligations.		
Affirmative Action Programs (AAP)	*Contractors required to develop written affirmative action programs must maintain:* • current AAP and documentation of good faith effort; and • AAP for the immediately preceding AAP year and documentation of good faith effort.[208]	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;	3 years recommended; regulations state "not less than two years from the date of the making of the record or the personnel action involved,

[205] 29 C.F.R. § 1910.1020(d).

[206] 29 C.F.R. § 1910.1020(d).

[207] 29 C.F.R. §§ 1904.33, 1904.44.

[208] 41 C.F.R. § 60-1.12(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• other records having to do with requests for reasonable accommodation, the results of any physical examination, job advertisements and postings, applications, resumes; and • any and all expressions of interest through the internet or related electronic data technologies as to which the contractor considered the individual for a particular position, such as on-line resumes or internal resume databases, records identifying job seekers contacted regarding their interest in a particular position, regardless of whether the individual qualifies as an internet applicant under 41 C.F.R. § 60–1.3, tests and test results, and interview notes; ▪ for purposes of record keeping with respect to internal resume databases, the contractor must maintain a record of each resume added to the database, a record of the date each resume was added, the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used and the date of the search; ▪ for purposes of record keeping with respect to external resume databases, the contractor must maintain a record of the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used, the date of the search, and the resumes of job seekers who met the basic qualifications for the particular position who are considered by the contractor). *Additionally, for any record the contractor maintains pursuant to 41 C.F.R. § 60-1.12, it must be able to identify:* • gender, race, and ethnicity of each employee; and • where possible, the gender, race, and ethnicity of each applicant or internet applicant.[209]	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.
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	Until final disposition of the complaint, compliance review or action.

[209] 41 C.F.R. §§ 60-1.12, 60-300.80, and 60-741.80.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	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.[210]	
Minimum Wage Under Executive Orders Nos. 13658 (contracts entered into on or after January 1, 2015), 14026 (contracts entered into on or after January 30, 2022)	*Covered contractors and subcontractors performing work must maintain for each worker:* • name, address, and Social Security number; • occupation(s) or classification(s); • rate or rates of wages paid; • number of daily and weekly hours worked; • any deductions made; and • total wages paid. These records must be available for inspection and transcription by authorized representatives of the Wage and Hour Division (WHD) of the U.S. Department of Labor. The contractor must also permit authorized representatives of the WHD to conduct interviews with workers at the worksite during normal working hours.[211]	3 years.
Paid Sick Leave Under Executive Order No. 13706	*Contractors and subcontractors performing work subject to Executive Order No. 13706 must keep the following records:* • employee's name, address, and Social Security number; • employee's occupation(s) or classification(s); • rate(s) of wages paid (including all pay and benefits provided); • number of daily and weekly hours worked; • any deductions made; • total wages paid (including all pay and benefits provided) each pay period; • a copy of notifications to employees of the amount of accrued paid sick leave; • a copy of employees' requests to use paid sick leave (if in writing) or (if not in writing) any other records reflecting such employee requests; • dates and amounts of paid sick leave used by employees (unless a contractor's paid time off policy	During the course of the covered contract as well as after the end of the contract.

[210] 41 C.F.R. §§ 60-1.12, 60-741.80.

[211] 29 C.F.R. § 23.260.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	satisfies the EO's requirements, leave must be designated in records as paid sick leave pursuant to the EO); • a copy of any written responses to employees' requests to use paid sick leave, including explanations for any denials of such requests; • any records relating to the certification and documentation a contractor may require an employee to provide, including copies of any certification or documentation provided by an employee; • any other records showing any tracking of or calculations related to an employee's accrual and/or use of paid sick leave; • the relevant covered contract; • the regular pay and benefits provided to an employee for each use of paid sick leave; and • any financial payment made for unused paid sick leave upon a separation from employment intended to relieve a contractor from its reinstatement obligation.[212]	
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	At least 3 years after the work.

[212] 29 C.F.R. § 13.25.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• worker or employee employed in conjunction with the project.[213]	
Service Contract Act	*Service Contract Act contractors or subcontractors must maintain the following records with respect to each employee:* • name, address, and Social Security number; • work classification; • rates of wage; • fringe benefits; • total daily and weekly compensation; • the number of daily and weekly hours worked; • any deductions, rebates, or refunds from daily or weekly compensation; • list of wages and benefits for employees not included in the wage determination for the contract; • any list of the predecessor contractor's employees which was furnished to the contractor by regulation; and • a copy of the contract.[214]	At least 3 years from the completion of the work records containing the information.
Walsh-Healey Act	*Walsh-Healey Act supply contractors must keep the following records:* • wage and hour records for covered employees showing wage rate, amount paid in each pay period, hours worked each day and week; • the period in which each employee was engaged on a government contract and the contract number; • name, address, sex, and occupation; • date of birth of each employee under 19 years of age; and • a certificate of age for employees under 19 years of age.[215]	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.

[213] 29 C.F.R. § 5.5.

[214] 29 C.F.R. § 4.6.

[215] 41 C.F.R. § 50-201.501.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Data Security Breach Notification	Businesses that own or license computerized data that includes personal information must conduct an investigation when they discover a security breach to determine the likelihood that personal information of an individual has been or will be misused as a result of the breach. If the business determines that it is not required to notify such an individual, the business must maintain records that reflect its determination.[216]	3 years after the determination is made.
Fair Employment Practices: Apprenticeship Program	*Each sponsoring employer must keep adequate records of the apprenticeship program, including:* • summary of the qualifications of each applicant; • the basis for evaluation and for selection or rejection of each applicant; • records pertaining to interviews of applicants; • the original application for each applicant; • information relative to the operation of the apprenticeship program, including job assignment, promotion, demotion, layoff or termination, rates of pay or other forms of compensation or conditions of work, hours including hours of work, and, separately, hours of training provided; • affirmative action plan statements; • evidence that qualification standards have been validated as required; and • any other records pertinent to a determination of compliance with the regulations. Records pertaining to individual applicants (selected and rejected) must be maintained in a manner so as to permit identification of minority and female participants.[217]	5 years.
Fair Employment Practices: Equal Pay Act	*Each employer must keep records, as required by the commissioner, including:* • wages of employees; • job classifications of employees; • other conditions of employment; and • **effective October 1, 2024:** a record of compliance with the wage disclosure requirements.[218]	3 years. For a record of compliance with wage disclosure requirements, the retention

[216] MD. CODE ANN., COM. LAW § 14-3504.

[217] MD. CODE REGS. 9.12.42.07.

[218] MD. CODE ANN., LAB. & EMPL. § 3-305.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
		period is at least 3 years after the position is filled, or if the position is not filled for 3 years after the position was posted.
Unemployment Compensation	*All employing units must maintain employment records for unemployment purposes, including:* • employee Social Security numbers (if none, employer must require employee to complete the proper application to obtain a number within 5 days of employment); • wage records; • payroll registers; • check registers; • cash disbursement journals; • cancelled checks; • tax returns; • general ledgers; and • other documents that supplement records.[219] *The required wage records specifically must include:* • dates of each pay period; • all wages paid to each worker for each pay period and the total amount of wage paid for employment in the pay period, showing separately the amount of wages paid in cash or any other medium; • the method the wages are computed; • hire date, separation date, and reason for separation; and • employees' names, addresses, and Social Security numbers. *For employees who work less than full-time, required wage records must also include*: • wage rate;	5 years from the last day of the calendar quarter to which they relate.

[219] MD. CODE ANN., LAB. & EMPL. § 8-625; MD. CODE REGS. 09.32.01.06.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• hours worked each day; • wages earned by calendar week; • whether individual worked less than full-time during the week; and • whether the individual worked all available hours.[220]	
Wages, Hours & Payroll	*Employers must keep wage records including:* • name, address, and occupation of each employee; • rate of pay of each employee; • amount paid each pay period to each employee; • hours that each employee works each day and workweek; and • other information the commissioner requires by regulation.[221]	At least 3 years.
Workplace Safety: Hazardous Communications	Employers must make and keep records indicating exposure of an *employee or former employee to a toxic material or harmful physical agent.*[222] *The Maryland Occupational Safety and Health agency also recommends that employers maintain hazardous substance training records. Such records* should indicate: • who was present; • who conducted the training; • a brief outline or summary of what was covered; • date training was conducted; • length of the training; and • titles of audiovisual materials used.[223]	None specified.
Workplace Safety: Injuries & Illnesses—General	*Employers (typically those with more than 10 employees) must record workplace injuries, illnesses, and fatalities in accordance with federal and state law including an accurate record of:* • each work-related death; • each work-related illness; • each work-related injury other than a minor injury that requires only first aid treatment and does not involve	None specified. See federal requirements.

[220] MD. CODE ANN., LAB. & EMPL. § 8-625; MD. CODE REGS. 09.32.01.06.

[221] MD. CODE ANN., LAB. & EMPL. § 3-424.

[222] MD. CODE ANN., LAB. & EMPL. § 5-701.

[223] Maryland Occupational Safety & Health, *Access To Information About Hazardous and Toxic Substances: Employee Training*, at 18, *available at* http://www.dllr.state.md.us/labor/rtkhaztox/.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	loss of consciousness, medical treatment, restriction of motion or work, or transfer to another job; and • each other record about an activity of the employer under this title that the Commissioner considers appropriate or necessary to develop information about the causes and prevention of occupational accidents, illnesses, and injuries.[224]	

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*

Maryland law does not contain an access to personnel files statute.

3.2 Privacy Issues for Employees

3.2(a) *Background Screening of Current Employees*

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

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

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

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

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

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

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

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

Maryland's drug testing laws were designed to provide some protection to employees, applicants, and contractors who are subject to job-related drug testing by providing safeguards that ensure the accuracy and professionalism of drug-testing practices. Most of the restrictions were designed to control the actions of the laboratories used by employers for alcohol and drug testing.

Maryland law provides that in almost all circumstances job-related alcohol and drug testing must be performed at a laboratory certified by the Maryland State Department of Health & Mental Hygiene. *Job-*

[224] MD. CODE ANN., LAB. & EMPL. § 5-702; MD. CODE REGS. 09.12.21.02 (incorporating certain federal regulations).

related means that the test is used by an employer for a legitimate business purpose.[225] The laboratory does not need to be physically located within the State of Maryland, so long as the laboratory obtains certification from Maryland's Department of Health and Mental Hygiene. Further, at the time of testing, upon request, an individual must be informed of the name and address of the laboratory that will test the specimen.[226] All positive initial drug tests must be confirmed.[227]

Employers may use on-site tests for preemployment tests only.[228] Off-site testing for employees is required. Maryland regulations allow testing of urine and blood in all circumstances, provided that cutoff levels adopted by SAMHSA (Substance Abuse Mental Health Services Administration) for workplace drug-testing programs are used. Testing of hair is permitted for preemployment purposes only. Breath testing is not permitted.[229]

Although a written policy regarding drug and alcohol testing is not expressly required under Maryland law, it is strongly recommended because it can help demonstrate an employer's commitment to ensuring full compliance with Maryland law.

Medical Review Officers. Maryland employers may designate a Medical Review Officer to monitor and oversee the drug-testing process. The Medical Review Officer is generally a licensed physician with knowledge of drug abuse disorders and a familiarity with the medical aspects of the particular drug tests used by the laboratory that is conducting the drug tests. The Medical Review Officer acts as a buffer between the employer and the laboratory and evaluates positive test results in light of the employee's medical history—such as determining whether a prescribed medication may have affected the accuracy of the test results. For obvious reasons, the Medical Review Officer needs to be independent of the laboratory so that they can objectively evaluate the laboratory's procedures and results. However, Maryland law does not require that the screening of positive test results be done by a Medical Review Officer so long as a physician or other qualified professional assesses whether positive test results reflect permissible use of over-the-counter or prescriptions drugs.[230]

Positive Test Results. If a positive test result is attributable to job-related alcohol or illegal drug use, the Medical Review Officer or physician should immediately notify the employer.[231] An employer that receives notice that an applicant, employee, or contractor has tested positive for alcohol or illegal drugs must, after confirmation of the test result, provide the applicant, employee, or contractor with the following documents:

- a copy of the laboratory test indicating the test results;
- a copy of the employer's written policy on the use or abuse of controlled dangerous substances or alcohol by applicants, employees, or contractors;

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[225] MD. CODE ANN., HEALTH-GEN. § 17-214(a)(6).

[226] MD. CODE ANN., HEALTH-GEN. § 17-214(b)(ii).

[227] MD. CODE ANN., HEALTH-GEN. § 17-214(c).

[228] MD. CODE ANN., HEALTH-GEN. § 17-214(b)(2).

[229] *Whye v. Concentra Health Servs., Inc.*, 2013 WL 5375167, at **9-10 (D. Md. Sept. 24, 2013).

[230] 75 Op. Att'y Gen. 163 (Sept. 10, 1990).

[231] MD. CODE ANN., HEALTH-GEN. § 17-214.

- if applicable, written notice of the employer's intent to take disciplinary action, terminate employment, or change the conditions of continued employment; and
- a written document advising the applicant, employee, or contractor of that person's right under Maryland law to request independent testing of the same sample for verification of the test result.[232]

Such documents must be delivered to the employee, contractor, or other person in person or by certified mail within 30 days from the date that the test was performed.[233] At that point, it is the obligation of the applicant, employee, or contractor to arrange to have a second confirmatory test conducted on the same sample at an independent, approved laboratory, at their own expense.[234]

Interaction with Workers' Compensation Rules. Maryland denies workers' compensation benefits to employees who are injured solely as a result of their illegal use of drugs or intoxication on the job.[235] However, the statute contains an additional provision placing the burden on the employer to overcome a legal presumption that a job-related injury was not caused solely by drug or alcohol use. As a result, Maryland courts have generally found that injured employees qualify for workers' compensation.

Fourth Amendment Concerns. Maryland courts have also examined whether an employer's drug test was unreasonable and therefore in violation of an employee's Fourth Amendment guarantee against unreasonable searches and seizures. In *Carroll v. City of Westminster*,[236] the Fourth Circuit Court of Appeals affirmed a Maryland court's finding that a police officer's Constitutional rights were *not* violated when his employer subjected him to a random drug test, which later proved positive. The employee officer had argued that the drug test violated his privacy rights since he was not told that the urine sample he provided would be tested for drugs. In rejecting this argument, the court emphasized that the officer had signed a waiver allowing his employer to test for drugs at any time, and that the City had compelling reasons for ensuring that the judgment of an armed officer not be impaired by illegal drug use.

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

It is a misdemeanor to violate Maryland's law on drug and alcohol testing procedures and notice to employees. First-time violations are punishable with a fine of up to $100 per violation. Any subsequent convictions are punishable with a fine of up to $500. Each day that a violation continues after the first conviction is considered a subsequent offense.[237]

3.2(c) *Marijuana Laws*

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

Under federal law, it is illegal to possess or use marijuana.[238]

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[232] MD. CODE ANN., HEALTH-GEN. § 17-214(c)(1).

[233] MD. CODE ANN., HEALTH-GEN. § 17-214(c)(2).

[234] MD. CODE ANN., HEALTH-GEN. § 17-214(e).

[235] MD. CODE ANN., LAB. & EMPL. § 9-506(b)-(c).

[236] 233 F.3d 208 (4th Cir. 2000).

[237] MD. CODE ANN., HEALTH-GEN. § 17-216.

[238] 21 U.S.C. §§ 811-12, 841 *et seq*.

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

While Maryland allows marijuana use for medicinal purposes, there are no employment-related statutory provisions.[239] At the November 8, 2022 election, Maryland voters approved Question 4 to add to the Maryland Constitution Article XX, which provides that, on or after July 1, 2023, individuals who are at least 21 years old can use and possess cannabis, and directs the state legislature to enact laws concerning the use, distribution, possession, regulation, and taxation of cannabis.

3.2(d) *Data Security Breach*

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

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

- An employer providing identity protection services to an employee whose personal information may have been compromised due to a data security breach is not required to include the value of the identity protection services in the employee's gross income and wages.
- An individual whose personal information may have been compromised in a data breach is not required to include in the individual's gross income the value of the identity protection services.
- 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.[240]

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.[241]

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

Maryland law requires that when a covered entity discovers or is notified of a breach, it must conduct in good faith a reasonable and prompt investigation to determine the likelihood that personal information has been or will be misused for identity theft or fraud purposes. If the investigation reveals that the misuse

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[239] MD. CODE ANN., ALCO. BEV. §§ 36-101 to 36-1507.

[240] 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.

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

of personal information for identity theft or fraud purposes has occurred, or is likely to occur, then notice is required.[242]

Covered Entities & Information. Any person or business that conducts business in Maryland and that owns, licenses, or maintains data that includes personal information is covered by this statute. Waivers under this statute are void.[243] Under the Maryland law, *personal information* means an individual's first name or first initial and last name in combination with any one or more of the following:

- Social Security number;
- driver's license number or state personal identification card number;
- account number, or credit or debit card number, in combination with any required security code, access code, or password that would permit access to the account;
- individual taxpayer identification number, a passport number, or other identification number issued by the federal government;
- health information, including information about an individual's mental health;
- a health insurance policy or certificate number or health insurance subscriber identification number in combination with a unique identifier that permits access to an individual's health information;
- biometric data including a fingerprint, voice print, genetic print, retina or iris image, or other unique biological characteristic;
- a username or email address in combination with a password or security question and answer that permits access to an individual's email account; or
- genetic information, such as DNA, RNA, genes, chromosomes, alleles, alterations to DNA or RNA, single nucleotide polymorphisms, data from an analysis of a biological sample, and information derived from genetic information.[244]

Personal information does not include data that is: (1) encrypted or redacted or otherwise protected by another method that renders the information unreadable or unusable; (2) information that is lawfully available publicly through federal, local, or state government records; (3) information that an individual has consented to have publicly disseminated; or (4) information that is disseminated in accordance with the federal Health Insurance Portability and Accountability Act.[245]

Content & Form of Notice. Notice must be written in a clear and conspicuous manner and contain:

- a description of the categories of information that are the subject of the unauthorized access or use;
- contact information for the covered entity making the notification, including the business address, telephone number, and toll-free number if one is maintained;

[242] MD. CODE ANN., COM. LAW § 14-3504.

[243] MD. CODE ANN., COM. LAW § 14-3504.

[244] MD. CODE ANN., COM. LAW § 14-3501.

[245] MD. CODE ANN., COM. LAW § 14-3501.

- toll-free telephone numbers, addresses, and website addresses for the Federal Trade Commission and the Maryland Office of the Attorney General; and
- a statement that an individual can obtain information from these sources about steps to take to avoid incidents of fraud and identity theft.[246]

Notice may be in one of the following formats:

- written notice sent to the recipient at the recipient's postal address in the records of the covered entity;
- email to the most recent email address of the individual if the recipient has expressly consented to receive electronic notice and the covered entity conducts its business primarily through internet account transactions or on the internet;
- telephonic notice to the most recent telephone number in the records of the business; or
- substitute notice if the covered entity demonstrates that:
  - the cost of providing notice would exceed $100,000;
  - the affected class of persons to be notified exceeds 175,000; or
  - the covered entity does not have sufficient contact information to give standard notice.[247]

Substitute notice must consist of all of the following:

- email notice when the covered entity has an electronic mail address for the subject persons;
- conspicuous posting of the notice on the website of the covered entity if the covered entity maintains a website; and
- notification to statewide media.[248]

Maryland has a specific notification procedure for a breach of the security system involving personal information that permits access to an individual's email account when no other personal information was subject to the breach. This notification must direct the individual to change their password and security question and take other steps to protect the email account and all other online accounts for which the individual used the same username or email and password or security question and answer. This notification may not be given by sending notification to the email account affected by the breach. The notification may be provided by a clear and conspicuous notice delivered to the individual online while the individual is connected to the affected email account from an IP address or online location from which the business knows the individual customarily accesses the account.[249]

Exceptions. A covered entity subject to the following laws or guidance is considered compliant with Maryland's data security breach statute: the Gramm-Leach-Bliley Act; the federal Fair and Accurate Transactions Act; the federal Interagency Guidelines Establishing Information Security Standards; the federal Interagency Guidance on Response Programs for Unauthorized Access to Customer Information

[246] MD. CODE ANN., COM. LAW § 14-3504(g).

[247] MD. CODE ANN., COM. LAW § 14-3504(e).

[248] MD. CODE ANN., COM. LAW § 14-3504(f).

[249] MD. CODE ANN., COM. LAW § 14-3504(i).

and Customer Notice; and HIPAA. Additionally, any covered entity that complies with the notification requirements or security breach procedures of their primary or functional federal regulator is deemed in compliance with the statute.[250]

Timing of Notice. Notice must be given as soon as reasonably practical, but not later than 45 days following discovery of the breach. However, notification may be delayed if:

- a law enforcement agency indicates that notification will impede a criminal investigation or will jeopardize homeland or national security;
- a covered entity needs time to determine the scope of the breach; or
- a covered entity needs time to restore the reasonable integrity of the data system.[251]

A determination of a breach must be documented in writing and retained for three years.[252] When a covered entity is destroying individual's records that contain personal information, the entity must take reasonable steps to protect against the unauthorized access to or use of personal information. Covered entities must take into account: the sensitivity of records; the nature and size of the business and its operations; the costs and benefits of different destruction methods; and available technology.[253]

Additional Provisions. If more than 1,000 residents will be notified of a security breach, then the covered entity must also notify all nationwide consumer reporting agencies of the breach, notice, and timing of the notice. This provision does not require that the covered entity disclose names of the consumers or any personal information relating to the consumers.[254] Covered entities must also notify the state Attorney General's office.[255]

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.[256] 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

[250] MD. CODE ANN., COM. LAW § 14-3507.

[251] MD. CODE ANN., COM. LAW § 14-3504(d).

[252] MD. CODE ANN., COM. LAW § 14-3504(b).

[253] MD. CODE ANN., COM. LAW § 14-3502.

[254] MD. CODE ANN., COM. LAW § 14-3506.

[255] MD. CODE ANN., COM. LAW § 14-3504.

[256] 29 U.S.C. § 218(a).

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.[257]

Tipped employees are paid differently. If an employee earns sufficient tips, an employer may take a maximum tip credit of up to $5.12 per hour. Therefore, the minimum cash wage that a tipped employee must be paid is $2.13 per hour. Note that if an employee does not make $5.12 in tips per hour, an employer must make up the difference between the wage actually made and the federal minimum wage of $7.25 per hour. An employer bears the burden of proving that it is not taking a tip credit larger than the amount of tips actually received by the employee.[258]

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.[259]

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.[260] 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*

When resolving any question about an employee's wages, Maryland employers must consider their obligations under state law in addition to an employer's minimum wage and overtime obligations under federal law.

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

As of January 1, 2024, the minimum wage in Maryland is $15.00 per hour for most nonexempt employees. Under Maryland law, employees must be paid the federal minimum wage or the state minimum wage, whichever is greater.[261]

3.3(b)(ii) *Tipped Employees*

Tipped employees may be paid differently. An employer may consider tips as part of their wages, but the minimum cash wage an employer directly pays a tipped employee cannot be less than $3.63 per hour, with the maximum tip credit being the difference between the minimum cash wage and minimum wage. If tipped employees do not receive at least the minimum wage when direct wages and tips are combined, an employer must pay the employee the difference.[262] A tipped employee who spends more than 20% of

[257] 29 U.S.C. § 206.

[258] 29 U.S.C. §§ 203, 206.

[259] 29 U.S.C. § 3(m)(2)(B).

[260] 29 U.S.C. § 207.

[261] MD. CODE ANN., LAB. & EMPL. § 3-413.

[262] MD. CODE ANN., LAB. & EMPL. § 3-419.

work time performing non-tip-producing duties directly related to the tipped occupation must be paid at least the minimum wage for that time.[263]

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

Maryland's minimum wage provisions do not apply to the following categories of workers:

- individuals employed in a capacity that the Commissioner of Labor and Industry defines by regulation to be administrative, executive, or professional;
- those employed in a nonadministrative capacity at an organized camp, including a resident or day camp;
- minors under the age of 16 years who are employed no more than 20 hours in a week;
- outside salespersons;
- individuals compensated on a commission basis;
- an individual who is a child, parent, spouse, or other member of the immediate family of the employer;
- employees of a drive–in theater;
- workers employed as part of the training in a special education program for emotionally, mentally, or physically handicapped students under a public school system;
- employees of an employer engaged in canning, freezing, packing, or first processing of perishable or seasonal fresh fruits, vegetables, or horticultural commodities, poultry, or seafood;
- individuals engaged in the activities of a charitable, educational, not for profit, or religious organization if the service is provided gratuitously and there is, in fact, no employer–employee relationship;
- employees of a cafe, drive–in, drugstore, restaurant, tavern, or other similar establishment that sells food and drink for consumption on the premises and has an annual gross income of $400,000 or less;
- agricultural employees if, during each quarter of the preceding calendar year, the employer used no more than 500 agricultural–worker days;
- workers engaged principally in the range production of livestock;
- covered employee under the Secure Maryland Wage Act;
- contracted to play baseball at the minor league level; or
- hand-harvest laborers paid on a piece-rate basis in an operation that, in the region of employment, has been and is customarily recognized as being paid on that basis.[264]

Under certain circumstances, employers are permitted to pay a subminimum wage rate. The Commissioner may authorize a work activities center or other sheltered workshop to pay a mentally or

[263] MD. CODE ANN., LAB. & EMPL. §§ 3-413, 3-419; MD. CODE REGS. 09.12.41.19.

[264] MD. CODE ANN., LAB. & EMPL. § 3-403.

physically disabled employee of the workshop less than the minimum wage.[265] However, this provision does not apply to a blind individual who works in a sheltered workshop of the Blind Industries and Services of Maryland.[266]

3.3(b)(iv) *Local Minimum Wage Ordinances*

Some local jurisdictions in Maryland have enacted minimum wage ordinances that establish a local minimum wage rate that may differ from the state's minimum wage rate. Local minimum wage ordinances often include their own notice, record-keeping, and wage statement requirements, so employers with operations in those localities must be aware of their overlapping state and local compliance obligations.

Table 9 includes two counties in Maryland. To the extent additional counties or cities may have enacted minimum wage ordinances, these are not covered here.

Table 9. Local Minimum Wage Ordinances

Jurisdiction	Hourly Minimum Wage Rate	Additional Requirements
Howard County	• Two-tier minimum wage: (1) employers; (2) *small employers* (employers with 14 or fewer employees, employers with tax-exempt status, employers that provides home health or community-based services and receive at least 75% of gross revenues through state and federal Medicaid programs, and food service facilities). • For employers, $15.00 per hour, and $16.00 per hour on January 1, 2025. • For *small employers*, $15.00 per hour based on higher state rate as of January 1, 2024 (local law set rate at $14.00 in 2024, and $14.75 in 2025), $15.50 per hour on January 1, 2026, and $16.00 per hour on July 1, 2026. • Annually, beginning January 1, 2027, the minimum wage rate applicable to all employers will be adjusted based on changes to the consumer price index. • Tipped employees must be paid a minimum cash wage of at least $3.63 per hour, so the tip credit is the difference between the applicable minimum wage and minimum cash wage per hour.[267]	• Employers must provide notice to tipped employees about the tip credit provisions.
Montgomery County	• Three-tier minimum wage: (1) for *large employers* (51 or more employees), $17.15	• Employers must provide written notice

[265] MD. CODE ANN., LAB. & EMPL. § 3-414(c).

[266] MD. CODE ANN., LAB. & EMPL. § 3-414(b).

[267] HOWARD COUNTY, MD., CODE §§ 12.2200 *et seq*.

Table 9. Local Minimum Wage Ordinances		
Jurisdiction	**Hourly Minimum Wage Rate**	**Additional Requirements**
	per hour; (2) for *mid-sized employers* (employers with between 11 and 50 employees or an employer with 11 or more employee and either tax-exempt or provides home health or community-based services and receives at least 75% of gross revenues through state and federal Medicaid programs), $15.50 per hour; and (3) for *small employers* (10 or fewer employees), $15.00 per hour. • Annually, on July 1, the rates will be adjusted based on changes to the consumer price index. • Tipped employees must be paid a minimum cash wage of at least $4 per hour, so the tip credit is the difference between the applicable minimum wage and minimum cash wage per hour.[268]	to tipped employees about the tip credit provisions.
Prince George's County	• $15.00 per hour minimum wage, $7.87 per hour maximum tip credit, and $3.63 per hour minimum cash wage.[269] Since 2021, the preset local rate has been less than the state rates and the local minimum wage is the state rate if the latter is higher.	None.

3.3(c) *State Guidelines on Overtime Obligations*

Nonexempt employees must be paid one-and-one-half times their regular rate of pay for all hours worked over 39 in the same workweek.[270] Special overtime computation rules apply to:

- agricultural employees;[271]
- craft and trade employees in the entertainment industry;[272]
- employees of bowling establishments;[273] and

[268] MONTGOMERY COUNTY, MD., CODE §§ 27-67 *et seq*.

[269] PRINCE GEORGE'S COUNTY, MD., CODE §§ 13A-117 to 13A-118.

[270] MD. CODE ANN., LAB. & EMPL. § 3-415.

[271] MD. CODE ANN., LAB. & EMPL. § 3-420(c).

[272] MD. CODE ANN., LAB. & EMPL. § 3-420(b).

[273] MD. CODE ANN., LAB. & EMPL. § 3-420(d).

- employees of nonhospital institutions who are engaged primarily in the care of individuals who are aged, mentally disabled, sick, or have a mental disorder and reside at the institution.[274]

3.3(d) *State Guidelines on Overtime Exemptions*

Maryland's overtime rules do not apply to an employer that is:

- a rail carrier;
- a hotel, motel, or restaurant;
- a gasoline service station;
- a *bona fide* private country club;
- a not-for-profit entity engaged primarily in providing temporary at-home care services;
- a not-for-profit concert promoter, legitimate theater, music festival, music pavilion, or theatrical show; or
- an amusement or recreational establishment, if the establishment operates for no more than seven months in a calendar year or for any six months during the preceding calendar year and has average receipts in excess of one-third of the average receipts for the other six months.[275]

The overtime rules also do not apply to an employer with respect to:

- an employee for whom the U.S. Secretary of Transportation may set qualifications and hours of service under the federal Motor Carrier Act;
- a mechanic, parts person, or salesperson who primarily sells or services automobiles, farm equipment, trailers or trucks, if the employer is engaged primarily in selling those vehicles to ultimate buyers and is not a manufacturer; or
- a driver, if the employer is engaged in the business of operating taxicabs.[276]

Maryland has adopted the FLSA's executive, administrative, professional, commissioned sales, outside sales, and computer professional exemption tests.[277] Employers should therefore refer to federal law in determining whether these white collar employees are considered overtime exempt.

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.[278] Employees must be

[274] MD. CODE ANN., LAB. & EMPL. § 3-420(d).

[275] MD. CODE ANN., LAB. & EMPL. § 3-415.

[276] MD. CODE ANN., LAB. & EMPL. § 3-415.

[277] MD. CODE ANN., LAB. & EMPL. § 3-403; MD. CODE REGS. 09.12.41.01 *et seq*.

[278] 29 C.F.R. § 785.19.

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.[279]

3.4(a)(ii) *Federal Meal & Rest Periods for Minors*

The FLSA does not include any generally applicable meal and rest period requirements for minors. The principles described above as to what constitutes "hours worked" for meal and rest periods applies to minors as well as to adults.

3.4(a)(iii) *Lactation Accommodation Under Federal Law*

The Providing Urgent Maternal Protections for Nursing Mothers Act ("PUMP Act"), which expands the FLSA's lactation accommodation provisions, applies to most employers.[280] 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.[281] 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.[282] Exemptions apply for smaller employers and air carriers.[283]

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.[284] Lactation is considered a related medical condition.[285] 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.[286] For more information on these topics, see **LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES**.

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279 29 C.F.R. § 785.18.

280 29 U.S.C. § 218d.

281 29 U.S.C. § 218d(b)(2).

282 29 U.S.C. § 218d(a).

283 29 U.S.C. § 218d(c), (d).

284 42 U.S.C. § 2000gg–1.

285 29 C.F.R. § 1636.3.

286 29 C.F.R. § 1636.3.

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

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

General Meal & Rest Period Requirements. There are no generally applicable meal or rest period requirements for adults in Maryland. Employers covered by the FLSA should consult the federal provisions. However, for employers that do provide a meal period, such time must be "included in computing hours of work if the individual is required to perform any duties during the meal period."[287] Further, the state labor department has published guidance for determining whether breaks are compensable. If an employer grants breaks, they can be unpaid if: (1) the break exceeds 20 minutes; (2) the employee is free to leave the worksite; (3) the employee in fact takes a break; and (4) the employee does not actually perform work.[288]

Maryland Healthy Retail Employee Act. The Healthy Retail Employee Act, which applies to retail establishments with 50 or more retail employees, mandates that a retailer must provide breaks to nonexempt employees, depending on the length of the shift. For purposes of this statute, a *retail establishment* is defined as a "place or business with the primary purpose of selling goods to a consumer who is present at the place of business at the time of sale."[289]

The Healthy Retail Employee Act mandates the following breaks for nonexempt employees, depending on the length of the shift:

- four to six consecutive hours requires a nonworking shift break of at least 15 minutes;[290]
- six or more consecutive hours requires a nonworking shift break of at least 30 minutes; and
- eight or more consecutive hours in a single shift requires an additional nonworking shift break of at least 15 minutes for every four consecutive hours.[291]

An employee may waive the employee's right to the nonworking shift break in a written agreement if the employee's hours do not exceed six consecutive hours.[292]

The Healthy Retail Employee Act also provides for a "working shift break" if the employee's work prevents him/her from being relieved during the nonworking shift break or the employee is allowed to consume a meal while working and is paid. However, a working shift break under either circumstance must be mutually agreed to by the employee and be in writing.[293]

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[287] MD. CODE REGS. 09.12.41.10.

[288] Maryland Dep't of Labor, Licensing and Regulation, *Maryland Guide to Wage Payment and Employment Standards – Pay for Lunch and Other Breaks*, *available at* http://www.dllr.state.md.us/labor/wagepay/wplunchbreaks.shtml.

[289] MD. CODE ANN., LAB. & EMPL. § 3-710.

[290] The Healthy Retail Employee Act is silent as to whether the breaks should be paid or unpaid. However, breaks ranging from five minutes to 20 minutes "must be counted as hours worked" under federal law and, therefore, must be paid. 29 C.F.R. § 785.18.

[291] MD. CODE ANN., LAB. & EMPL. § 3-710.

[292] MD. CODE ANN., LAB. & EMPL. § 3-710.

[293] MD. CODE ANN., LAB. & EMPL. § 3-710.

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

Minors in Maryland cannot be employed or allowed to work more than five continuous hours without a nonworking period of at least 30 minutes.[294]

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

Maryland Healthy Retail Employee Act. An employee alleging a violation of the Healthy Retail Employee Act may file a complaint with the Department of Labor, Licensing and Regulation (DLLR). The statute, however, does not give the DLLR any guidance on how to actually resolve a complaint. In particular, the Healthy Retail Employee Act simply instructs DLLR to "try to resolve the issue informally" or "determine whether the employer has violated [the Healthy Retail Employee Act]."[295] If the DLLR determines that the law has been violated, it may fine a retailer up to $300 for each employee for whom the employer is not in compliance. If the DLLR finds a similar violation within three years, it may assess a civil penalty up to $600 for each affected employee. In assessing the amount of any civil penalty, the DLLR considers: (1) the seriousness of the violation; (2) the size of the employer's business; (3) the employer's good faith; and (4) the employer's history of compliance.[296]

If an employer is fined, it may request an administrative hearing in accordance with title 10, subtitle 2 of the State Government Article. If an employer is unsuccessful at an administrative hearing, it may appeal the decision to a circuit court. However, the court may overturn the administrative decision only if it is unsupported by competent, material, and substantial evidence or is arbitrary or capricious."

Minors. Violations of the break provisions for minors constitute a misdemeanor, which are punishable by a fine up to $10,000, imprisonment up to one year, or both.[297]

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

State Law. Under Maryland law, an individual has the right to breast feed in any public or private location in which the individual and the individual's child are authorized to be.[298] Although the law does not specifically mention employers, it can be construed to include places of employment.

3.4(b)(v) *Lactation Accommodation Under Local Law*

While state law does not mandate that employers provide lactation accommodation to employees, the City of Baltimore has enacted a lactation accommodation ordinance. Under the ordinance, employers of two or more employees must provide a reasonable amount of break time to accommodate an employee who desires to express breast milk.[299] If possible, the break time must run concurrently with any paid rest or break time already required by law or otherwise authorized for the employee. Break time that does not run concurrently with paid rest or break time required by law or otherwise authorized for the employee may be unpaid.[300]

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294 MD. CODE ANN., LAB. & EMPL. § 3-210.

295 MD. CODE ANN., LAB. & EMPL. § 3-710(d)(2).

296 MD. CODE ANN., LAB. & EMPL. § 3-710.

297 MD. CODE ANN., LAB. & EMPL. § 3-216.

298 MD. CODE ANN., HEALTH-GEN. § 20-801.

299 BALTIMORE CITY CODE art. 11, §§ 16-1, 16-10.

300 BALTIMORE CITY CODE art. 11, § 16-10.

Covered employers must also provide a lactation location, other than a bathroom or a closet, that is in close proximity to the employee's work area and that shields its occupants from view and from intrusion by coworkers or others. "Close proximity" means no more than 500 feet and two adjacent floors from the furthest employee work area being served. The lactation location may include the place where the employee normally works, if that area otherwise meets the specifications for a lactation location under the ordinance.[301] The lactation location must:

- be safe, clean, and free of toxic or hazardous materials;
- limit access to it by a door that can be locked from the inside; and
- contain a surface on which to place a breast pump and other personal items, a place to sit, at least one electrical outlet, and, unless elsewhere provided in close proximity to the employee's work area, a sink with running hot and cold water and a refrigerator in which the employee can store milk.[302]

An employer may provide a lactation location that is also used for other purposes, so long as:

- throughout the period of any employee's need to express milk, the primary function is its use as a lactation location;
- during that period, the location's use for lactation takes precedence over all other purposes; and
- the employer provides notice to all other employees that the location's primary function is a lactation location and that this purpose takes precedence over all other purposes for using the location.[303]

If an employer's workspace is inadequate to satisfy the requirements for providing a lactation location and other employers are located within the same building, the employer may fulfill the requirements of the ordinance by providing a lactation location that is shared by two or more employers in the building, meets the requirements for a lactation location, and that can accommodate the number of employees who need to use it at any given time.[304]

An employer may apply to the Baltimore Community Relations Commission for a waiver or variance from the ordinance's requirements. The employer must demonstrate that compliance would impose an undue hardship by causing significant expense or operational difficulty when considered in relation to the employer's size, financial resources, and nature or structure of the employer's operations. An employer may also apply to the Commission to designate a temporary lactation location as a variance, if a permanent lactation location or multipurpose room used as a lactation location would impose an undue hardship.[305] The temporary lactation location could be created by using a screen or curtains, and must meet the following specifications:

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[301] BALTIMORE CITY CODE art. 11, § 16-11.

[302] BALTIMORE CITY CODE art. 11, § 16-11.

[303] BALTIMORE CITY CODE art. 11, § 16-12.

[304] BALTIMORE CITY CODE art. 11, § 16-13.

[305] BALTIMORE CITY CODE art. 11, § 16-14.

- the means of creation and the features of the location (shelf/table, seating, etc.) should not be modified during the duration of an employee's need to express milk;
- while an employee expresses milk, the location should be free from intrusion by other employees by means of a latch or other closure mechanism;
- the location should have signage visible to other employees designating the space as a lactation location for the duration of an employee's need to express milk; and
- the employer should provide notice to other employees that the space is being used as a temporary lactation location and should not be disturbed.[306]

Covered employers must also develop and implement a written lactation accommodation policy that:

- contains a statement that employees have a legal right to request lactation accommodation;
- include the employer's process for requesting accommodation, including
  - the means by which an employee must submit the request to the employer;
  - a requirement that the employer must respond to the employee within five business days; and
  - a requirement that the employer and employee engage in an interactive process to determine lactation breaks and a lactation location appropriate to the employee's needs;
- state that, whenever the employer does not provide lactation breaks or a lactation location, or provides a lactation location that does not fully comply with the ordinance, or asserts any waiver or variance granted, the employer will be required to describe, in a written response to the request, the specific bases on which the employer has done so;
- state that any employee aggrieved by an alleged violation of the ordinance may file a complaint with the Commission; and
- state that retaliation against an employee for exercising rights under the ordinance is prohibited.[307]

An employer must distribute a copy of the policy to new employees upon hire, and to existing employees within 10 calendar days of any modification to the policy. For employers that maintain an employee handbook or set of written policies that it distributes to employees, the lactation accommodation policy must appear in the handbook or set of policies. An employer must also provide a copy of the policy to any employee who requests or inquires about pregnancy or parental leave.[308]

The employer must retain records of all employee requests for accommodation as well as copies of all written responses to employees' requests for accommodation for a period of three years. The records must include:

- the employee's name;
- the date of the initial request and of any update to the request;

[306] BALTIMORE CITY CODE art. 11, § 16-14.

[307] BALTIMORE CITY CODE art. 11, § 16-20.

[308] BALTIMORE CITY CODE art. 11, § 16-20.

- a copy of all written or digital correspondence by or on behalf of the employee and the employer; and
- a description of the employer's actions taken to resolve the request.[309]

Failure to retain the required records or provide the Commission with access to the records creates a presumption that the employer has violated the ordinance, absent clear and convincing evidence otherwise.[310]

An employee alleging a violation of the ordinance may file a complaint with the Baltimore Community Relations Commission within 180 days of such alleged unlawful practice.[311]

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.[312] 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."[313]

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*

There are a number of issues considered when determining whether activities constitute work. This publication looks more closely at pay requirements for reporting time, on-call time, and travel time. Maryland law addresses the compensability of on-call time and travel time. The Maryland Department of

[309] BALTIMORE CITY CODE art. 11, § 16-21.

[310] BALTIMORE CITY CODE art. 11, § 16-21.

[311] BALTIMORE CITY CODE art. 11, §§ 4-1, 16-25.

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

[313] *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").

Labor, Licensing and Regulation describes *work* as service performed by an employee at the request and under the control of an employer which is therefore on the employer's time.[314]

On-Call Time. Employees are not paid for being on-call if they are free to leave the jobsite, even if the employee is instructed by the employer to remain on-call with a beeper or other electronic device.[315]

Travel time. Employees are not paid for time spent commuting to and from work. Once arriving at work, employees should be paid for time necessary to travel to another worksite or any other employer required travel. Additionally, employees must be paid for travel time when called out after work hours in emergencies.[316]

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

Considerable penalties can be imposed for violation of the child labor requirements, and goods made in violation of the child labor provisions may be seized without compensation to the employer. Employers may protect themselves from unintentional violations of child labor provisions by maintaining an employment or age certificate indicating an acceptable age for the occupation and hours worked.[318] 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*

The general purpose of Maryland's Employment of Minors statute is to encourage the development of minors by allowing them to engage in occupations that prepare them for responsible citizenship, while protecting them from occupations that will be detrimental to their mental, moral, or physical welfare.[319]

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[314] Maryland Dep't of Labor, Licensing & Regulation, *Maryland Guide to Wage Payment and Employment Standards – Work Issues – What is Work?*, *available at* http://www.dllr.state.md.us/labor/wagepay/wpwhatiswork.shtml.

[315] Maryland Dep't of Labor, Licensing & Regulation, *Maryland Guide to Wage Payment and Employment Standards – Work Issues – What is Work?*.

[316] Maryland Dep't of Labor, Licensing and Regulation, *Maryland Guide to Wage Payment and Employment Standards – Wages and Compensation – Commuting to Work: Non-Compensable*, *available at:* https://www.dllr.state.md.us/labor/wagepay/wpcomppay.shtml.

[317] 29 C.F.R. §§ 570.36, 570.50.

[318] 29 C.F.R. § 570.6.

[319] MD. CODE ANN., LAB. & EMPL. § 3-202.

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

General Restrictions. Maryland's Employment of Minors statute places restrictions on the hours and types of jobs that individuals under the age of 18 years may hold, as detailed in Table 10.

Table 10. State Restrictions on Type of Employment by Age

Age Range	Restrictions
Under Age 18	*Children under the age of 18 cannot perform the following types of work or occupations, or work in or about the following establishments or areas:* • manufacturing hazardous materials; • blast furnaces; • distilleries where alcoholic beverages are manufactured, bottled, wrapped, or packed; • railroads; • engineering, firefighting, or on a vessel as a pilot; • docks or wharves (other than marinas where pleasure vessels are sold or served); • erection or repair of electrical wiring; • cleaning, oiling, or wiping machinery; and • other occupations prohibited by law.[320]
Under Age 16	Children under age 16 cannot perform the following types of work or occupations, or work in or about the following establishments or areas: • in connection with acid, dye, gas, lye, or paint; • at airports, brickyards, or lumberyards; • in workrooms where goods are manufactured or processed; • construction; • in occupations where dust in injurious quantities exists; • in manufacturing, mechanical, and processing occupations; • operation of power-driven machinery (except office machines and machinery used in training programs); or • other occupations, as determined by the state labor department.[321]
Under Age 14	Children under age 14 cannot be employed, subject to limited exceptions.[322]

Restrictions on Selling or Serving Alcohol. In Maryland, the minimum age at which a person may serve alcohol in restaurants in connection with a meal, or bartend, varies by county.[323]

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

Under Age 18. In Maryland, minors under age 18 cannot work:

[320] MD. CODE ANN., LAB. & EMPL. § 3-213.

[321] MD. CODE ANN., LAB. & EMPL. § 3-213.

[322] MD. CODE ANN., LAB. & EMPL. § 3-209.

[323] *See, e.g.*, MD. CODE ANN., ALCO. BEV. § 18-1902.

- more than 12 hours per day (includes school and work hours);
- without at least eight consecutive hours of nonwork, nonschool time per day;
- between 8:00 P.M. and 8:00 A.M. if employed to transport to or from a business establishment any money, checks, or negotiable instruments (including payroll funds or business receipts), in any amount or value; or
- between 8:00 A.M. and 8:00 P.M. if employed to transport to or from a business establishment any money, checks, or negotiable instruments (including payroll funds or business receipts), in any amount or value over $100.

However, the state labor department may grant exceptions to these requirements. Special rules apply to minors aged 17 years who serve as election judges on election day.[324]

Under Age 16. When school is in session in Maryland, minors under age 16 cannot work:

- more than four hours a day;
- more than 23 hours in a week that school is in session for five days; or
- between 8:00 P.M. and 7:00 A.M. from the day after Labor Day through the day before Memorial Day.

However, any hours that a minor works in a *bona fide* work-study or student-learner program do not count toward these hours restrictions.[325]

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

- more than eight hours a day;
- more than 40 hours in a week; or
- between 9:00 P.M. and 7:00 A.M. from Memorial Day through Labor Day.

However, the state labor department may grant exceptions to the above restrictions.[326]

Under Age 14. In Maryland, minors under age 14 cannot be employed, subject to limited exceptions.[327]

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

Maryland's child labor work restrictions do not apply to the following activities, as long as they are performed outside of the prescribed school hours set for that minor and they do not involve manufacturing, mining, or a hazardous occupation restricted under section 3-213(c):

- farm work performed on a farm;
- domestic work performed in or about a home;

[324] MD. CODE ANN., LAB. & EMPL. §§ 3-210, 3-212.

[325] MD. CODE ANN., LAB. & EMPL. § 3-211.

[326] MD. CODE ANN., LAB. & EMPL. § 3-211.

[327] MD. CODE ANN., LAB. & EMPL. § 3-209.

- work for a business owned or operated by a parent of the minor or a person standing in place of the parent;
- work performed by nonpaid volunteers in a charitable or a not-for-profit organization, if the minor is employed with the written consent of a parent or a person standing in place of the parent;
- work as a caddy on a golf course;
- work as a sailing instructor;
- work manufacturing evergreen wreaths in or about the home;
- work delivering newspapers to consumers; and
- work as a camp counselor.[328]

The state labor commissioner may grant an exception to the restriction on hours if the commissioner receives written consent from the minor employee's parent or a person standing in the place of a parent; and determines that there will be no hazard to the health or welfare of the minor and that granting the exception will not impede the minor in fulfilling school graduation requirements.[329]

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

In Maryland, unless an employer possesses a work permit for a minor (under age 18), a minor cannot work for the employer.[330] Work permits are issued by the state labor department and applications must be submitted online. A minor's parent or guardian may apply online for a permit by completing an application that: (1) verifies the minor's age; (2) describes the work to be performed; (3) provides approval of employment by the parent or guardian; and (4) requests other information the state labor department may require.

Assuming that the minor's employment is permitted by state law, and all requirements are met, the department will approve the permit.[331] A work permit authorizes a minor to work for an employer as specified in the permit.[332] After review, the state labor department can revoke a work permit if the permit is not issued in accordance with its requirements.[333] Additionally, the state labor department may issue a special permit for a minor of any age to be employed as an entertainer, model, or performer.[334]

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

It is unlawful to knowingly employ a minor in violation of any provision of Maryland's child labor laws or to allow a minor to be employed in violation thereof. It is also unlawful to interfere with or hinder the performance of any duty of the labor commissioner or to knowingly give false information to the

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328 MD. CODE ANN., LAB. & EMPL. § 3-203.

329 MD. CODE ANN., LAB. & EMPL. § 3-211(b).

330 MD. CODE ANN., LAB. & EMPL. § 3-205.

331 MD. CODE ANN., LAB. & EMPL. § 3-206.

332 MD. CODE ANN., LAB. & EMPL. § 3-208.

333 MD. CODE ANN., LAB. & EMPL. § 3-215.

334 MD. CODE ANN., LAB. & EMPL. § 3-207.

commissioner. Employers that violate Maryland's employment of minors laws are subject to conviction for a misdemeanor, punishable by a fine of up to $10,000, or imprisonment for up to one year, or both.[335]

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).[336]

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.[337]

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.[338]

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.[339] 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

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[335] MD. CODE ANN., LAB. & EMPL. § 3-216.

[336] 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").

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

[338] 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.

[339] 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/.

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.[340]

Employers that use payroll card accounts must comply with several requirements set forth in the prepaid rule. Employers must give employees certain disclosures before the employees choose to be paid via a payroll card account, including a short-form disclosure, a long-form disclosure, and other information that must be disclosed in close proximity to the short-form disclosure. Employees must receive the short-form disclosure and either receive or have access to the long-form disclosure before the account is activated. All disclosures must be provided in writing. Importantly, within the short-form disclosure, employers must inform employees in writing and before the card is activated that they need not receive wages by payroll card. This disclosure must be very specific. It must provide a clear fee disclosure and include the following statement or an equivalent: "You do not have to accept this payroll card. Ask your employer about other ways to receive your wages." Alternatively, a financial institution or employer may provide a statement that the consumer has several options to receive wages or salary, followed by a list of the options available to the consumer, and directing the consumer to tell the employer which option the customer chooses using the following language or similar: "You have several options to receive your wages: [list of options]; or this payroll card. Tell your employer which option you choose." This statement must be located above the information about fees. A short-form disclosure covering a payroll card account also must contain a statement regarding state-required information or other fee discounts or waivers.[341] 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.[342]

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.[343]

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

[340] 12 C.F.R. § 1005.2(b)(3)(i)(A).

[341] 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.

[342] 12 C.F.R. § 1005.18.

[343] *See* Consumer Fin. Prot. Bureau, *Prepaid Cards*, *available at* https://www.consumerfinance.gov/ask-cfpb/category-prepaid-cards/ and *Prepaid Rule Small Entity Compliance Guide* (Apr. 2019), *available at* https://files.consumerfinance.gov/f/documents/cfpb_prepaid_small-entity-compliance-guide.pdf.

an employer cannot calculate how much it owes an employee in overtime by payday, it must pay that employee overtime as soon as possible and no later than the next payday.[344]

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

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

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

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

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

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

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

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

The FLSA does not have a general expense reimbursement obligation. Nonetheless, it prohibits employers from circumventing minimum wage and overtime laws by passing onto employees the cost of items that are primarily for the benefit or convenience of the employer, if doing so reduces an employee's wages below the highest applicable minimum wage rate or cuts into overtime premium pay.[345] 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.[346] Accordingly, among other items, an employer may be required to reimburse an employee for expenses related to work uniforms,[347] tools and equipment,[348] and business transportation and travel.[349] 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.[350]

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[344] 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.

[345] *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).

[346] 29 C.F.R. §§ 531.35, 531.36, and 531.37.

[347] 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.

[348] 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).

[349] 29 C.F.R. § 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c04.

[350] 29 C.F.R. § 778.217.

3.7(a)(vii) *Wage Deductions Under Federal Law*

Permissible Deductions. Under the FLSA, an employer can deduct:

- state and federal taxes, levies, and assessments (*e.g.*, income, Social Security, unemployment) from wages;[351]
- 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);[352]
- 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);[353]
- 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;[354]
- 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;[355] 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.[356]

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

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[351] 29 C.F.R. § 531.38.

[352] 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*.

[353] 29 C.F.R. § 531.40.

[354] 29 C.F.R. § 531.40.

[355] 29 U.S.C. § 203. However, the cost cannot be treated as wages if prohibited under a collective bargaining agreement.

[356] 29 C.F.R. § 825.213.

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.[357]

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.[358] 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.[359]

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.[360]

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.[361]

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.[362]

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

[358] 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.

[359] 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.

[360] 29 C.F.R. § 531.36.

[361] 29 C.F.R. § 531.37.

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

3.7(b) *State Guidelines on Wage Payment*

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

Authorized Instruments. Wages may be paid in cash, check, direct deposit with the employee's authorization, or voluntary payment to a debit card or pay card account.[363]

Direct Deposit. Mandatory direct deposit is not permitted. However voluntary direct deposit is allowed with the employee's authorization. Note that an employer cannot print or cause to be printed an employee's Social Security number on a notice of direct deposit of an employee's wages.[364]

Payroll Debit Card. The wage payment statute does not prohibit the credit of wages to a debit card or card account from which the employee is able to access the funds through withdrawal, purchase, or transfer, provided:

- the employee authorizes payment by this method; and
- any fees applicable to the debit card are disclosed to the employee in writing in at least 12-point font.[365]

An employer cannot print or cause to be printed an employee's Social Security number on a notice of credit of an employee's wage to a debit card or card account.[366]

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

Under Maryland law, employers must set regular pay periods. Most employees must be paid at least once every two weeks or twice in each month. If a regular payday is a nonworking day (such as a weekend or holiday) the employer must pay the employee on the preceding workday.[367] Employers may pay employees on a semi-monthly basis.[368] Executive, professional, and administrative employees may be paid less frequently than once in every two weeks or twice each month.[369]

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

Discharged employees must be paid all wages on or before the date the employee would have been paid if not terminated.[370] Employees who resign, however, must be paid all wages on or before the date the employee would have been paid, regardless of whether an employee has quit without notice.[371]

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[363] MD. CODE ANN., LAB. & EMPL. § 3-502; 79 Md. Op. Att'y Gen. 340 (1994); Maryland Dep't of Labor, Licensing and Regulation, *Maryland Guide to Wage Payment and Employment Standards – Direct Deposit*, *available at* http://www.dllr.state.md.us/LABOR/wagepay/wppaidontime.shtml#direct.

[364] MD. CODE ANN., LAB. & EMPL. § 3-502; 79 Md. Op. Att'y Gen. 340 (1994).

[365] MD. CODE ANN., LAB. & EMPL. § 3-502.

[366] MD. CODE ANN., LAB. & EMPL. § 3-502.

[367] MD. CODE ANN., LAB. & EMPL. § 3-502.

[368] MD. CODE ANN., LAB. & EMPL. § 3-502.

[369] MD. CODE ANN., LAB. & EMPL. § 3-502.

[370] MD. CODE ANN., LAB. & EMPL. § 3-505.

[371] Maryland Dep't of Labor, Licensing and Regulation, *Maryland Guide to Wage Payment and Employment Standards – Wages Paid on Time and Wage Payment on Termination*, *available at*

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

Employees must receive a wage statement for each pay period including both gross earnings and deductions from those gross earnings. **Effective October 1, 2024**, in addition to the above information, employers must also provide each employee with the following written information on a physical or online pay statement:

- the employer's name as registered with the state of Maryland, address and telephone number;
- the date of payment and the beginning and ending dates of the pay period for which the payment is made;
- unless an employee is exempt from receiving overtime pay under federal or state law, the number of hours worked during the pay period;
- the employee's rate of pay;
- the gross and net pay earned during each pay period;
- the amount and name of all deductions from gross wages;
- a list of additional bases of pay, including bonuses, commissions on sales, or other bases; and
- for each employee paid at a piece rate, the applicable piece rates of pay and the number of pieces completed at each piece rate.

When wages are paid to an employee, the employer must provide in writing by any reasonable method a statement regarding the amount of earned sick and safe leave that is available for use by the employee. An employer may satisfy this requirement by providing an online system through which an employee may ascertain the balance of the employee's available earned sick and safe leave.[372]

Employers cannot print an employee's Social Security number or a notice of credit on the paycheck, any attachment to the paycheck or on the notice of direct deposit or debit card.[373] Maryland law does not address whether an employer may provide wage statements electronically.

Restaurant employers that include a tip credit as part of the wage of an employee are required to provide tipped employees with a written or electronic statement no later than two weeks following the end of the pay period, for each pay period that shows the effective hourly tip rate as derived from employer-paid cash wages plus all reported tips for tip credit hours worked each workweek of the pay period. A restaurant employer may satisfy the requirement for providing a tip credit wage statement by providing an online system through which an employee may obtain the employee's tip credit wage statement.[374]

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http://www.dllr.state.md.us/labor/wagepay/wppaidontime.shtml and http://www.dllr.state.md.us/labor/wagepay/wppayonterm.shtml.

[372] MD. CODE ANN., LAB. & EMPL. § 3-1305.

[373] MD. CODE ANN., LAB. & EMPL. §§ 3-502, 3-504.

[374] MD. CODE ANN., LAB. & EMPL. § 3-419; MD. CODE REGS. § 09.12.41.20

3.7(b)(v) *Wage Transparency*

In Maryland, an employer cannot prohibit an employee from: (1) inquiring about, discussing, or disclosing the wages of the employee or another employee; or (2) requesting that the employer provide a reason for why the employee's wages are a condition of employment.[375]

Further, an employer cannot:

- require an employee to sign a waiver or any other document that purports to deny the employee the right to disclose or discuss the employee's wages; or
- take any adverse employment action against an employee for:
  - inquiring about the employee's or another employee's wages;
  - disclosing the employee's own wages;
  - discussing another employee's wages if those wages have been disclosed voluntarily; or
  - asking the employer to provide a reason for the employee's wages.[376]

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

Changing Regular Pay Days. Employers must give each employee notice of any payday change at least one pay period in advance.[377]

Changing Pay Rate. Employers must give each employee notice of any wage change at least one pay period in advance. However, employers can increase wages without advance notice.[378]

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

In Maryland, there is no general obligation to indemnify an employee for business expenses, however, as discussed in **3.7(b)(viii)**, an employee may be required to pay for certain uniform costs.

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

Permissible Deductions. In Maryland, an employer cannot deduct from wages unless the deduction is:

- ordered by a court;
- expressly authorized in writing by the employee;
- allowed by the state labor department because the employee has received full consideration for the deduction; or
- otherwise made in accordance with any law or regulation.[379]

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[375] MD. CODE ANN., LAB. & EMPL. § 3-304.

[376] MD. CODE ANN., LAB. & EMPL. § 3-304.1.

[377] MD. CODE ANN., LAB. & EMPL. § 3-504.

[378] MD. CODE ANN., LAB. & EMPL. § 3-504.

[379] MD. CODE ANN., LAB. & EMPL. § 3-503.

The state labor department contends the employee's authorization "should take the form of a separate and distinct statement, signed by the employee, concerning only the deduction and nothing more."[380] The department states the deduction cannot cause an employee's pay to fall below the minimum wage if the deduction is "made to offset a loss to the employer due to the admitted or court determined fault or negligence of an employee (for example, careless damage to the employer's truck)."[381] However, per the department, the deduction can cause the employee's pay to fall below the minimum wage "[i]f the deduction is made to offset something the employee received or retained from the employer which had monetary value (for example, personal loan, use of long-distance telephone line, materials, etc.)."[382]

Maryland employers are expressly permitted to deduct from employees' wages for the following items:

- the reasonable cost of providing the employee board, lodging, or other advantages, such as a facility or service an employer customarily provides employees, as part of an employee's wages, unless a collective bargaining agreement excludes these items;[383]
- the cost of providing and maintaining uniforms bearing the employer's name or logo, if the employee provides a signed, written authorization;[384] or
- a work uniform's depreciated value if it is not returned as required.[385]

Prohibited Deductions. Maryland law does not specify any deductions that are prohibited under any circumstances. However, if an employer does not comply with the requirement to obtain authorization from an employee or the deduction exceeds amounts permitted under the law, as required for certain deductions, such deductions would be noncompliant and prohibited.

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

Debt Collection. Sections 15-601 through 15-607 of the Commercial Law Article of the Maryland Annotated Code govern the garnishment of employees' wages. After an employer is served with a *writ of garnishment*, it must respond within 30 days, or the court may hold the employer in contempt, and require it to pay the creditor's attorneys' fees and court costs. If the employer's answer admits the employment relationship, and no defenses or objections are raised by the employer or

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[380] Maryland Dep't of Labor, Licensing & Regulation, *Maryland Guide to Wage Payment and Employment Standards – Deductions from Wages*, *available at* https://www.dllr.state.md.us/labor/wagepay/wpdeductions.shtml.

[381] Maryland Dep't of Labor, Licensing & Regulation, *Maryland Guide to Wage Payment and Employment Standards – Deductions from Wages*.

[382] Maryland Dep't of Labor, Licensing & Regulation, *Maryland Guide to Wage Payment and Employment Standards – Deductions from Wages*.

[383] MD. CODE ANN., LAB. & EMPL. § 3-418; MD. CODE REGS. 9.12.41.18; *see Marroquin v. Canales*, 505 F. Supp. 2d 283 (D. Md. 2007) (employer not entitled to take offsets for food and lodging under section 3-418 without employee's written authorization for deductions, as required by section 3-503). For detailed information about applying the cost of board, lodging, or other facilities toward employee wages (*e.g.*, amount, full requirements), employers should consult the regulation.

[384] MD. CODE ANN., LAB. & EMPL. § 3-503; Maryland Dep't of Labor, Licensing and Regulation, *Maryland Guide to Wage Payment and Employment Standards – Uniforms: Passing On the Cost*, *available at* http://www.dllr.state.md.us/labor/wagepay/wpuniforms.shtml.

[385] MD. CODE ANN., LAB. & EMPL. § 3-503; Maryland Dep't of Labor, Licensing and Regulation, *Maryland Guide to Wage Payment and Employment Standards – Uniforms: Passing On the Cost*.

the employee/debtor, the court will enter a judgment against the employer, directing it to pay to the creditor all garnishable wages that are earned by the employee/debtor.[386]

The following wages[387] are exempt from attachment. The greater of:

1. the product of $145 multiplied by the number of weeks in which the wages due were earned; or
2. 75% of the disposable wages due; and
3. any medical insurance payment deducted from an employee's wages by the employer.[388]

In Caroline, Kent, Queen Anne's, and Worcester Counties, the following wages are exempt from attachment—the greater of:

1. 75% of the disposable wages due; or
2. 30 times the federal minimum hourly wages under the Fair Labor Standards Act in effect at the time that the wages are due; and
3. any medical insurance payment deducted from an employee's wages by the employer.[389]

The amount subject to attachment must be calculated per pay period.[390] If the employee is not paid on a weekly basis, the formula in the statute must be applied to the appropriate time period. Tips must be included when an employer calculates total wages.[391]

The exemptions from attachment contained in section 15-601.1 do not apply to a wage lien for contractual spousal support ordered pursuant to sections 10-120 and 10-122 of the Family Law Article.[392]

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[386] Of course, Maryland courts must have personal jurisdiction of the defendant to properly garnish an employee's wages. *See Livingston v. Naylor*, 920 A.2d 34, 40-41, 49 (Md. Ct. Spec. App. 2007) (creditor can seek garnishment of debtor residing and working in Maryland "for at least four to six weeks" and garnishment may occur "without having to establish personal jurisdiction anew at the time garnishment was requested").

[387] *Wages* for purposes of this statute means all monetary remuneration paid to any employee for his employment. MD. CODE ANN., COM. LAW § 15-601(c); *see also Mayor of Balt. v. Hooper*, 539 A.2d 1130 (Md. 1988); *United States v. Williams*, 370 A.2d 1134 (Md. 1977) (federal military retirement pay constitutes *wages* within the meaning of this statute); *Shriver v. Carlin & Fulton Co.*, 141 A. 434 (Md. 1928) (monthly allowance of fixed amount for traveling expenses constitutes *wages* within the meaning of this statute).

[388] MD. CODE ANN., COM. LAW § 15-601.1(b).

[389] MD. CODE ANN., COM. LAW § 15-601.1(b). *But see Marshall v. Safeway, Inc.*, 88 A.3d 735 (Md. 2014) ("States can provide a *greater* exemption than that provided by Federal law, but not a *lesser* one. Thus, it is not permissible for Maryland to exempt only $145 per week if that would be greater than 75% of disposable wages but would produce less of an exemption than the Federal requirement of 30 times the FLSA minimum hourly wage.").

[390] MD. CODE ANN., COM. LAW § 15-601.1(c).

[391] *Shanks v. Lowe*, 774 A.2d 411 (Md. 2001) (explaining that if the employer does not hold onto tips, it need not provide that money as part of the garnishment since it is not in possession of it, but, nevertheless, the employer must take the tip amount into account when determining the amount it will turn over.).

[392] MD. CODE ANN., COM. LAW § 15-602(b). If an employee accumulates child and/or spousal support payment arrears amounting to more than 30 days of support, the obligor will be subject to earnings withholding. MD. CODE ANN., FAM. LAW §§ 10-120(d), 10-121; *see Blum v. Blum*, 453 A.2d 824 (Md. 1983). Further, the exemptions from

While the attachment remains a lien, the employer/garnishee must withhold all attachable wages payable to the judgment debtor and remit the amount withheld to the judgment creditor or their legal representative within 15 days after the close of the last pay period in each month.[393] If the employer/garnishee is served with more than one attachment against the same judgment debtor, then the attachments must be made in the order in which they were served upon the employer/garnishee, and each prior attachment must be satisfied in its entirety before any effect can be given to a subsequent attachment.[394]

If a judgment debtor resigns or is dismissed from their employment while an attachment upon their wages is still wholly or partially unsatisfied, the attachment lapses, and no further deductions may be made, unless the judgment debtor is reinstated or reemployed within 90 days of the resignation or dismissal.[395]

Maryland law prohibits an employer from terminating an employee because the employee's wages are subject to an attachment for any one indebtedness within a given calendar year.[396] However, employees subject to two or more garnishments in a calendar year for separate debts are unprotected, and may be discharged. This having been said, employers are advised to proceed cautiously in this area out of concern for the possible impact of equal employment opportunity provisions or termination actions prompted by wage garnishments. Any employer that willfully violates section 15-606(a) is guilty of a misdemeanor, and upon conviction, is subject to a fine not exceeding $1,000, imprisonment of not more than one year, or both.[397]

Orders of Support. An employer that receives a child support withholding order against an employee's wages must begin the required income withholding in the next pay period after receipt of the order. The employer must remit the withheld amounts within seven business days of each payday. The employer may also deduct an administrative fee of $2 with each withholding.[398] The total amount withheld cannot exceed the limits imposed under the federal Consumer Credit Protection Act.[399] If the obligor-employee's employment terminates, the employer must notify the agency or court that issued the support order in writing within 10 days of the termination and provide the employee's name, date of separation, case identifier, last known address, and the name and address of the employee's new employer, if known.[400] An employer may not use child support withholding as a basis for reprisal against the employee, dismissal of the employee from employment, or refusal to hire or to promote the employee.[401]

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garnishment do not apply to federal military retirement pay where the underlying obligation is for alimony. *Williams*, 370 A.2d at 1137. Finally, any waiver of the limitations contained in section 15-601.1(b) is void.

393 MD. CODE ANN., COM. LAW § 15-603(a).

394 MD. CODE ANN., COM. LAW § 15-603(b).

395 MD. CODE ANN., COM. LAW § 15-604.

396 MD. CODE ANN., COM. LAW § 15-606(a).

397 MD. CODE ANN., COM. LAW § 15-606(b).

398 MD. CODE ANN., FAM. LAW § 10-129.

399 MD. CODE REGS. 07.07.19.04.

400 MD. CODE REGS. 07.07.10.134.

401 MD. CODE ANN., FAM. LAW § 10-129.

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

Maryland Wage and Hour Law. If an employer pays an employee less than the wage required by the Maryland Wage and Hour Law, the employee may bring an action against the employer to recover the difference between the wage paid to the employee and the wage required, along with reasonable attorneys' fees and other costs.[402] Such an action must be filed within three years of the alleged violation.[403] Upon the written request of an employee who is entitled to bring an action, the Labor Commissioner may take an assignment of the claim in trust for the employee, ask the state attorney general to bring an action on the employee's behalf, or consolidate two or more claims against an employer.[404]

An employer that violates the minimum wage or overtime provisions commits a misdemeanor and may be fined up to $1,000.[405]

Wage Payment and Collection Law. Whenever the Commissioner of Labor and Industry determines that the Wage Payment and Collection Law has been violated, the Commissioner may: (1) try to resolve any issue involved in the violation informally through mediation; (2) with the written consent of the employee, ask the attorney general to bring an action in accordance with section 3-507 on behalf of the employee; and (3) bring an action on behalf of an employee in the county where the violation allegedly occurred.[406] If, in an action under section 3-507(a), a court finds that an employer withheld the wage of an employee in violation of the law and not as a result of a *bona fide* dispute, the court may award the employee an amount not exceeding three times the wage and reasonable counsel fees and other costs.[407] If wages of an employee are recovered under section 3-507, they must be paid to the employee without cost to the employee.[408]

As a practical matter, however, the attorney general's office lacks the budgetary resources to actually bring an action under this statute and, for this reason, the attorney general supported legislation in 1993 that would allow employees to bring suit directly in court to recover under the Wage Payment and Collection Law.[409] The General Assembly enacted such legislation, and it is now incorporated into the Wage Payment and Collection Law at section 3-507.1, discussed immediately below.

The Maryland Wage Payment and Collection Law provides that, after two weeks have elapsed from the date on which the employer is required to have paid wages, the employee may institute a civil action against the employer to recover the unpaid wages.[410] Thus, the statute of limitations for an employee's

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[402] MD. CODE ANN., LAB. & EMPL. § 3-427.

[403] MD. CODE ANN., CTS. & JUD. PROC. § 5-101.

[404] MD. CODE ANN., LAB. & EMPL. § 3-427.

[405] MD. CODE ANN., LAB. & EMPL. § 3-428.

[406] MD. CODE ANN., LAB. & EMPL. § 3-507(a).

[407] MD. CODE ANN., LAB. & EMPL. § 3-507(b)(1).

[408] *See Battaglia v. Clinical Perfusionists, Inc.*, 658 A.2d 680, 680 (Md. 1995); *see also Taylor v. Lotus Dev. Corp.*, 906 F. Supp. 290 (D. Md. 1995).

[409] *See Battaglia*, 658 A.2d at 686.

[410] MD. CODE ANN., LAB. & EMPL. § 3-507.1(a); *Friolo v. Frankel*, 819 A.2d 354 (Md. 2003) (section permits separate action by employee if the employer fails to pay wages due within two weeks after the wages were due to be paid).

cause of action does not begin to run until two weeks after the day they were entitled to the wages.[411] An action must be brought within three years.[412] The Wage Payment and Collection Law only permits an employee to bring a private cause of action against an employer for violations of sections 3-502 or 3-505.[413]

If a court finds that an employer wrongfully withheld the wage of an employee and not as a result of a *bona fide* dispute, the court may award the employee an amount up to three times any unpaid wage, plus reasonable counsel fees, and other costs.[414] The court must decline to award these additional amounts, however, if it finds that the wages were withheld as a result of a *bona fide* dispute rather than in violation of the law.[415]

An employer may not willfully violate the wage payment statute.[416] If convicted for this offense, an employer is guilty of a misdemeanor and is subject to a fine not exceeding $1,000.[417] An employee is also prohibited from knowingly making a false statement to a governmental unit with respect to any investigation or proceeding under the statute with the intent that the governmental unit consider or otherwise act in connection with the statement.[418] Upon conviction for engaging in this conduct, an employee is guilty of a misdemeanor and is subject to a fine not exceeding $500.[419]

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).[420] 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.[421] 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

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411 *Higgins v. Food Lion*, 2001 WL 77696 (D. Md. Jan. 23, 2001).

412 MD. CODE ANN., CTS. & JUD. PROC. § 5-101.

413 *Marshall v. Safeway, Inc.*, 63 A.3d 672 (Md. Ct. Spec. App. 2013) (refusing to permit a private right of action for an alleged over-garnishment of wages by the employer).

414 MD. CODE ANN., LAB. & EMPL. § 3-507.1(b).

415 MD. CODE ANN., LAB. & EMPL. § 3-507.1(b).

416 MD. CODE ANN., LAB. & EMPL. § 3-508(a).

417 MD. CODE ANN., LAB. & EMPL. § 3-508(c)(1).

418 MD. CODE ANN., LAB. & EMPL. § 3-508(b).

419 MD. CODE ANN., LAB. & EMPL. § 3-508(c)(2).

420 29 U.S.C. § 1002.

421 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.

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.[422]

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

Maryland law does not require employers to provide fringe benefits, such as vacation pay, severance pay, or holiday pay, although it does require paid sick leave. Once an employer does establish a policy and promises vacation pay and other types of additional compensation, however, the employer may not arbitrarily withhold or withdraw these fringe benefits retroactively. It is important to draft clear, precise, and complete policies and procedures regarding these benefits, as they can become contractual obligations and subject the employer to liability if withheld or reduced without notice. Such benefits must be administered uniformly in accordance with the established policy or employment agreement.

Maryland law does not address whether an employer may cap vacation accrual or prohibit carryover of accrued vacation from year to year (a "use-it-or-lose-it" provision). However, under certain circumstances, Maryland law permits an employer's vacation policy to require forfeiture of accrued vacation upon termination. The state's definition of *wages* includes vacation time that has been earned under an employer's policies but is unused as of the date of termination.[423] In an unpublished decision, the Maryland Court of Special Appeals expanded this principle and held that, when the employment relationship ends, an employer is required to pay its employees all pay under its "universal leave" plan, which included sick and vacation leave.[424]

The Maryland Wage Payment and Collection Law provides employers with a safe harbor against the requirement that they pay out accrued paid leave upon termination of employment.[425] Under the law, an employer's written vacation policy (or other paid leave policy) governs whether the employer is required to pay out unused accrued leave upon termination of employment. These policies are lawful in Maryland if the employer:

1. has a written policy that limits the payment of accrued vacation leave to its employees upon termination; and
2. distributes the policy to its employees at the time they are hired.[426]

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.

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[422] 490 U.S. 107, 119 (1989).

[423] "[W]here the employer does not have a written policy that limits the compensation for accrued leave to a terminated employee, that employee is entitled to the cash value of whatever unused earned vacation leave was left – provided it was otherwise usable." Maryland Dep't of Labor, Licensing & Regulation, *Maryland Guide to Wage Payment and Employment Standards – Unused Vacation at Termination – Is It Payable?*, *available at* https://www.dllr.state.md.us/labor/wagepay/wppayonterm.shtml#vp.

[424] *Catapult Tech., Ltd. v. Wolfe*, No. 997 (Md. App. Aug. 20, 2007).

[425] MD. CODE ANN., LAB. & EMPL. §§ 3-504, 3-505.

[426] MD. CODE ANN., LAB. & EMPL. § 3-505(b).

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

In Maryland, an employee in a retail establishment may choose as a day of rest—Sunday or the employee's Sabbath—unless the employee is a managerial, professional employee, or a part-time employee (except in Wicomico County). An employee who chooses a day of rest must give written notice to the employer and may change the day by giving the employer at least 30 days' written notice of the change. The day of rest requirement does not apply during an emergency declared by the federal, state, or local government.[427]

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.[428] 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).[429] However, under COBRA, only an employee and the employee's spouse and dependent children are considered "qualified beneficiaries."[430] Here again, states may choose to extend continuation coverage requirements to domestic partners and civil union partners under state mini-COBRA statutes.

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

In Maryland, two unmarried adults, regardless of sex, can establish a domestic partnership. Domestic partners are eligible for several of the benefits extended to spouses, such as hospital visitation privileges and tax treatment in property transfers.[431] With respect to employee benefits, covered insurance policies

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[427] MD. CODE ANN., LAB. & EMPL. § 3-704.

[428] 29 U.S.C. § 1144.

[429] 29 U.S.C. § 1161.

[430] 29 U.S.C. § 1167(3).

[431] *See*, *e.g.*, MD. CODE ANN., TAX-PROP. § 12-108; MD. CODE ANN., HEALTH-GEN. § 6-201.

that allow family coverage must extend the same health insurance benefits that are available to any covered dependent to domestic partners and child dependents of domestic partners.[432]

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;[433]
- to care for an immediate family member (spouse, child, or parent) with a serious health condition;[434]
- to take medical leave when the employee is unable to work because of a serious health condition;[435]
- 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.[436] 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.[437] 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*

Maryland's Flexible Leave Act (MFLA) authorizes employees of employers with 15 or more individuals to use their earned leave with pay for an illness in the employee's immediate family.[438]

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[432] MD. CODE ANN., INS. § 15-403.2.

[433] 29 C.F.R. §§ 825.102, 825.112, 825.113, 825.120, and 826.121.

[434] 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).

[435] 29 C.F.R. §§ 825.112, 825.113.

[436] 29 U.S.C. § 2611(4); 29 C.F.R. §§ 825.104 to 825.109.

[437] 29 U.S.C. § 2611(2); 29 C.F.R. §§ 825.110 to 825.111.

[438] MD. CODE ANN., LAB. & EMPL. §§ 3-801, 3-802.

Coverage & Eligibility. The MFLA governs any employer employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. It is not clear whether the 15 employees must be within the state of Maryland.[439] Employees who have earned leave with pay provided by their employer under the terms of an employment policy or a collective bargaining agreement may use such earned leave to attend to the illness of a child, spouse, or parent. *Leave with pay* means paid time away from work that "is earned and available to an employee," and includes sick leave, vacation time, and compensatory time. *Leave with pay* does *not* include various other types of benefits, however. The definition excludes, for example benefits under an ERISA plan and insurance benefits, including under an employer's self-insured plan. *Leave with pay* also does not include: short term disability leave, other disability benefits, unemployment compensation, workers' compensation, or similar benefits. Additionally, an employee must be primarily employed in the state of Maryland to be eligible under the MFLA.[440]

Purpose & Length of Leave. The MFLA allows employees to use their earned paid leave for the illness of an immediate family member. The definition of *immediate family member* is limited to the child, spouse, or parent of the employee. Additionally, employees may use their leave for bereavement purposes, upon the death of a member of the employee's immediate family, which includes a child, spouse, or parent.[441]

A *child* is defined as an adopted, biological, foster child, stepchild, or legal ward who is under 18 years old. However, the age ceiling is waived where the adopted, biological, foster child, stepchild, or legal ward is incapable of self-care due to a mental or physical disability. For purposes of bereavement leave, there is no restriction on the age of the child. A *parent* is an adoptive, biological, or foster parent, a stepparent, a legal guardian, or a person standing in *loco parentis*.[442]

The MFLA does not specify any duration for the leave, however, it presumably is limited to the amount of earned leave with pay that is available to an employee.

Employer Obligations. An employer that provides leave with pay to an employee following the birth of a child must provide the same leave for the adoption of a child.[443] An employer may not discharge, demote, suspend, discipline, or otherwise discriminate against an employee who takes leave as authorized under the MFLA or files a complaint or assists in an action brought against an employer for violation of the MFLA. An employer is also prohibited from retaliating against an employee for requesting leave under the MFLA.[444]

Employee Rights & Obligations. An employee who earns more than one type of leave with pay may elect the type and amount of leave with pay to be used. An employee who uses leave with pay under the Flexible Leave Act must comply with the terms of a collective bargaining agreement or employment policy. If a collective bargaining agreement or employment policy provides benefits equal to or greater than the benefit provided under the MFLA, the collective bargaining agreement or employment policy prevails. An

[439] MD. CODE ANN., LAB. & EMPL. § 3-802(b).

[440] MD. CODE ANN., LAB. & EMPL. §§ 3-801, 3-802.

[441] MD. CODE ANN., LAB. & EMPL. § 3-802(a)(4).

[442] MD. CODE ANN., LAB. & EMPL. § 3-802(a)(1), (6).

[443] MD. CODE ANN., LAB. & EMPL. § 3-801(c).

[444] MD. CODE ANN., LAB. & EMPL. § 3-802(f).

employer may deny paid leave under the MFLA if an employee violates the employer's leave policies, which can include insufficient notice or inadequate documentation.[445]

Family and Medical Leave Insurance Program (FAMLI). Maryland enacted the Family and Medical Leave Insurance Program to provide paid benefits to employees on leave for a variety of reasons. The law requires all covered employees to contribute to the program, as well as covered employers with 15 or more employees. Contributions to the program begin July 1, 2025, and the use of benefits begins July 1, 2026.[446]

Covered Employers and Employees. All employers that employ at least one individual in the state are covered under the new law. While all such employers are covered under the law, only employers with 15 or more employees must make contributions to the program's fund. To determine how many workers an employer has, the employer must disclose the average number of workers who are out of state, which the state will add to the average number reported in wage and hour reports for the previous four quarters to make the determination. Covered employees are those that have worked at least 680 hours in a position based in Maryland in the four most recently completed calendar quarters for which quarterly reports have been required immediately before the date that leave begins. Self-employed individuals may opt-in to the state program. Independent contractors are not covered.[447]

Reasons for Benefits. A covered employee may receive temporary benefits when on leave:

- to care for or bond with a child of the covered individual during the first year after the child's birth or during the process through which a child is being placed with the covered individual through foster care, kinship care, or adoption and to care for a bond with the child during the first year after placement;
- to care for a family member with a serious health condition;
- for employee's own serious health condition which makes them unable to work;
- to care for a service member who is the employee's next of kin; or
- because the employee has a qualifying exigency arising out of a family member's deployment as a service member.

The law includes a detailed definition of the covered individual's family members, including child, parent, legal guardian/ward, spouse, grandparent, grandchild, and sibling.[448]

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[445] MD. CODE ANN., LAB. & EMPL. § 3-802.

[446] MD. CODE ANN., LAB. & EMPL. §§ 8.3-101 *et seq*.

[447] MD. CODE ANN., LAB. & EMPL. §§ 8.3-101, 8.3-201; Maryland Department of Labor Frequently Asked Questions from Employers about Family and Medical Leave Insurance (FAMLI), #2, 21, 32, available at https://paidleave.maryland.gov/employers/Documents/Frequently%20Asked%20Questions%20from%20Employers.pdf.

[448] MD. CODE ANN., LAB. & EMPL. §§ 8.3-101, 8.3-302; see also Maryland Department of Labor Frequently Asked Questions from Employers about Family and Medical Leave Insurance (FAMLI), #50, available at https://paidleave.maryland.gov/employers/Documents/Frequently%20Asked%20Questions%20from%20Employers.pdf.

Amount and Use of Benefits. The amount of benefits varies based on each individual's average weekly wage, which is the total wages received over the highest of the previous four completed calendar quarters for which quarterly reports have been required, divided by 13. If an employee's average weekly wage is 65% or less of the state average weekly wage, they will receive 90% of their average weekly wage as benefits under the law. If an employee's average weekly wage is more than 65% of the state average weekly wage, they will receive 90% of their average weekly wage up to 65% of the state average, plus 50% of their weekly wage that is greater than 65% of the state average. Employees can also take partially paid leave.[449]

Covered employees may receive up to 12 weeks of benefits during each 12-month period. The 12-month period begins on the first day of the calendar week in which the employee applies for benefits. However, an employee can receive an additional 12 weeks of benefits during the same 12-month period if:

- the employee received benefits due to caring for a child during the first year after its birth or placement, and then becomes eligible for benefits due to their own serious health condition; or
- the employee received benefits due to their own serious health condition and then becomes eligible for benefits due to caring for a child during the first year after its birth or placement.[450]

Employees may use the benefits on an intermittent basis if necessary, in increments of at least four hours. The employee must provide notice before the leave and make a reasonable effort to schedule the leave so that it does not unduly disrupt the employer's operations.[451]

Employees are not required to use or exhaust their own paid time off (vacation, sick, or other PTO) before receiving benefits under the law, but can agree that this PTO would be used to replace the employee's wages up to 100% of their average weekly wage while they are on leave. While an employee is on leave, an employer may require that their state-provided leave benefits run concurrently with employer-provided parental, family, or military leave benefits.[452]

Employee Notice and Certifications. If an employee's need for leave is foreseeable, an employer may require them to provide written notice at least 30 days before the leave. If the need for leave is not foreseeable, employees must provide notice to their employer as soon as practicable and to generally comply with the employer's procedures regarding leave.[453]

In order to receive benefits under the law, covered employees must submit certification that details the need for leave and an estimate of the length of leave needed. The Department of Labor will issue regulations that explain the required certification.[454]

Family and Medical Leave Insurance Fund Contributions and Benefits. All employees and all employers with 15 or more employees will begin making contributions to the state fund on July 1, 2025. Employers

[449] MD. CODE ANN., LAB. & EMPL. § 8.3-703.

[450] MD. CODE ANN., LAB. & EMPL. § 8.3-702.

[451] MD. CODE ANN., LAB. & EMPL. § 8.3-701.

[452] MD. CODE ANN., LAB. & EMPL. § 8.3-702.

[453] MD. CODE ANN., LAB. & EMPL. § 8.3-701.

[454] MD. CODE ANN., LAB. & EMPL. § 8.3-403.

will deduct the employees' contributions from their wages. An employee's contribution cannot be over 1.2% of their wages, through June 2026. The rate may change annually thereafter. Employers and employees will each contribute 50% of the total rate of contribution for each employee. Employers must notify employees of both the employees' rate of contribution and the portion that the employer will pay.[455] According to the state FAQs, employers must make contributions for all Maryland-based workers, including those who are not eligible to receive benefits (such as seasonal workers). However, employers are not required to make contributions for workers who live in Maryland but work in another state. More information about which localization rules can be found in the FAQs.[456]

Covered employees taking leave for one of the covered reasons described above may submit a claim for benefits under the new law beginning July 1, 2026.[457]

Employment Protections. When an employee uses benefits under the law or takes leave from work and receives benefits, they must be restored to an equivalent position when their leave expires, subject to exceptions. Additionally, while an employee is on leave and receiving benefits under the law, an employer may terminate the employee only for cause. While an individual is receiving benefits or taking leave from work and receiving benefits, their employer must continue to provide health benefits as required under the federal Family and Medical Leave Act.[458]

Employer Notice. Employers must give a written notice of rights and duties under the law to each employee at the time of hire and once per year thereafter. Additionally, if an employee requests leave under the law, or if an employer knows that an employee's reason for leave may qualify for benefits under the law, the employer must notify the employee of their eligibility for benefits under the law within five business days. The law details the information that must be included in the notice. Employers must notify employees of both the employees' rate of contribution and the portion that the employer will pay.[459]

Discrimination. Employers and other persons may not discharge, demote, discriminate, or take adverse action against a covered individual because they have filed for, applied for, received benefits, or taken leave for which benefits may be paid under the law; inquired about rights and responsibilities under the law; communicated an intent to file a claim, complaint, or appeal under the law; or testified or assisted in a proceeding under the law.[460]

Additional Provisions. Employers may choose to use a private plan that provides benefits to covered employees that are equivalent to the state benefits. A collective bargaining agreement may not diminish any of the rights provided by the program. Employees may not waive their rights under the law.[461]

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[455] MD. CODE ANN., LAB. & EMPL. § 8.3-601.

[456] Maryland Department of Labor Frequently Asked Questions from Employers about Family and Medical Leave Insurance (FAMLI), #33, 34, *available at* https://paidleave.maryland.gov/employers/Documents/Frequently%20Asked%20Questions%20from%20Employers.pdf.

[457] MD. CODE ANN., LAB. & EMPL. § 8.3-701.

[458] MD. CODE ANN., LAB. & EMPL. §§ 8.3-706, 8.3-707.

[459] MD. CODE ANN., LAB. & EMPL. §§ 8.3-801.

[460] MD. CODE ANN., LAB. & EMPL. § 8.3-904.

[461] MD. CODE ANN., LAB. & EMPL. §§ 8.3-705, 8.3-203.

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.[462] 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 and Local Guidelines on Paid Sick Leave*

The Maryland Healthy Working Families Act provides paid sick leave to covered employees in Maryland.[463] Additional requirements exist in Montgomery County.[464]

Under state law, all private employers are covered, but different standards apply based on whether an employer has 15 or more employees (paid leave) or 14 or fewer employees (unpaid leave).[465] Under Montgomery County's law, all employers with at least one employee in the county are covered, but different standards apply based on whether an employer has five or more employees (paid leave) or fewer than five employees (paid and unpaid leave).

State law defines covered employees by who is not covered, *e.g.*, real estate salespeople, associate real estate brokers, minors, agricultural employees, certain employees employed by a staffing agency, employees that regularly work fewer than 12 hours per week, and certain individuals that work on an as-needed basis in a health or human services industry. In Montgomery County, the law applies to employees who regularly work in the county more than eight hours per week, and excludes, *e.g.*, employees who regularly work in the county 8 hours or less per week, employees that are only paid commissions, and certain individuals without a regular work schedule that contact the employer for assignments.

Under state law, the law does not apply to employees covered by an unexpired collective bargaining agreement (CBA) entered into before June 1, 2017, and the law's requirements can be waived by certain construction employees covered by a CBA. The Montgomery County law does not apply to employees covered by an unexpired CBA in effect on October 1, 2016.

Employees can use leave for themselves or family members, which include children, grandchildren, grandparents, parents, siblings, and spouses.

Under both laws, accrual begins when employment begins. Employees must accrue at least one leave hour for every 30 hours worked, which in Montgomery County is based on hours worked in the county.

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[462] 80 Fed. Reg. 54,697-54,700 (Sept. 10, 2015).

[463] MD. CODE ANN., LAB. & EMPL. §§ 3-1301 *et seq*.

[464] MONTGOMERY COUNTY, MD CODE §§ 27-76 *et seq*.

[465] In an FAQ, the state labor department contends that, for business size calculation purposes, all employees working in Maryland are counted. Maryland Department of Labor, Licensing & Regulation, HB 1 Guidance, *available at* http://www.dllr.state.md.us/paidleave/paidleavefaqs.pdf.

The laws allow accrual caps, but the numbers differ. Under state law, employers are not required to allow employees to accrue more than 40 hours in a year or 64 hours at any time. In Montgomery County, an employer is not required to allow employees to accrue more than 56 hours in a year (all paid hours if an employer has five or more employees, or 32 paid and 24 hours unpaid if an employer has fewer than five employees).

Under state law, employers are not required to allow employees to carry-over to the following year more than 40 leave hours, and in Montgomery County employers are not required to permit employees to carry-over more than 56 hours. Under both laws, if at the beginning of each year an employer front loads the full amount of leave, carry-over requirements do not apply.

The state law says employers are not required to allow employees to use leave during the first 106 calendar days of employment – which is based on an employee's date of hire, per the state labor department[466] – and in Montgomery County employers can prohibit use during the first 90 days of employment. Under both laws, employees may take leave in the smallest increment the payroll system uses to account for absences or work time, but cannot be required to take in an increment exceeding four hours. Under state law, employers are not required to allow employees to use more than 64 hours in a year, whereas in Montgomery County it is 80 hours.

Under both laws, leave can be used for "sick," "safe", or "other" purposes. The laws allow "sick" time use to care for or treat a mental or physical illness, injury, or condition, and preventive medical care. They also allow leave to be used for the following "safe" time purposes due to domestic violence, sexual assault, or stalking: medical attention; services from a victim services organization; legal services or proceedings; when an employee has temporarily relocated. Under state law, leave can also be used for maternity or paternity leave, whereas in Montgomery County leave can also be used when an employer's place of business or a family member's school or child care center has been closed by a public official due to a public health emergency, for the birth of a child or placement of a child for adoption or foster care, or to care for a newborn, newly adopted, or newly placed child within one year of birth, adoption, or placement.

For foreseeable absences, state law provides that employers can require employees to provide reasonable advance notice of not more than seven days before leave would begin. For unforeseeable absences, state law requires employees to provide notice as soon as practicable. In Montgomery County, whether leave is foreseeable or unforeseeable, employees must request leave as soon as practicable.

Under state law, employers may require to provide documentation to confirm leave was taken for a covered purpose if leave was used for more than two consecutive scheduled shifts. In Montgomery County, documentation can be required after an employee uses more than three consecutive days of leave. Additionally, under state law, if leave is used between the first 106 and 120 days of employment, and at the time of hiring an employee agreed to provide documentation demonstrating leave was used for a lawful purpose, documentation can be required.

State law requires employees to be paid the same wage rate they normally earn when taking leave, whereas in Montgomery County leave is paid at the same wage rate the employee earns and with the same benefits. Tipped employees must be paid the full minimum wage, which in Montgomery County will be the county – instead of the state – minimum wage. Under both laws, when wages are paid employers

[466] Maryland Department of Labor, Licensing & Regulation, HB 1 Guidance, *available at* http://www.dllr.state.md.us/paidleave/paidleavefaqs.pdf.

must provide a statement in writing regarding the amount of leave available. The laws additionally state employers can satisfy this requirement via an online system through which employees can ascertain their leave balance. Neither law requires an employer to payout accrued but unused leave when employment ends.

Under the laws, employers must notify employees of their leave rights. The notice must include a statement about how leave is accrued, the permitted leave uses, a statement that retaliation is prohibited, information about filing an administrative charge or – where applicable – a lawsuit. Additionally, the state law notice must notify employees that making a complaint, filing a lawsuit, or testifying in an action in bad faith is prohibited. For at least three years, both laws require employees to keep a record of leave accrued and used by each employee.

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.[467] 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.[468] 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

[467] 42 U.S.C. § 2000e(k); *see also* 29 C.F.R. § 1604.10.

[468] 29 C.F.R. § 825.202.

impairment.[469] An employee may also be allowed to take leave beyond the maximum FMLA leave if the additional leave would be considered a reasonable accommodation.

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

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

Pregnancy Disability. Maryland employers with 15 or more employees must provide the same leave benefits to employees whose disabilities are caused or contributed to by pregnancy or childbirth as are provided to employees with other temporary disabilities.[470] Written and unwritten employment policies and practices involving matters such as commencement and duration of leave, the availability of extensions, reinstatement, and payment under any health or temporary disability insurance or sick leave plan must be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.[471]

Parental Leave. Maryland's Parental Leave Act provides eligible employees up to six weeks of unpaid leave in a 12-month period for the birth of the employee's child or the placement of a child with the employee for adoption or foster care.[472] An eligible employee is an individual who has requested that the employer provide parental leave and who, as of the date the requested leave begins, will have been employed by that employer for at least one year and for 1,250 hours during the previous year. The following individuals are not considered eligible employees: (1) independent contractors; and (2) employees at a worksite at which the employer employs fewer than 15 employees, if the total number of employees employed within 75 miles of that worksite is also fewer than 15.[473]

Parental leave is unpaid. However, if an employer offers paid leave to an eligible employee, the employer may require, or the employee may elect, to substitute paid leave for any part or all of the parental leave period. An employee who earns commissions as part of the employee's compensation must continue to receive commissions earned as a result of performing work prior to taking parental leave and that come due during the leave period.[474]

During the period of an employee's leave, the employer must maintain group health coverage for the employee under the same terms and conditions that would apply if the employee had not taken leave. If the employee fails to return to work after the parental leave period, the employer may recover any

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[469] 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.

[470] MD. CODE ANN., STATE GOV'T §§ 20-601, 20-609.

[471] MD. CODE ANN., STATE GOV'T §§ 20-601, 20-609.

[472] MD. CODE ANN., LAB. & EMPL. § 3-1202.

[473] MD. CODE ANN., LAB. & EMPL. § 3-1201.

[474] MD. CODE ANN., LAB. & EMPL. §§ 3-1202, 3-1205.

premiums paid to maintain the employee's group health coverage unless the employee's failure to return to work was due to circumstances beyond the employee's control. The employer may recover the premiums by deducting the amounts from the employee's final wages.[475]

Upon return from parental leave, an employee is entitled to be restored to: (1) the job position the employee held at the time the leave began; or (2) an equivalent position with equivalent benefits, pay, and other terms of employment. An employer may deny restoration of the employee's job position if the denial is necessary to prevent substantial and grievous economic injury to the employer's operations, the employer notifies the employee of the denial upon determining that such injury would occur, and where parental leave has begun, if the employee elects not to return to employment after the employer notifies the employee. An employer may terminate the employment of an employee out on parental leave only for cause.

3.9(d) *Adoptive Parents Leave*

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

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

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

An employer that provides paid leave to an employee following the birth of a child must provide the same leave with pay to an employee when a child is placed with an employee for adoption.[476]

Parental Leave. Maryland's Parental Leave Act provides eligible employees up to six weeks of unpaid leave in a 12-month period for the birth of the employee's child or placement of a child with the employee for adoption or foster care.[477] See 3.9(c)(ii) for more information on the Parental Leave Act.

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*

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

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

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

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

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

Employers of 15 or more employees must permit an eligible employee to take leave:

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[475] MD. CODE ANN., LAB. & EMPL. § 3-1205.

[476] MD. CODE ANN., LAB. & EMPL. §§ 3-801, 3-802.

[477] MD. CODE ANN., LAB. & EMPL. § 3-1202.

- up to 60 business days in a 12-month period to serve as an organ donor; and
- up to 30 business days in a 12-month period to serve as a bone marrow donor.[478]

An eligible employee is an employee who has requested organ or bone marrow donation leave and who, as of the date the leave will commence, has been employed by that employer for at least 12 months and 1,250 hours during the 12-month period.[479] The employee must provide written verification from a physician documenting that the employee is an organ or bone marrow donor and that there is a medical necessity for the organ or bone marrow donation.[480]

Organ and bone marrow donation leave do not run concurrently with leave taken under the federal FMLA. The statute cannot be construed to limit an employer's obligation to comply with a collective bargaining agreement or employment benefit or policy that provides for more generous leave rights.[481]

During the leave period, the employer must maintain the employee's group health insurance coverage for the duration of the leave in the same manner as would have been provided if the employee had not taken leave. Leave is unpaid. If an employee works on a commission basis, the employer must pay the employee any commissions that come due during the leave period for work that the employee performed prior to the leave period.[482]

Upon returning from leave, an employee is entitled to be reinstated to the position the employee held when the leave began, or an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. An employer may deny reinstatement for reasons unrelated to using organ or bone marrow donation leave. An employer cannot treat the leave period as a break in the employee's continuous service for purposes of the employee's right to salary adjustments, sick leave, vacation, PTO, annual leave, or seniority.[483]

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*

In Maryland, an employer must allow a registered Maryland voter a period of up to two hours in which to leave work and vote on election day if an employee does not have two hours of continuous off-duty time while voting polls are open.[484] The employer is required to pay the employee for the two-hour absence, provided the employee furnishes the employer with proof that the employee has voted. The proof shall be on a form prescribed by the State Board. A violation of this provision is a misdemeanor and, upon

[478] MD. CODE ANN., LAB. & EMPL. §§ 3-1401, 3-1402.

[479] MD. CODE ANN., LAB. & EMPL. § 3-1401.

[480] MD. CODE ANN., LAB. & EMPL. § 3-1402.

[481] MD. CODE ANN., LAB. & EMPL. §§ 3-1402, 3-1408.

[482] MD. CODE ANN., LAB. & EMPL. § 3-1404.

[483] MD. CODE ANN., LAB. & EMPL. § 3-1403.

[484] MD. CODE ANN., ELEC. LAW § 10-315.

conviction, the employer may be subject to a fine of not less than $10 or more than $250, imprisonment between 30 days and six months, or both.[485]

In addition to the sanctions set forth in the statute, employees may be able to sue employers for wrongful discharge if an employee is fired for exercising these statutory rights.[486]

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*

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

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

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

The Jury System Improvements Act prohibits employers from terminating or disciplining "permanent" employees due to their jury service in federal court.[487] 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.[488] 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. An employer may not deprive an employee of their employment solely because of job time lost by the employee as a result of responding to a court summons or as a result of attending court for service as a juror. An employer is not required to compensate an employee for time spent on jury service. An employer may not require an employee to use annual, vacation, or sick leave to respond to a jury summons. If an individual is summoned and appears for jury service for four or more hours—

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485 MD. CODE ANN., ELEC. LAW § 16-1001(a).

486 *See Ambush v. City of Frederick*, 2011 WL 232031 (D. Md. Jan. 21, 2011) (Maryland recognizes an at-will employee's wrongful discharge claim when the employee's termination violates a clear public policy); *Adler v. American Standard Corp.*, 432 A.2d 464 (Md. 1981) ("Maryland does recognize a cause of action for abusive discharge by an employer of an at-will employee when the motivation for the discharge contravenes some clear mandate of public policy"); *see also Adler v. American Standard Corp.*, 538 F. Supp. 572, 578 (D. Md. 1982) (plaintiff may also "rely on federal law as the source of the public policy contravened by plaintiff's discharge").

487 28 U.S.C. § 1875.

488 *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).

including travel time— the employee may not be required to work a shift that begins on or after 5:00 P.M. on the day the employee appears for jury service, or before 3:00 A.M. on the day following the appearance for jury service.[489]

Leave to Comply with a Subpoena. An employer may not deprive an employee of the employee's job solely because of job time lost by the employee as a result of the employee's response to a subpoena requiring the employee to appear as a witness in any civil or criminal proceeding, including discovery proceedings.[490] A violation of this provision is punishable by a fine of not more than $1,000.[491] Maryland courts recognize a public policy exception to the employment-at-will doctrine and, consequently, any employee discharged for complying with a subpoena may have a cause of action against the employer for wrongful discharge.

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*

Maryland state law permits an eligible employee to take time off to comply with a subpoena or other court order or to attend any proceeding in which the defendant or juvenile has the right to appear, including a trial or adjudicatory hearing. An employee will be eligible for such leave if the employee is: (1) the victim of the crime or juvenile delinquent act at issue in the proceedings; (2) the victim's next of kin or guardian when the victim is deceased or disabled; or (3) the victim's representative appointed by the court.[492] The time off does not need to be compensated.

3.9(k) *Military-Related Leave*

3.9(k)(i) *Federal Guidelines on Military-Related Leave*

Two federal statutes primarily govern military-related leave: the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Family and Medical Leave Act (FMLA). For more detailed information on these statutes, including notice and other requirements, see LITTLER ON LEAVES OF ABSENCE: MILITARY & CIVIC DUTY LEAVES.

USERRA. USERRA imposes obligations on all public and private employers to provide employees with leave to "serve" in the "uniformed services." USERRA also requires employers to reinstate employees returning from military leave who meet certain defined qualifications. An employer also may have an obligation to train or otherwise qualify those employees returning from military leave. USERRA guarantees employees a continuation of health benefits for the 24 months of military leave (at the employee's expense) and protects an employee's pension benefits upon return from leave. Finally, USERRA requires that employers

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489 MD. CODE ANN., CTS. & JUD. PROC. §§ 8-501, 8-502.

490 MD. CODE ANN., CTS. & JUD. PROC. § 9-205(a)(1).

491 MD. CODE ANN., CTS. & JUD. PROC. § 9-205(b).

492 MD. CODE ANN., CTS. & JUD. PROC. § 9-205; MD. CODE ANN., CRIM. PROC. §§ 11-102, 11-302.

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.[493]

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.494 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.495 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 Leave. Maryland has adopted the provisions of the federal USERRA for members of the National Guard, the District of Columbia National Guard, or the National Guard of another state when ordered to military duty.[496]

Family Military Leave. Under the Leave–Deployment of Family Members in the Armed Services Act, employees who have worked for an employer for one year and at least 1,250 hours during the previous 12 months have the opportunity to take unpaid leave to spend time with their immediate family member (*i.e.*, spouse, parent, step-parent, child, stepchild, or sibling) on the day the immediate family member

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493 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)).

494 29 C.F.R. § 825.126(a).

495 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).

496 MD. CODE ANN., PUB. SAFETY § 13-704.

leaves for, or returns from, active duty outside the United States.[497] An employer may not require an employee to use sick, vacation, or other "paid time off" leave when taking leave under this law.

The statute defines *employer* as a person or entity that: (1) employs 50 or more individuals; and (2) is engaged in a business, industry, profession, trade, or other enterprise in the state. Because *employer* is not defined as employing 50 or more individuals in the state, this law appears to apply to an employer with even one employee who is employed in Maryland and who otherwise meets the one-year and 1,250-hour requirement. Judicial and regulatory interpretation in this regard will be important.[498]

An employer, however, may require an employee requesting leave to submit "proof to the employer verifying that the leave is being taken" for this purpose. Notably, this law does not require an employee to provide advance notice of the leave.[499]

Other Military-Related Protections: Spousal Unemployment. Voluntarily leaving work will not result in disqualification from benefits if the worker's spouse is in the U.S. military or is a civilian employee of the military or a federal agency involved in military operations, and the spouse's employer requires a mandatory transfer to a new location.[500]

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*

Civil Air Patrol Leave. Employers employing more than 15 employees must also provide no less than 15 days of unpaid leave to qualifying employees responding to an emergency mission under the Civil Air Patrol Leave Act.[501] Employees must provide as much notice as possible of the intended start and end dates of leave. After arriving at an emergency, the employee must provide the employer an estimate of the mission's duration and must notify the employer of necessary changes in time to complete a mission.

Employees need not exhaust other forms of leave prior to taking civil air patrol leave. Employers may require verification of the employee's eligibility to take leave, and leave can be denied if verification is not provided.[502] Employers cannot discriminate against or discharge an employee who has been employed at least 90 days who is a member of the Civil Air Patrol because of the employee's membership. An employer may not hinder or prevent said employees from performing service as part of the Maryland Wing of the Civil Air Patrol during an emergency mission if the employee is entitled to leave.[503] Further, employers cannot interfere with the use of leave, nor can they discharge, fine, suspend, expel, discipline, or in any

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497 MD. CODE ANN., LAB. & EMPL. § 3-803.

498 MD. CODE ANN., LAB. & EMPL. § 3-803.

499 MD. CODE ANN., LAB. & EMPL. § 3-803.

500 MD. CODE ANN., LAB. & EMPL. § 8-1001(c)(1)(iii).

501 MD. CODE ANN., LAB. & EMPL. §§ 3-1001, 3-1003(A).

502 MD. CODE ANN., LAB. & EMPL. § 3-1003(B).

503 MD. CODE ANN., LAB. & EMPL. § 3-1003.

other manner discriminate against qualifying employees who comply with the leave provisions or oppose any act that runs counter to its provisions.[504]

Volunteer Emergency Responder Protections. An employer may not discharge an employee for participation in an activity of a civil air patrol, civil defense, volunteer fire department, or volunteer rescue squad matters, so long as the activity is in response to an emergency that the governor declares on the request of the governing body of a county or municipal corporation and the employee submits written proof that the employee's participation was required.[505]

3.10 Workplace Safety

3.10(a) *Occupational Safety and Health*

3.10(a)(i) *Fed-OSH Act Guidelines*

The federal Occupational Safety and Health Act ("Fed-OSH Act") requires every employer to keep their places of employment safe and free from recognized hazards likely to cause death or serious harm to employees.[506] Employers are also required to comply with all applicable occupational safety and health standards.[507] 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.[508] 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*

Maryland, under agreement with Fed-OSHA, operates its own state occupational safety and health program in accordance with section 18 of the Fed-OSH Act.[509] Thus, Maryland 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. Maryland adopted its Occupational Safety and Health Act (MOSHA), which is overseen by the Occupational Safety and Health Commission of the Division of Labor and Industry ("Commission" or "MOSH"). [510] MOSH is responsible for enforcing federal occupational safety and health

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[504] MD. CODE ANN., LAB. & EMPL. § 3-1006.

[505] MD. CODE ANN., LAB. & EMPL. § 3-703.

[506] 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.

[507] 29 U.S.C. § 654(a)(2).

[508] 29 U.S.C. § 667(c)(2).

[509] 29 U.S.C. § 667.

[510] MD. CODE ANN., LAB & EMPL. §§ 5-101 *et seq*.

standards and also has the authority to promulgate its own regulations. Often, MOSH simply adopts Fed-OSHA regulations; however, the state tends to regulate when the Commission desires to impose more stringent rules in a given area. MOSHA covers virtually all Maryland employers that employ at least one employee, including state and local governments.[511] It does not apply to the working conditions of any employee of the federal government or its units or to an employee whose occupational safety and health is protected under certain federal statutes.[512]

MOSHA is intended to be preventive and noncompensatory in nature. Therefore, it does not create an action for damages for an employee.[513] Under MOSHA, an employer will not be held to a standard of strict liability.[514] If charged with a violation, employers may defend themselves by claiming contributory negligence and assumption of the risk played a role, absent a statute expressly abrogating such defenses.[515]

Rights & Duties of Employers Under MOSHA. An employer is required to provide to its employees (or employees of contractors or subcontractors) a place of employment or work area that is safe and healthful and free from recognized hazards that are causing or likely to cause death or serious physical harm to employees.[516] The employer is responsible for the safety of the workplace in general, not just for those items provided to employees by the employer. An employer also must take reasonable precautionary steps to protect its employees (and possibly others) from reasonably foreseeable, recognized dangers that are causing or are likely to cause death or serious physical injury.[517]

Each employer must comply with all occupational safety and health standards and regulations promulgated under MOSHA.[518] Moreover, each employer must keep its employees informed of their protections and duties under MOSHA, including every occupational safety and health standard by: (1) posting notice where notices to employees are normally posted; or (2) using other appropriate means.[519] The employer must post the notice in a conspicuous place in each establishment.[520]

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511 MD. CODE ANN., LAB & EMPL. §§ 5-101(d), 5-104(b).

512 MD. CODE ANN., LAB & EMPL. § 5-103. For example, MOSHA does not affect workplaces subject to certain other federal laws such as the Atomic Energy Act, the Federal Mine Safety and Health Act, and the Longshoremen's and Harbor Workers' Compensation Act.

513 *Jones v. Parsons Transp. Grp., Inc.*, 2004 WL 1254029, at *5 (D. Md. May 20, 2004).

514 *J.I. Hass Co. v. Dep't of Licensing & Regulation, Div. of Labor & Indus.*, 340 A.2d 255 (Md. 1975). *But see Mardo Homes, Inc. v. Comm'r of Labor & Indus.*, 370 A.2d 144, 148 (Md. Ct. Spec. App. 1977) (question of whether a deceased worker was guilty of contributory negligence was rejected by the court where the employer did nothing to assure that a metal ladder would not be used in an area containing uninsulated electric wires).

515 *See Strub v. C&M Builders, L.L.C.*, 996 A.2d 399 (Md. Ct. Spec. App. 2010), *rev'd on other grounds,* 22 A.3d 867 (Md. 2011).

516 MD. CODE ANN., LAB & EMPL. § 5-104(a).

517 *Mardo Homes, Inc.*, 370 A.2d at 148.

518 MD. CODE ANN., LAB & EMPL. § 5-104(b).

519 MD. CODE ANN., LAB & EMPL. § 5-104(c).

520 MD. CODE REGS. 09.12.20.02(B).

An employer may not discharge, or in any way discriminate against, any employee for filing a complaint, instituting a proceeding, testifying in such a proceeding, or precipitating an inspection under MOSHA.[521]

Maryland's Right-to-Know Law. To comply with the requirements of Code of Federal Regulations title 28, section 1910.1200(e)(1)(i), each employer must compile and maintain a chemical information list of each hazardous chemical that is formulated, handled, manufactured, packaged, processed, reacted, repackaged, stored, or transferred in the workplace of the employer.[522] Unlike the federal regulations, which excludes many different products from coverage, section 5-405 of Maryland Code, Labor and Employment Article has limited exceptions—it does not apply to consumer products or foodstuffs that are: (1) packaged for distribution to and intended for use by the general public; and (2) handled unopened or stored unopened in a retail establishment, including its storeroom or warehouse.[523] To be certain that this list is complete, MOSH recommends that employers include on the list *all* chemicals in the workplace. This list must be made available upon an employee's request. Within 30 days after a hazardous chemical is introduced into the workplace of an employer, the employer must add that hazardous chemical to its chemical information list. An employer must revise its chemical information list every two years.[524]

An employee is entitled to access and/or to a copy of their employer's chemical information list.[525] Each employer is required to have a written hazard determination and communication program, as well as an adequate training program for employees regarding hazardous materials. In addition to the training program itself, employers must make available to employees at all times copies of the MSDS forms, the written hazard determination and communication program, and the chemical information list.

An employer may not ask or require an employee to waive any right under Maryland's Right-to-Know Law or under Code of Federal Regulations title 29, section 1910.100. Any such waiver will be void.[526]

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*

Maryland prohibits individuals from using a handheld device to write, send, or read a text message or an electronic message while operating a motor vehicle in the travel portion of a roadway.[527]

Under the Communications Traffic Safety Act, a driver of a motor vehicle that is in motion may not use the driver's hands to use a handheld telephone other than to initiate or terminate a wireless telephone call or to turn on or turn off the handheld telephone.[528] An individual convicted of using a handheld

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[521] MD. CODE ANN., LAB & EMPL. § 5-604.

[522] MD. CODE ANN., LAB & EMPL. § 5-405(b)(1); *see also* 29 C.F.R. § 1910.1200(e).

[523] MD. CODE ANN., LAB & EMPL. § 5-405(a).

[524] MD. CODE ANN., LAB & EMPL. § 5-405(b)(2)-(3).

[525] MD. CODE ANN., LAB & EMPL. § 5-407.

[526] MD. CODE ANN., LAB & EMPL. § 5-404(a)-(b).

[527] MD. CODE ANN., TRANSP. § 21-1124.1(b).

[528] MD. CODE ANN., TRANSP. § 21-1124.2(d)(2).

telephone while driving will be subject to fines as follows: (1) for a first offense, a fine of not more than $75; (2) for a second offense, a fine of not more than $125; and (3) for a third and subsequent offense, a fine not to exceed $175.[529]

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

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. The owner of a business or property may carry a concealed handgun within the confines of the business establishment during the course of employment. The owner may designate a supervisory employee who is licensed to carry a gun to carry a concealed gun in the facility while the owner is absent from the facility.[530] In addition, a business may restrict firearms on its business premises. A person wearing, carrying, or transporting a firearm may not enter or trespass on property unless:

- the property owner or the owner's agent has posted a clear and conspicuous sign indicating that it is permissible to wear, carry, or transport a firearm on the property; or
- the property owner or the owner's agent has given the person express permission to wear, carry, or transport a firearm on the property.[531]

Firearms in Company Parking Lots. Maryland law does not address firearms in company parking lots.

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*

Maryland's Clean Indoor Air Act requires all indoor workplaces, including restaurants, bars, and private clubs, to be smoke free.[532] The Clean Indoor Air Act does not preempt a county or municipal government from enacting and enforcing additional measures to reduce involuntary exposure to environmental tobacco smoke. Beginning in July 2024, the Act also prohibits vaping in any location in which smoking is also prohibited. *Vaping* means the use of an electronic smoking device and any device through which the user inhales aerosol containing tobacco, cannabis, or hemp.[533]

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[529] MD. CODE ANN., TRANSP. § 21-1124.2(e).

[530] MD. CODE ANN., CRIM. LAW § 4-203(b)(6-7).

[531] MD. CODE ANN., CRIM. LAW § 6-411; S.B. 1 (Md. 2023).

[532] MD. CODE ANN., HEALTH-GEN. §§ 24-501 *et seq*.

[533] MD. H.B. 238 (S.B. 244) (2024).

The law prohibits smoking or vaping in the following areas: (1) indoor areas open to the public; (2) indoor places in which meetings are open to the public; (3) government-owned or government-operated means of mass transportation; and (4) indoor places of employment.[534]

The following places are *excluded* from the smoking ban:

- private homes and residences, including those used as businesses, unless they are used to provide licensed day care or child care;
- private vehicles, unless used for public transportation of children;
- a limited percentage of hotel rooms (total number of smoking rooms cannot be greater than 25%);
- retail tobacco businesses whose primary activity is the sale of tobacco products and accessories, and where the sale of other products is incidental;
- any facility of a manufacturer, importer, wholesaler, or distributor of tobacco products (or of any tobacco leaf dealer or processor) in which employees work or congregate; and
- any research or educational laboratory used for the purpose of conducting scientific research on the effects of environmental smoke.[535]

Posting Requirements. Employers must post a sign stating that smoking is not permitted at each entrance to an indoor place of employment.[536] Also, for places excluded from the smoking ban, signs that state "Smoking or Vaping Permitted in This Room" must be prominently posted and properly maintained where smoking is allowed.[537] An affirmative defense to a violation is available where a business has posted a sign or has removed all smoking paraphernalia from all areas where smoking is prohibited.[538]

Antiretaliation Provisions. Employers may not discharge or retaliate against an employee due to the employee reporting a violation or otherwise exercising their rights under this law.[539]

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*

Maryland law does not address suitable seating requirements for employees.

[534] MD. CODE ANN., HEALTH-GEN. § 24-504.

[535] MD. CODE ANN., HEALTH-GEN. § 24-505.

[536] MD. CODE REGS. 09.12.23.03.

[537] MD. CODE ANN., HEALTH-GEN. § 24-506.

[538] MD. CODE ANN., HEALTH-GEN. § 24-506.

[539] MD. CODE ANN., HEALTH-GEN. § 24-508.

3.10(f) *Workplace Violence Protection Orders*

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

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

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

An employer may petition a court for a peace order for acts or threatened acts of violence against an employee in the employer's workplace.[540] Employers must notify employees before seeking a peace order and must seek peace orders and not domestic violence orders. However, an employer will not be held liable for failing to file for a peace order. Further, employees are protected from retaliation for refusing to provide information or testify in support of the employer's petition for the order.[541] The peace order may be issued on an interim, temporary, or final basis.

Procedural Requirements. A petitioner may file a petition that alleges the following acts against the petitioner's employee at the employee's workplace if the act occurred within 30 days before filing the petition:

- an act that causes serious bodily harm;
- an act that places the petitioner or the petitioner's employee in fear of imminent serious bodily harm;
- assault in any degree;
- false imprisonment;
- harassment under state criminal law;
- stalking under state criminal law;
- malicious destruction of property under state criminal law;
- misuse of telephone facilities and equipment under state criminal law;
- misuse of electronic communication or interactive computer service under the state criminal law;
- revenge porn under state criminal law; or
- visual surveillance under the state criminal law.[542]

The petition must include the address of the petitioner or the petitioner's employee and include all information known to petitioner of:

[540] MD. CODE ANN., CTS. & JUD. PROC. § 3-1501.

[541] MD. CODE ANN., CTS. & JUD. PROC. § 3-1503.

[542] MD. CODE ANN., CTS. & JUD. PROC. § 3-1503.

- the nature and extent of the act for which the relief is sought, including information known to the petitioner concerning previous harm or injury by the respondent;
- each previous and pending action between the parties in any court; and
- the whereabouts of the respondent.[543]

Interim Peace Order. Interim peace orders are served immediately. Interim peace orders should only provide the minimally necessary relief to protect the petitioner or the petitioner's employee. Interim peace orders are effective until the earlier of:

- the temporary peace order hearing; or
- the end of the second business day the Office of the Clerk of the District Court is open following the issuance of an interim peace order.[544]

Temporary Peace Order. If after a hearing on a petition, whether ex parte or otherwise, a judge finds that there are reasonable grounds to believe that the respondent has committed, and likely to commit future abuse, the judge may issue a temporary peace order only providing the minimally necessary relief to protect the petitioner or the petitioner's employee. A temporary peace order may include any or all of the following relief:

- An order to refrain from committing the acts causing the petition.
- An order to refrain from contacting, attempting to contact, or harassment of the petitioner or petitioner's employee.
- An order to not entering the residence of the petitioner or petitioner's employee.
- An order to remain away from the place of employment of the petitioner or the petitioner's employee.

Temporary orders are ineffective from seven days after service of the order. However, the judge may extend the order as needed, up to 30 days. The temporary order will state the date and time of the final peace order hearing.[545]

Final Peace Order. If the judge finds by a preponderance of the evidence that the respondent committed, and is likely to commit in the future, the acts causing the petition at the final peace order hearing, then the judge can order a final peace order. The order must only provide the minimally necessary relief to protect the petitioner or the petitioner's employee. It may include any or all of the following relief:

- an order to refrain from committing the acts causing the petition;
- an order to refrain from contacting, attempting to contact, or harassment of the petitioner or petitioner's employee;
- an order to not enter the residence of the petitioner or petitioner's employee;

[543] MD. CODE ANN., CTS. & JUD. PROC. § 3-1503.

[544] MD. CODE ANN., CTS. & JUD. PROC. § 3-1503.1.

[545] MD. CODE ANN., CTS. & JUD. PROC. § 3-1504.

- an order to remain away from the place of employment of the petitioner or the petitioner's employee;
- direct the respondent or petitioner to participate in professionally supervised counseling or, if the parties are amenable, mediation; and
- order either party to pay filing fees and costs of the proceedings.

Final peace orders may be for a period of up to six months. For good cause shown, the term of the final peace order may be extended after a subsequent hearing.[546]

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");[547] (2) the Americans with Disabilities Act (ADA);[548] (3) the Age Discrimination in Employment Act (ADEA);[549] (4) the Equal Pay Act;[550] (5) the Genetic Information Nondiscrimination Act of 2009 (GINA);[551] (6) the Civil Rights Acts of 1866 and 1871;[552] 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);[553]
- disability (includes having a "record of" an impairment or being "regarded as" having an impairment);
- age (40); or

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[546] MD. CODE ANN., CTS. & JUD. PROC. § 3-1505.

[547] 42 U.S.C. §§ 2000e *et seq.* Title VII applies to employers with 15 or more employees. 42 U.S.C. § 2000e(b).

[548] 42 U.S.C. §§ 12101 *et seq.* The ADA applies to employers with 15 or more employees. 42 U.S.C. § 12111(5).

[549] 29 U.S.C. §§ 621 *et seq*. The ADEA applies to employers with 20 or more employees. 29 U.S.C. § 630.

[550] 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.

[551] 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)).

[552] 42 U.S.C. §§ 1981, 1983.

[553] 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.

- genetic information.

The Equal Employment Opportunity Commission (EEOC) is the agency charged with handling claims under the antidiscrimination statutes.[554] 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.[555]

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

Maryland's primary FEP protection is the Maryland Fair Employment Practices Act (FEPA).[556] It is similar to its federal counterparts, but broader in some ways. Generally, the Maryland Fair Employment Practices Act prohibits discrimination on the basis of:

- race (see below);
- color;
- religion;
- ancestry;
- national origin;
- sex;
- age;
- marital status;
- sexual orientation;
- genetic information;
- disability (includes being regarded as);
- individual's refusal to submit to a genetic test or make available the results of a genetic test;
- pregnancy or childbirth status; or
- **effective October 1, 2024:** military status.[557]

The definition of *race* is expanded to include traits associated with race, including hair texture, Afro hairstyles, and protective hairstyles. *Protective hairstyles* includes braids, twists, and locks.[558]

Additionally, an employer is prohibited from failing to make a reasonable accommodation for the known disability of an otherwise qualified applicant or employee.[559]

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

[555] 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.

[556] MD. CODE ANN., STATE GOV'T § 20-601 *et seq*.

[557] MD. CODE ANN., STATE GOV'T §§ 20-606, 20-609.

[558] MD. CODE ANN., STATE GOV'T § 20-101.

[559] MD. CODE ANN., STATE GOV'T §§ 20-603; 20-606.

Maryland's FEPA protects individuals from discrimination in virtually all aspects of employment, including preemployment testing and inquiries, hiring, terms and conditions of employment, compensation, fringe benefits, assignments, promotions, discipline, and termination. FEPA's protections extend to employees, interns, applicants for employment, and labor organization members.[560]

Private employers, public employers, labor organizations, and joint labor-management training committees are covered by FEPA. A *covered employer* is a person a person engaged in an industry or a business and who either has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year or, for alleged harassment claims, has one or more employees in each working day for each of 20 or more calendar weeks in the current or preceding calendar year.[561] The State of Maryland also qualifies as a *covered employer* under FEPA. FEPA does not apply to employers when they employ aliens outside of the state, nor does FEPA apply to religious corporations, associations, educational institutions, or societies with respect to the employment of individuals of a particular religion or sexual orientation.[562]

Employees of employers with fewer than 15 employees are exempt from FEPA. However, employers with fewer than 15 employees can be sued by their employees directly for wrongful discharge.

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

Agency Enforcement. Maryland's Commission on Civil Rights (MCCR or "Commission") investigates charges of alleged violations of FEPA.[563] To satisfy FEPA's procedural requirements, a complaint may alternatively be filed with the federal or local human rights commission within two years from the date that the alleged unlawful act occurred. A complaint alleging an unlawful employment practice *other* than harassment must be filed with the Maryland Commission on Human Rights within 300 days after the date on which the alleged discriminatory act occurred. Complaints filed with the federal EEOC within six months or a local human relations committee within 300 days after will be deemed to comply. The MCCR also has the power to institute proceedings against an employer whenever it has "received reliable information" from any source that an employer has violated the FEPA. Maryland employees also have a private right of action under Title 20 of the Maryland Code Annotated. A complainant may file a civil action alleging an unlawful employment practice if they filed a timely administrative charge and at least 180 days have passed since the administrative filing, A complainant has two years to file a civil action after the alleged practice occurred. If it is a harassment complaint, the complainant has three years to file a civil action. These time limitations are tolled while the administrative charge or complaint is pending.[564]

Procedure. Any person claiming to be aggrieved by an alleged act of unlawful employment discrimination may file a complaint in writing with the Commission, stating the names of the individual or entity alleged to have committed the act of discrimination and the particulars thereof.[565] After a complaint is filed, the executive director must consider the allegations and, if the complaint is deemed valid, refer it to the Commission's staff for investigation.

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[560] MD. CODE ANN., STATE GOV'T §§ 20-606, 20-610.

[561] MD. CODE ANN., STATE GOV'T § 20-601.

[562] MD. CODE ANN., STATE GOV'T § 20-604.

[563] MD. CODE ANN., STATE GOV'T § 20-1004(c); MD. CODE REGS. 14.03.01.03.

[564] MD. CODE ANN., STATE GOV'T §§ 20-1013, 20-1004(c)..

[565] MD. CODE ANN., STATE GOV'T § 20-1004.

As with the EEOC, investigations by the Commission begin with notice to the employer of the complaining party's charge of discrimination and service of a copy of the charge. Employers may insist that their attorney be present for any interview of managerial and supervisory employees, but the MCCR will insist on interviewing nonmanagerial and nonsupervisory employees outside the presence of management.[566] The investigator then requests that the employer submit a position statement within 15 days. After the investigation, the investigator will make a recommendation as to whether there is probable cause that FEPA was violated.[567]

If the executive director finds that there is probable cause that FEPA has been violated, the MCCR staff will attempt to conciliate a resolution of the charge.[568] If an agreement is reached for the resolution of the charge, the agreement will be reduced to writing, signed, and an order will be entered by the Commission setting forth the terms of the agreement. If the parties cannot reach an agreement, a finding to that effect will be made, and it will be reduced to writing and furnished to both sides.[569]

The case file will then be sent to the chairman of the Commission to be certified for a public hearing before an administrative law judge (ALJ).[570] After considering the body of evidence, the ALJ issues a written provisional order that discusses the facts upon which it is based. If no discriminatory act is found, the ALJ so states their findings and issues an order dismissing the complaint.[571]

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

In addition to the federal and state laws, employers with operations in Baltimore, Baltimore County, Frederick County, Howard County, Montgomery County, and Prince George's County are subject to local fair employment practices ordinances.

- **Anne Arundel County.** Protected classifications include: age; ancestry; citizenship; color; creed; disability; familial status; gender identity or expression; marital status; national origin; occupation; race; religion; sex; sexual orientation; and source of income.[572] A person alleging a violation may file a complaint with the Human Relations Commission no later than the later of 300 days after the alleged violation occurs or six months after the complainant discovers the alleged violation.[573]
- **Baltimore.** Employers employing one or more employees (exclusive of parents, spouses, or children of the employer) during at least 15 days in the preceding 12 full months are subject to the following antidiscrimination protections: race; color; religion; national origin; ancestry; age (18-65); marital status; physical or mental disability; sexual orientation; gender identity or expression; and (effective September 22, 2023) HIV or AIDS status.[574] An aggrieved

[566] *Maryland Comm'n on Human Relations v. Talbot Cnty. Detention Ctr.*, 803 A.2d 527 (Md. 2002).

[567] MD. CODE ANN., STATE GOV'T § 20-1005.

[568] MD. CODE ANN., STATE GOV'T § 20-1005(b).

[569] MD. CODE ANN., STATE GOV'T § 20-1005(c).

[570] MD. CODE ANN., STATE GOV'T § 20-1006.

[571] MD. CODE ANN., STATE GOV'T § 20-1009(d).

[572] ANNE ARUNDEL CNTY., MD., CODE OF ORDINANCES § 1-9-101 (definitions).

[573] ANNE ARUNDEL CNTY., MD., CODE OF ORDINANCES § 3-5A-203.

[574] BALTIMORE, MD., CITY CODE §§ 1-1 (definitions and exceptions, including fraternal and religious organizations), 3-1.

individual may file a complaint with the Baltimore Community Relations Commission within 180 days of the alleged unlawful practice.[575] Also effective September 22, 2023, it is unlawful for any employer, employment agency, or labor organization to willfully and repeatedly use an individual's incorrect name or pronouns after being clearly informed of the individual's correct name or pronouns, unless otherwise required by law. Additional restrictions apply during the job interview process.

- **Baltimore County.** The antidiscrimination protections apply to employers (and their agents) engaged in industry or business in the county with one or more full- or part-time employees for each working day for 20 or more calendar weeks in the current or preceding year are subject to the following antidiscrimination protections: race; creed; religion; color; sex; age; national origin; marital status; sexual orientation; gender identity or expression; status as a veteran; and physical or mental disability.[576] A person claiming to be aggrieved by an alleged violation may file a complaint with the Baltimore County Human Relations Commission no more than six months after the alleged violation has occurred or been discovered by the complainant.[577]
- **Frederick County.** Employers with 15 or more employees must extend antidiscrimination protections on the basis of: race; color; religion; national origin; sex; age (40 years, as under federal law); marital status; disability; gender identity; sexual orientation; and, familial status.[578] An individual alleging a violation of the ordinance may file a complaint with the Frederick County Human Relations Commission within six months of the discrimination.[579]
- **Hagerstown.** A person engaged in an industry or business who has 15 or more employees for each working day in each 20 or more calendar weeks in the current or preceding calendar year and any agent of such person are subject to the following antidiscrimination protections: gender; race; color; religion; sex; sexual orientation; gender identity or expression; age; disability; marital status; citizenship; national origin; genetic information; and any other characteristic protected by law.[580]
- **Howard County.** Protected classifications include: race; creed; religion; disability; color; sex (including pregnancy, childbirth, or related medical conditions); national origin; age; occupation; marital status; political opinion; sexual orientation; personal appearance; familial status; and gender identity or expression. Employers (and their agents) engaged in industry or business employing five or more full- or part-time employees for each working day in each of 20 or more calendar weeks in the current and previous calendar year are subject to the antidiscrimination provisions.[581] An aggrieved person may file a complaint with the Howard

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[575] BALTIMORE, MD., CITY CODE §§ 2-4, 4-1.

[576] BALTIMORE CNTY., MD., CODE OF ORDINANCES §§ 29-1-101 (definitions), 29-2-201 (additional definitions), 29-2-202, and 29-2-204 (exceptions, including *bona fide* occupational qualifications and religious educational institutions; reasonable appearance, grooming, and dress standards are permitted).

[577] BALTIMORE CNTY., MD., CODE OF ORDINANCES § 29-3-103.

[578] FREDERICK CNTY., MD., CODE OF ORDINANCES §§ 1-2-93, 1-2-95(A)(3).

[579] FREDERICK CNTY., MD., CODE OF ORDINANCES § 1-2-95; *see also* Frederick Cnty. Human Relations Comm'n, *Filing a Discrimination Complaint*, *available at* https://frederickcountymd.gov/1515/Filing-Discrimination-Complaints.

[580] HAGERSTOWN, MD., CODE § 82-12.

[581] HOWARD CNTY., MD., CODE OF ORDINANCES § 12.208 (includes several exemptions).

County Office of Human Rights within six months after the alleged violation has occurred or been discovered by the complainant.[582]

- **Montgomery County.** Employers employing one or more individuals in Montgomery County, either for compensation or as a volunteer are subject to the following antidiscrimination protections: race (including immutable traits associated with race: hair texture and protective hairstyles. *Protective hairstyles* are those hairstyles necessitated by or resulting from immutable characteristics of a hair texture associated with race, such as braids, locks, afros, curls, or twists); color; religious creed; ancestry; national origin; age; sex (including pregnancy, childbirth, or related medical conditions); marital status; sexual orientation; gender identity and expression; family responsibilities; genetic status; and HIV status.[583] A covered employer must post a workplace poster covering these protections and must also furnish to the Montgomery County Commission on Human Rights all reports required by the federal EEOC.[584] Any person subjected to a discriminatory act or practice may file a written complaint with the Executive Director of the Montgomery County Office of Human Rights within one year after the alleged discriminatory act or practice.[585]
- **Prince George's County.** Employers employing one or more individuals for a total of 40 or more hours in the current or preceding calendar year must extend antidiscrimination protections on the basis of: age (except as required by state or federal law); color; familial status; marital status; national origin; occupation; personal appearance; physical or mental handicap; race; religion; sex; and sexual orientation.[586] Any aggrieved person may file a complaint with the Human Relations Commission within 180 days after the date of the alleged violation.[587]

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."[588] 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.

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582 HOWARD CNTY., MD., CODE OF ORDINANCES § 12.212.

583 MONTGOMERY CNTY., MD., CODE §§ 27-6 (definitions), 27-19 (exceptions, including for religious organizations and *bona fide* occupational qualifications).

584 MONTGOMERY CNTY., MD., CODE § 27-20(a), (b).

585 MONTGOMERY CNTY., MD., CODE § 27-7.

586 PRINCE GEORGE'S CNTY., MD., CODE OF ORDINANCES §§ 2-186 (definitions), 2-222, and 2-227 (exceptions, including *bona fide* occupational qualifications).

587 PRINCE GEORGE'S CNTY., MD., CODE OF ORDINANCES §§ 2-194 *et seq.*

588 29 U.S.C. § 206(d)(1).

An employee alleging a violation of the Equal Pay Act must first exhaust administrative remedies by filing a complaint with the EEOC within 180 days of the alleged unlawful employment practice. Under the federal Lilly Ledbetter Fair Pay Act of 2009, for purposes of the statute of limitations for a claim arising under the Equal Pay Act, an unlawful employment practice occurs with respect to discrimination in compensation when: (1) a discriminatory compensation decision or other practice is adopted; (2) an individual becomes subject to such a decision or practice; or (3) an individual is affected by application of such decision or practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.[589]

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

Maryland law requires equal pay regardless of gender.[590] Under the Equal Pay for Equal Work Act ("Equal Pay Act"), an employer may not discriminate between employees in any occupation by paying "a wage to employees at a rate less than the rate paid to other employees if the employees work in the same establishment and perform work of comparable character, or work on the same operation, in the same business, or of the same type and the pay difference is based on the race, religious beliefs, sex, gender identity, or sexual orientation of the employees."[591] For purposes of this statute, *wage* means all compensation for employment, including accommodations for board, room, and other advantages, when they are furnished for the convenience of the employer.[592]

The Equal Pay Act does not prohibit variation in wage rates based on differences in seniority or merit increase systems that do not discriminate on the basis of gender. Similarly, the prohibition does not extend to variations based on jobs requiring different skills or ability, jobs requiring different duties or services performed regularly, or work performed on different shifts or at different times of day.[593] An employer may not reduce the wage rate of any employee to comply with these provisions.[594]

It is unlawful for an employer: (1) to willfully violate any provision of this statute; (2) to refuse entry to the Commissioner or an authorized representative of the Commissioner into a place of employment that the Commissioner is authorized to inspect under this statute; or (3) violate wage range or wage history provisions.[595]

The Equal Pay Act similarly prohibits an employer from discharging or otherwise discriminating against an employee or applicant: (1) who has made a complaint to their employer, the Commissioner, or any other

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589 42 U.S.C. § 2000e-5.

590 MD. CODE ANN., LAB. & EMPL. §§ 3-301 *et seq*.

591 MD. CODE ANN., LAB. & EMPL. § 3-304(b).

592 MD. CODE ANN., LAB. & EMPL. § 3-301(e); s*ee also Nixon v. State*, 625 A.2d 404 (Md. Ct. Spec. App. 1993), *cert. denied*, 632 A.2d 151 (Md. 1993) (female assistant professor failed to establish a *prima facie* case that she performed work of comparable character or comparable skill, effort, or responsibility as her male colleague, as required under the Maryland Equal Pay Act).

593 MD. CODE ANN., LAB. & EMPL. § 3-304(c).

594 MD. CODE ANN., LAB. & EMPL. § 3-304(e).

595 MD. CODE ANN., LAB. & EMPL. § 3-308(a)(1)-(3).

person under this statute; (2) has instituted or caused any proceeding to be brought under this statute or related to the equal pay law; or (3) has testified or intends to testify in any such proceeding.[596]

An affected employee may bring an action against an employer to recover both the difference between the wages paid to male and female employees who do the same type of work and an additional equal amount as liquidated damages, along with reasonable counsel fees and other costs of the action, if the action is filed within three years of the act on which it is based.[597] However, Maryland enacted the Maryland Lilly Ledbetter Civil Rights Restoration Act of 2009, its version of the federal Lilly Ledbetter Fair Pay Act of 2009. This law allows recovery of back pay for up to two years with regard to discrimination in compensation that occurred outside the time for filing a complaint.[598]

An employee may bring an action on behalf of the employee and other employees similarly situated.[599] On the written request of an employee who is entitled to bring an action, the Commissioner may: (1) take an assignment of the claim in trust for the employee; (2) ask the attorney general to bring an action in accordance with section 3-307 on behalf of the employee; and (3) consolidate two or more claims against an employer.[600]

In addition to any powers set forth elsewhere in this statute, the Commissioner may: (1) use informal methods of conference, conciliation, and persuasion to eliminate pay practices that are unlawful under the Equal Pay Act; and (2) supervise the payment of a wage owing an employee under this statute.[601] The agreement of an employee to work for less than the wage to which the employee is entitled is not a defense to an action under section 3-307.[602]

Upon conviction for engaging in prohibited conduct under the Equal Pay Act, an employer is guilty of a misdemeanor and is subject to a fine not exceeding $300.[603] An employer found to have violated the equal pay statute two or more times within a three-year period may be assessed a penalty of 10% of the amount of damages owed by the employer.[604]

Beginning in October 2024, the Equal Pay Act requires an employer to disclose, in each public or internal job posting for each position, the wage range and a general description of the benefits and any other compensation offered for the position. If a public or internal posting for a position was not made available to an applicant for the position, the employer must disclose to the applicant the wage range, benefits,

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596 MD. CODE ANN., LAB. & EMPL. § 3-308(a)(4).

597 MD. CODE ANN., LAB. & EMPL. § 3-307.

598 MD. CODE ANN., STATE GOV'T § 20-607(b). In 2009, article 49B of the Maryland Code Annotated was recodified at title 20 of the Code's article on state government. *See* MD. CODE ANN., STATE GOV'T §§ 20-101 *et seq*.

599 MD. CODE ANN., LAB. & EMPL. § 3-307(a).

600 MD. CODE ANN., LAB. & EMPL. § 3-307(b).

601 MD. CODE ANN., LAB. & EMPL. § 3-303.

602 MD. CODE ANN., LAB. & EMPL. § 3-307(d).

603 MD. CODE ANN., LAB. & EMPL. § 3-308(d).

604 MD. CODE ANN., LAB. & EMPL. § 3-308.

and any other compensation offered for the position: (1) before the employer discusses compensation with the applicant; and (2) at any other time, at the applicant's request.[605]

"Wage range" means the minimum and maximum hourly rate or salary for a position, set in good faith by reference to:

- any applicable pay scale;
- any previously determined minimum and maximum hourly rate or salary for the position;
- the minimum and maximum hourly rate or salary of an individual holding a comparable position at the time of the posting; or
- the budgeted amount for the position.[606]

"Posting" means a solicitation intended to recruit applicants for a specific available position, including recruitment done directly by an employer or indirectly through a third party.[607]

The requirement to disclose the wage range for a position applies only to a position for work that will be physically performed, at least in part, within the state.[608]

The state labor commissioner will develop a model form for disclosing the required wage range. An employer may comply with the wage disclosure requirement by completing the model form and including the form in public and internal job postings or providing the form to applicants.[609]

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

3.11(c) *Pregnancy Accommodation*

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

As discussed in **3.9(c)(i)**, the federal Pregnancy Discrimination Act (PDA), which amended Title VII, the Family and Medical Leave Act (FMLA), and the Americans with Disabilities Act (ADA) may be implicated in 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;

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[605] MD. CODE ANN., LAB. & EMPL. § 3-304.2.

[606] MD. CODE ANN., LAB. & EMPL. § 3-301.

[607] MD. CODE ANN., LAB. & EMPL. § 3-301.

[608] MD. CODE ANN., LAB. & EMPL. § 3-304.2.

[609] MD. CODE ANN., LAB. & EMPL. § 3-304.2.

- 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.[610]

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).[611]

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.[612] 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.[613] 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."[614]

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

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[610] 42 U.S.C. § 2000gg-1. The regulations provide definitions of *pregnancy*, *childbirth*, and *related medical conditions*. 29 C.F.R. § 1636.3.

[611] 29 C.F.R. § 1636.3.

[612] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1636.3.

[613] 29 C.F.R. § 1636.3.

[614] 29 C.F.R. § 1636.4.

determine whether the employee has a limitation within the meaning of the PWFA and needs an adjustment or change at work due to the limitation.

Reasonable accommodation is not required if providing the accommodation would impose an undue hardship on the employer's business operations. An *undue hardship* is an action that fundamentally alters the nature or operation of the business or is unduly costly, extensive, substantial, or disruptive. When determining whether an accommodation would impose an undue hardship, the following factors are considered:

- the nature and net cost of the accommodation;
- the overall financial resources of the employer;
- the number of employees employed by the employer;
- the number, type, and location of the employer's facilities; and
- the employer's operations, including:
  - the composition, structure, and functions of the workforce; and
  - the geographic separateness and administrative or fiscal relationship of the facility where the accommodation will be provided.[615]

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.[616]

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*

The Maryland Fair Employment Practices Act requires employers with 15 or more employees to provide pregnant employees with reasonable accommodations. An employer is not required to provide accommodation if doing so would impose an undue hardship. Reasonable accommodations include changing the employee's job duties; changing the employee's work hours; relocating the employee's work

[615] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1630.2(p).

[616] 29 C.F.R. § 1636.3.

area; providing mechanical or electrical aids; transferring the employee to a less strenuous or less hazardous position; or providing leave.

With respect to a transfer to a less strenuous or less hazardous position as a reasonable accommodation, transfer is not required unless:

- the employer has a policy, practice, or collective bargaining agreement requiring or authorizing the transfer of a temporarily disabled employee to a less strenuous or less hazardous position for the duration of the disability; or
- the employee's health care provider advises the transfer and the employer can provide the reasonable accommodation by transferring the employee without: creating additional employment that the employer would not otherwise have created; discharging any employee; transferring any employee with more seniority than the employee requesting the reasonable accommodation; or promoting any employee who is not qualified to perform the job.

An employer may require an employee to provide a certification from the employee's health care provider concerning the medical advisability of a reasonable accommodation to the same extent a certification is required for other temporary disabilities. This certification must include: (1) the date the reasonable accommodation became medically advisable; (2) the probable duration of the reasonable accommodation; and (3) an explanatory statement as to the medical advisability of the reasonable accommodation.

If an employee requests a reasonable accommodation, the employer must explore with the employee all possible means of providing the reasonable accommodation.

An employer may not interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under this statute.

Finally, under this law, an employer must notify employees of their rights to reasonable accommodations and leave for a disability caused or contributed to by pregnancy by: posting a notice in a conspicuous location in the workplace; and including the notice in any employee handbook.[617]

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.[618] Multiple decisions of the U.S. Supreme Court[619] and subsequent lower court decisions have made clear that an employer that does not conduct effective training: (1) will be unable to assert the affirmative defense that it exercised reasonable care to prevent and correct harassment; and (2) will subject itself to the risk of punitive damages. EEOC guidance on employer liability reinforces the important

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[617] MD. CODE ANN., STATE GOV'T §§ 20-601, 20-606, and 20-609.

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

[619] *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *see also Kolstad v. American Dental Assoc.*, 527 U.S. 526 (1999).

role that training plays in establishing a legal defense to harassment and discrimination claims.[620] 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 Maryland.

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*

Maryland's Whistleblower Law applies to all employees (and applicants for positions) in the executive branch of the state government, including any government unit with an independent personnel system.[621] Maryland also extends whistleblower protection to employees of state contractors.[622]

Maryland does not have a general whistleblower law directed towards private-sector employees. However, the state Office of the Comptroller has established a whistleblower reward program related violations of state tax laws.[623]

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)[624] and the Railway Labor Act (RLA)[625] are the two main federal laws governing

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[620] 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.

[621] MD. CODE ANN., STATE PERS. & PENS. §§ 5-301 *et seq*.

[622] MD. CODE ANN., STATE FIN. & PROC. §§ 11-301, 11-303.

[623] MD. CODE ANN., TAX – GEN. §§ 1-401 – 1-408.

[624] 29 U.S.C. §§ 151 to 169.

[625] 45 U.S.C. §§ 151 *et seq*.

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

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

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

Maryland does not have a comprehensive labor relations law and, instead, the federal protections of the National Labor Relations Act (NLRA) are the governing law of the state for private employers. Nonetheless, a promise made between an employee (or prospective employee) and an employer, or any other individual, association, company, corporation, or firm is against public policy if the promise requires either party: (1) to join or remain a member of an employer or labor organization; (2) not to join or not to remain a member of a labor organization; or (3) to withdraw from an employment relation if the party joins or remains a member of an employer or labor organization.[626]

In addition, certain communications between an employee and a union agent are privileged.[627] In other words, the Maryland law extends certain facets of the attorney-client privilege to the union-employee relationship.

Protected Communications. Any communication or information imparted in confidence by an employee to a labor union and/or its agent while the labor union or agent was acting in a representative capacity concerning an employee grievance is protected under the statute. However, the communication or information must be relevant to the employee's grievance proceeding.

Despite the rather broad protections offered to employees, there are several important exceptions of which employers should be aware:

- Communications germane to a criminal proceeding are not protected.
- The union or agent may be compelled to disclose the facts underlying a communication but not the communication itself.
- The union or agent must disclose the communication if disclosure is reasonably necessary to prevent death or bodily harm.

[626] MD. CODE ANN., LAB. & EMPL. § 4-304(b).

[627] MD. CODE ANN., CTS. & JUD. PROC. § 9-124.

- The union or agent may disclose the communication if it reasonably believes:
  - the disclosure is necessary to prevent the employee from committing a crime, fraud, or violation of the collective bargaining agreement between the employer and the union. However, the union or agent may only disclose if the employee's expected action is reasonably certain to cause injury to the property (tangible and/or financial) of any person or entity;
  - disclosure is necessary to prevent, remedy, or mitigate injury to an entity's property (tangible and/or financial) resulting from a criminal act completed or intended by the employee;
  - disclosure is necessary to secure legal advice regarding compliance with a court order or the CBA;
  - disclosure is necessary to establish a claim or defense in a legal action or dispute between the employee and the union;
  - disclosure is necessary to comply with a court order or the CBA;
  - the communication is an admission that the employee committed a crime;
  - disclosure is necessary in any court, arbitration, and/or agency proceeding against the union or the union's agent;
  - the union obtained written or verbal consent from the employee to disclose the communication; or
  - the employee waived the communication's confidentiality.[628]

In addition, the law includes a *savings clause*, which means that, if a union is required to disclose the communication under the National Labor Relations Act or another federal statute, federal law controls.[629]

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).[630] The notice must be provided to affected nonunion employees, the representatives of affected unionized employees, the state's dislocated worker unit, and the local

[628] MD. CODE ANN., CTS. & JUD. PROC. § 9-124(d).

[629] MD. CODE ANN., CTS. & JUD. PROC. § 9-124(f).

[630] 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.

government where the closing or layoff is to occur.[631] 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*

In addition the mandatory notice to the Maryland Department of Labor, Licensing and Regulation (DLLR) discussed in 4.1(c), Maryland's Economic Stabilization Act[632] provides that employers must give notice to employees of a reduction in the employer's operations. Employers with 50 or more employees must give 60 days' notice of a reduction in operations (RIO) in writing to each employee.[633] A RIO includes:

- the relocation of a part of an employer's operation from one workplace to another existing or proposed site; or
- the shutting down of a workplace or a portion of the operations of a workplace that reduces the number of employees by at least 25% or 15 employees, whichever is greater, over any three-month period.[634]

An employee may not be counted in the determination of a reduction in operations if the employee accepts an offer to transfer to any other site of employment within 30 days after being offered the transfer.

Employers with 50 or more employees implementing an RIO must provide 60 days' advance written notice to employees and others.[635] They must also provide continuation of health, pension, severance and/or other benefits to affected employees on terms yet to be developed by the state secretary of labor.

An RIO triggers the law. An RIO includes (1) a relocation of part of an employer's operations, and (2) the shutdown of a workplace, or portion of operations, that reduces the number of employees by at least 25% or 15 employees, whichever is greater, over any three-month period. The statute does not count persons who work on average less than 20 hours per week or have worked for the employer for less than 6 months in the immediately preceding 12 months.[636] With respect to the relocation trigger, the law does not specify whether 25% or 15 employees must have their employment terminated, or whether the relocation must involve a significant distance.

The written notice must be provided to the following persons and entities:

- all employees at the workplace that are subject to the RIO;
- each exclusive representative or bargaining agency [sic] that represents employees at the workplace that is subject to the RIO;
- the Division of Workforce Development's dislocated worker unit; and

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631 20 C.F.R. §§ 639.4, 639.6.

632 MD. CODE ANN., LAB. & EMPL. § 11-301 *et seq*.

633 MD. CODE ANN., LAB. & EMPL. §§ 11-301(b), 11-304(b); MD. CODE REGS. 09.33.02.03, 09.33.02.04(A)(2).

634 MD. CODE ANN., LAB. & EMPL. § 11-301(c); MD. CODE REGS. 09.33.02.03.

635 MD. CODE ANN., LAB. & EMPL. § 11-305.

636 MD. CODE ANN., LAB. & EMPL. § 11-301.

- the chief elected official in the jurisdiction where the workplace that is subject to the RIO is located.[637] If the workplace is located in more than one political subdivision, the chief elected official where the employer paid the most taxes for the fiscal year before the reduction in operations.

The notice must include:

- name and address of the workplace where the RIO is expected;
- name, telephone number, and email address of a company official as a contact for further information;
- a statement that explains whether the reduction in operations is expected to be permanent (*permanent* means that an employer has not agreed in a written contract to restore operations within three months after the time that a reduction in operations occurs) or temporary and whether the workplace is expected to shut down; and
- the expected date when the reduction in operations will begin.[638]

However, an employer is not required to provide written notice if:

- It was actively seeking capital or business to avoid or postpone the reduction in operations and believed that the notice would have precluded the employer from obtaining the necessary capital or business.
- If a reduction in operations occurs due to any form of natural disaster such as a flood, an earthquake, or a drought.

Employers that rely on the seeking capital or natural disaster exclusions must provide notice as soon as practical.[639]

If a reduction in business will result in the sale of all or part of an employer's business, the notice must be provided by both the seller on or before the effective date of sale and the purchaser after the effective date of the sale. Employees of the seller are considered an employee of the purchaser after the effective date of sale.[640]

The state secretary of labor is directed to develop regulations that must include the continuation of benefits, such as health, severance, and pension that an employer facing an RIO should provide to employees whose employment will be terminated.[641]

The state secretary of labor may issue orders compelling compliance and fines for violations of the notice requirement. Where a violation is found, the law requires the secretary issue an order compelling compliance, and gives the secretary discretion to assess a civil penalty up to $10,000 per day (up to a potential total of $600,000). Factors taken into consideration when determining the penalty are: (1) the gravity of the violation; (2) the size of the employer's business; (3) the employer's good faith; and (4) the

[637] MD. CODE ANN., LAB. & EMPL. § 11-305(A).

[638] MD. CODE ANN., LAB. & EMPL. § 11-305(B).

[639] MD. CODE ANN., LAB. & EMPL. § 11-305(C).

[640] MD. CODE ANN., LAB. & EMPL. § 11-305(D).

[641] MD. CODE ANN., LAB. & EMPL. § 11-304.

employer's history of violations under the law. The Maryland law does not expressly address whether it authorizes private rights of action. However, a federal district court applying Maryland law has held there is no private right of action.[642]

4.1(c) *State Mass Layoff Notification Requirements*

In Maryland, where an employer conducts a mass layoff, it must provide notice to the Secretary of the DLLR.[643] A *mass layoff* occurs when an employer lays off 25 or more workers in a single establishment at the same time, for the same reason, and for an expected duration of seven days or more.[644] The notice to the Secretary must include:

- the date of the layoff;
- the reason for the layoff;
- the name and Social Security number of each employee that the layoff affects;
- the amount and form of any pension pay to which an employee may be entitled, and whether the employee contributed to the pension;
- the amount of any vacation pay, holiday pay, severance pay, or special pay paid or payable by the employer;
- any wage continuation; and
- each employee's last weekly or hourly pay rate.[645]

Timing. When the employer has advance knowledge of the expected mass layoff, the employer must file the notice 48 hours before the beginning of the layoff. When the employer has no advance knowledge of the mass layoff, the employer must notify the Secretary of the date and reason for the layoff immediately when it begins, then within 48 hours of the beginning of the layoff, must file the additional information described above.[646]

An employer that willfully violates the notice requirement may be subject to a fine of up to $1000 or imprisonment of up to 90 days or both.[647]

4.2 Documentation to Provide When Employment Ends

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

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

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[642] *Teamsters Local Union No. 355 , a/w International Brotherhood of Teamsters, v. Total Distribution Services, Inc.,* 2024 WL 3936943 (D. Md. Aug. 26, 2024).

[643] MD. CODE ANN., LAB. & EMPL. § 8-627.

[644] MD. CODE ANN., LAB. & EMPL. § 8-627.

[645] MD. CODE ANN., LAB. & EMPL. § 8-627; MD. CODE REGS. 09.32.02.06.

[646] MD. CODE REGS. 09.32.02.06.

[647] MD. CODE ANN., LAB. & EMPL. § 8-1305.

Table 11. Federal Documents to Provide at End of Employment	
Category	**Notes**
Health Benefits: Consolidated Omnibus Budget Reconciliation Act (COBRA)	Under COBRA, the administrator of a covered group health plan must provide written notice to each covered employee and spouse of the covered employee (if any) of the right to continuation coverage provided under the plan.[648] 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.[649]

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

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

Table 12. State Documents to Provide at End of Employment	
Category	**Notes**
Health Benefits: Mini-COBRA, etc.	Notice of the availability of continuation coverage must be provided by the employer and by the Secretary of Labor, Licensing, and Regulation.[650] The notification must state the availability of benefits and provide a summary of the eligibility requirements, the duration, and a general description of the benefits.[651]

[648] 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.

[649] 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.

[650] MD. CODE ANN., INS. § 15-409(h).

[651] MD. CODE REGS. 31.11.04.09; *see also* MD. CODE ANN., INS. § 15-409(f). The notification and election form to be provided to the employee is available at https://insurance.maryland.gov/Consumer/Pages/CobraCoverage.aspx. MD. CODE REGS. 31.11.04.10. An employer that fails to provide this notice or an election notification form is not liable to the insured or any other covered individual for benefits that otherwise would have been payable or for other damages that result from the omission. MD. CODE ANN., INS. § 15-409(i).

Table 12. State Documents to Provide at End of Employment	
Category	**Notes**
Unemployment Notice	**Generally.** First, prior to distributing a retirement benefit (as defined in the statute) in the form of a lump sum to any former employee, an employer must provide written notice to the employee of the effect of the lump sum distribution on the amount of the employee's weekly unemployment benefit if the employee subsequently files a claim for unemployment insurance benefits.[652] Second, Maryland Department of Labor requires that employees be provided the Employer Letter or E-mail to an Employee About the Availability of Unemployment Compensation when employment ends.[653] **Multistate Workers.** Whenever an individual covered by an election is separated from employment, an employer must again notify the employee, immediately, as to the jurisdiction under whose unemployment compensation law services have been covered. If, at the time of termination, the individual is not located in the elected jurisdiction, an employer must notify the employee as to the procedure for filing interstate benefit claims.[654] In addition to this notice requirement, employers must comply with the covered jurisdiction'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*

Under Maryland law, an employer acting in *good faith* may not be held liable for disclosing information about the job performance or the reason for termination of employment of an employee or former employee to a prospective employer at the request of the prospective employer, the employee, or former employee.[655] An employer is presumed to have disclosed information in good faith unless it is shown by clear and convincing evidence that the employer: (1) acted with malice toward the employee or former employee; or (2) intentionally or recklessly disclosed false information about the employee or former employee.[656]

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[652] MD. CODE ANN., LAB. & EMPL. § 8-1008.

[653] MD. CODE ANN., LAB. & EMPL. § 8-603. This Employer Letter or E-mail to an Employee About the Availability of Unemployment Compensation is available at https://www.labor.maryland.gov/forms/uiavailnotice.pdf.

[654] MD. CODE REGS. 09.32.04.05.

[655] MD. CODE ANN., CTS. & JUD. PROC. § 5-423(a).

[656] MD. CODE ANN., CTS. & JUD. PROC. § 5-423(b).