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STATE

Littler on

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

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

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

## DISCLAIMER

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



## ACKNOWLEDGEMENTS

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

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

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

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# 1. PRE-HIRE

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

**Table 1. State Tests for Classifying Workers**

| Purpose of Determining Employee Status | State Agency | Test to Apply |
|---|---|---|
| **Fair Employment Practices Laws** | Not applicable | Mississippi has no fair employment practices laws applicable to private-sector employees.[5] |
| **Income Taxes** | Mississippi Department of Revenue | Internal Revenue Service (IRS) 20-factor test.[6]<br><br>The Mississippi Rules state: "[g]enerally the relationship of employer and employee 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. That is, |

[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*, 15F.3d105, 107 (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] Mississippi's employment discrimination provisions only apply to *public* employers. *See* MISS. CODE ANN. §§ 25-9-101 *et seq*.

[6] Mississippi Dep't of Revenue, *Withholding Tax FAQs, How do I know if a worker is an employee or an independent contractor for Withholding Tax purposes?, available at* https://www.dor.ms.gov/business/withholding-tax-faqs ("The Department of Revenue relies on federal rules to determine if the person providing the services is an employee or an independent contractor. This information can be found on the IRS website."). The statutory definition of *employee* is "any individual subject to the provisions of Article 1 of this chapter, who performs or performed services for an employer as defined herein and receives wages therefor." MISS. CODE ANN. § 27-7-303.

| Table 1. State Tests for Classifying Workers | | |
|---|---|---|
| **Purpose of Determining Employee Status** | **State Agency** | **Test to Apply** |
| | | an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so."[7]<br><br>Factors characteristic of an *employer* include, but are not limited to, the right to discharge and the furnishing of tools and a place to work to the individual performing services. However, the designation or description a party gives to itself, whether as partner, coadventurer, agent, independent contractor, or other, is immaterial if the employment relationship otherwise exists.[8] |
| **Unemployment Insurance** | Mississippi Department of Employment Security | Multi-factor balancing test.<br><br>Under the unemployment law, "[s]ervices performed by an individual for wages shall be deemed to be employment … unless and until it is shown to the satisfaction of the department that such individual has been and will continue to be free from control and direction over the performance of such services both under his or her contract of service and in fact; and *the relationship of employer and employee shall be determined in accordance with the principles of the common law governing the relation of master and servant*."[9] |

[7] 35-003-001 MISS. CODE R. § 100.108.

[8] 35-003-001 MISS. CODE R. § 100.108. The Mississippi rules also note that all levels of employees, including superintendents, managers, and other supervisory personnel, are employees. Officers of a corporation are generally considered employees unless they do not perform any services (or only minor services) and do not receive any remuneration. A director of a corporation "in his capacity as such is not an employee of the corporation." 35-003-001 MISS. CODE R. § 100.108.

[9] MISS. CODE ANN. § 71-5-11(14) (emphasis added); *see also* 20-101-101 MISS. CODE R. § 603.00(A) (noting that "[t]he Law provides that the relationship of employer and employee shall be determined in accordance with the principles of the common law governing the relation of master and servant."). The Mississippi rules also emphasize

| Table 1. State Tests for Classifying Workers | | |
|---|---|---|
| **Purpose of Determining Employee Status** | **State Agency** | **Test to Apply** |
| | | In determining if an employment relationship exists, Mississippi courts have considered the following factors on a case-by-case basis:<br>"(1) The extent of control exercised over the details of the work;<br>(2) Whether or not the one employed is engaged in a distinct occupation or business;<br>(3) The skill required in the particular occupation;<br>(4) Whether the employer supplies the tools and place of work for the person doing the work;<br>(5) The length of time for which the person is employed;<br>(6) The method of payment, whether by the time or by the job; and<br>(7) Whether or not the work is a part of the regular business of the employer."[10] |

that whether workers performing services are employees is a fact-specific inquiry and sets forth a mechanism that employers must follow in contacting the unemployment agency:

> No single test is conclusive and every employing unit claiming the existence of a relationship other than that of employer-employee shall make application to the Agency for determination of its status. They shall furnish to the Agency a full and complete statement of all facts concerning its relationship with the person claimed to be an independent contractor, together with a copy of the contract existing between them. All persons performing services for any employing unit shall be deemed employees unless and until this rule shall have been complied with and their status shall have been otherwise determined by the Agency after a decision has been made by the Agency relative to the employer-employee relationship, and the business has been notified by mail or electronically.

20-101-101 MISS. CODE R. § 603.00(A).

[10] *College Network v. Mississippi Dep't of Emp't Sec.*, 114. So. 3d 740, 745 (Miss. Ct. App. 2013) (citations omitted); *see also Mississippi Department of Employment Security v. Dover Trucking, L.L.C.,* 2022 WL 555695 (Miss. Feb. 24, 2022); *Meds, Inc. v. Mississippi Dep't of Emp't Sec.*, 130 So. 3d 148, 151-52 (Miss. Ct. App. 2014); Mississippi Dep't of Emp't Sec., *Worker Classification*, *available at* http://mdes.ms.gov/employers/unemployment-tax/reporting-and-filing/worker-classification/ (noting there are seven factors relevant to whether an individual is an independent contractor or an employee; that is, the common-law factors). The Mississippi Court of Appeals further stated that "a prominent factor" in determining employee status is "whether the employer has the right to exercise control over the work of the employee . . . [T]he relationship status depends upon the extent the putative employer controls, in substance and in detail, the work activities of the putative employee." *College Network*, 114 So. 3d at 745 (quotations omitted). In *Meds, Inc.*, the Mississippi Court of Appeals also acknowledged that "the mere fact that a contract declares the status of a worker to be that of an independent contractor is not conclusive in determining employment status." 130 So. 3d at 154.

| Table 1. State Tests for Classifying Workers | | |
|---|---|---|
| **Purpose of Determining Employee Status** | **State Agency** | **Test to Apply** |
| **Wage & Hour Laws** | Not applicable | Mississippi has no wage and hour laws applicable to private-sector employees. |
| **Workers' Compensation** | Mississippi Workers' Compensation Commission | The Mississippi Supreme Court has adopted two tests: the "right to control" and the "nature of the work."<br><br>Under the workers' compensation law, *independent contractor* is defined as "any individual, firm or corporation who contracts to do a piece of work according to his own methods without being subject to the control of his employer except as to the results of the work, and who has the right to employ and direct the outcome of the workers independent of the employer and free from any superior authority in the employer to say how the specified work shall be done or what the laborers shall do as the work progresses, one who undertakes to produce a given result without being in any way controlled as to the methods by which he attains the result."[11]<br><br>Under the "control test," Mississippi courts examine:<br>• direct evidence of the right to control;<br>• the method of payment;<br>• the furnishing of equipment; and<br>• the right to fire.[12] |

[11] MISS. CODE ANN. § 71-3-3(r). The term *employee* is defined as "any person . . . in the service of an employer under any contract of hire or apprenticeship, written or oral, express or implied," but it excludes "independent contractors." MISS. CODE ANN. § 71-3-3(d).

[12] *Davis v. The Clarion-Ledger*, 938 So. 2d 905, 908-09 (Miss. Ct. App. 2006) (citing *Shelby v. Peavey Elecs. Corp.*, 724 So. 2d 504, 507 (Miss. Ct. App. 1998)); *see also Fortner v. Specialty Contracting*, 217 So. 3d 736 (Miss. Ct. App. 2017). In *Davis*, the Mississippi Court of Appeals noted that "it is the right to control, rather than the exercise of that right, which is decisive." 938 So. 2d at 908 (citation omitted). Moreover, it appears most Mississippi courts primarily rely on the control test. *See, e.g.*, *Fortner*, 217So.3d at 743 ("The control test is the "traditional test" used to determine whether an individual is an employee or independent contractor. However, the "nature of the work test" is also relevant to the determination.") (citations omitted); *Southeastern Auto Brokers v. Graves*, 210So. 3d 1012, 1016 (Miss. Ct. App. 2015) ("The final element, the right to control, forms the foundation of the employer-employee relationship."); *Concert Sys. USA, Inc. v. Weaver*, 33 So. 3d 1186, 1189 (Miss. Ct. App. 2010) ("The supreme court has held that the traditional test of the employer-employee relationship is the right of the employer to control the details of the work.") (quotation omitted); *Shelby*, 724 So. 2d at 507 (applying only the right to

| Table 1. State Tests for Classifying Workers | | |
|---|---|---|
| **Purpose of Determining Employee Status** | **State Agency** | **Test to Apply** |
| | | Under the "nature of the work test," Mississippi courts examine:<br>"the character of the claimant's work or business-how skilled it is, how much of a separate calling or enterprise it is, to what extent it may be expected to carry its own accident burden and so on-and its relation to the employer's business, that is, how much it is a regular part of the employer's regular work, whether it is continuous or intermittent, and whether the duration is sufficient to amount to the hiring of continuing services as distinguished from contracting for the completion of a particular job."[13] |
| **Workplace Safety** | Not applicable | There are no relevant statutory definitions or case law identifying a test for independent contractor status in this context. Mississippi does not have an approved state plan under the federal Occupational Safety and Health Act. |

## 1.2 Employment Eligibility & Verification Requirements

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

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

Although IRCA requires employers to review specified documents establishing an individual's eligibility to work, it provides no way for employers to verify the documentation's legitimacy. Accordingly, the federal

control test in evaluating the employment relationship; but acknowledging that Mississippi courts also apply the nature of the work test).

[13] *Davis*, 938 So. 2d at 909 (citations omitted); *see also Fortner*, 217So.3d 736.

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.[14]

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.[15] 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.[16]

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

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

### 1.2(b)(i) Private Employers

Under the Mississippi Employment Protection Act, employers may only hire employees who are legal citizens of the United States or who are legal aliens. An *employee* is any person or entity hired to perform work in Mississippi and to whom a federal Form W-2 or Form 1099 must be issued.[17] A *legal alien* is defined as an individual who was lawfully present in the United States (or was permanently residing in the United States under color of state law) at the time of employment and for the duration of employment.[18]

**E-Verify Requirement.** Additionally, every Mississippi employer must register with and use E-Verify to verify employment authorization of all newly-hired employees.[19]

Third-party employers, such as staffing agencies, conducting business in Mississippi must:

- register to do business in the state with the Department of Employment Security before placing employees into the workforce; and

[14] 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.

[15] *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).

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

[17] MISS. CODE ANN. § 71-11-3(3)(b).

[18] MISS. CODE ANN. § 71-11-3(4)(a).

[19] MISS. CODE ANN. § 71-11-3(4)(b)(i).

 

- provide proof of registration and any participation in E-Verify to any Mississippi employer with whom they do business.[20]

**Defense to Discriminatory Practices.** Enrollment and use of E-Verify is a defense in an action claiming that an employer discharged an employee working in Mississippi who is a U.S. citizen or permanent resident alien while retaining an employee who the employer knows (or reasonably should have known) is an unauthorized alien, and who is working in a job category in Mississippi requiring equal skill, effort, and responsibility and performed under similar working conditions, as the job category held by the discharged employee. An employer that used E-Verify is exempt from liability, investigation, or suit under these provisions.[21]

### 1.2(b)(ii) State Contractors

No contractors and subcontractor may enter into a contract with a public employer unless it has registered with and participates in E-Verify to verify information of all newly-hired employees, and no contractor or subcontractor may hire any employee unless it has registered with and participates in E-Verify.[22] *Public employer* is a department, agency, instrumentality, or political subdivision of the state.[23] *Subcontractor* is a subcontractor, contract employee, staffing agency, or any contractor regardless of its tier.[24]

This provision does not apply to contracts entered into on or before July 1, 2008.[25]

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

**Employment of Unlawful Aliens.** Businesses convicted of hiring illegal immigrants will be ineligible to receive loans, grants, or other assistance from programs administered by the Mississippi Development Authority. Businesses that have received funds or assistance, and are later convicted of intentionally hiring illegal immigrants, will be required to repay the amount of the funds or assistance received.[26]

**Failure to Meet E-Verify Requirements.** If an employer fails to meet verification requirements it will be subject to:

- the cancellation of any state or public contract resulting in ineligibility for any state or public contract for up to three years;
- the loss of any license, permit, certificate, or other document granting the right to do business in the state for up to one year; or
- both.[27]

[20] MISS. CODE ANN. § 71-11-3(6).

[21] MISS. CODE ANN. § 71-11-3(4)(d)-(e).

[22] MISS. CODE ANN. § 71-11-3(4)(b)(ii).

[23] MISS. CODE ANN. § 71-11-3(3)(f).

[24] MISS. CODE ANN. § 71-11-3(3)(g).

[25] MISS. CODE ANN. § 71-11-3(4)(c).

[26] MISS. CODE ANN. §§ 57-1-371, 57-1-373.

[27] MISS. CODE ANN. § 71-11-3(7)(e).

A contractor or employer also will be liable for the additional costs incurred by the state or its political subdivisions because of the cancellation of the contract or loss of right to do business in the state.[28]

The Department of Employment Security, State Tax Commission, Secretary of State, Department of Human Services, and the Attorney General may seek penalties and bring charges for noncompliance against any employer or employee.[29]

## 1.3 Restrictions on Background Screening & Privacy Rights in Hiring

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

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

There is no applicable federal law restricting employer inquiries into an applicant's criminal history. However, the federal Equal Employment Opportunity Commission (EEOC) has issued enforcement guidance pursuant to its authority under Title VII of the Civil Rights Act of 1964 ("Title VII").[30] 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 **1.2(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**.

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[28] MISS. CODE ANN. § 71-11-3(7)(e).

[29] MISS. CODE ANN. § 71-11-3(7)(f).

[30] 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.

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

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

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

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

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

Persons with arrest records for which charges were never filed or were dropped, persons convicted of certain enumerated felonies, and first offenders of nontraffic misdemeanor convictions may petition to have their records expunged.[31] If an expunction order is entered, the person can legally deny the occurrence of the arrest, indictment, or conviction in response to any inquiry made of him/her for any purpose, other than the purpose of determining in any subsequent proceeding whether the person is a first offender, without being held guilty of perjury or otherwise giving a false statement.[32] However, the existence of an expunction order does *not* preclude an employer from asking a prospective employee if the employee has had an order of expunction entered on their behalf.[33]

First offenders for certain drug offenses may apply to have their records expunged, and may not be found guilty of perjury or otherwise giving a false statement by reason of their failure to recite or acknowledge such arrest, indictment, or trial in response to any inquiry made of them for any purpose.[34]

### 1.3(b) Restrictions on Credit Checks

### 1.3(b)(i) Federal Guidelines on Employer's Use of Credit Information & History

**The Fair Credit Reporting Act (FCRA).** The FCRA[35] governs an employer's acquisition and use of virtually any type of information gathered by a "consumer reporting agency"[36] regarding job applicants for use in 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

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[31] MISS. CODE ANN. § 99-19-71(1)-(2).

[32] MISS. CODE ANN. § 99-19-71(3).

[33] MISS. CODE ANN. § 99-19-71(3).

[34] MISS. CODE ANN. § 41-29-150(d)(2).

[35] 15 U.S.C. §§ 1681 *et seq*.

[36] A *consumer reporting agency* is any person or entity that regularly collects credit or other information about consumers to provide "consumer reports" for third persons. 15U.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. 15U.S.C. § 1681a(d).

 

wholly or partly on information contained in a consumer report must also follow certain notification requirements. For additional information on the FCRA, see LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The federal Employee Polygraph Protection Act (EPPA) imposes severe restrictions on using lie detector tests.[38] The law bars most private-sector employers from requiring, requesting, or suggesting that an employee or job applicant submit to a polygraph test, and from using or accepting the results of such a test.

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

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

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

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

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

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

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

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

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

Whether an employer must implement a drug testing program for its employees under federal law is often determined by the industry in which it operates. For example, the Omnibus Transportation Employee Testing Act requires testing certain applicants and employees in the transportation industries.[39] The Drug-

[38] 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.

[39] 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

 

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.[40] 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

Mississippi's drug testing law covers both private and public employees, with the exception of employers subject to independent federal law or regulation.[41] While employers are not required to conduct substance abuse testing of employees or applicants, those that voluntarily choose to test must do so in accordance with Mississippi's drug testing law in order to be covered by its protections.[42]

A private employer that chooses to test under the law must affirmatively elect to conduct testing in conformity with the law, and must include a statement notifying job applicants of such in a written policy statement. A private employer may rescind its election to test without notifying job applicants, but must notify employees of rescission. A private employer that does not make this election or rescinds a previous election may still conduct substance testing, but the rights and obligations will be governed by "applicable principles of contract or common law" rather than by the drug testing law.[43]

If an employer chooses to proceed under Mississippi's drug testing law, it must also have a written policy statement that meets the detailed statutory requirements.[44] An employer may also decide to ask a job applicant or employee to sign a statement acknowledging that they have "read and understands the employer's drug and alcohol testing policy and/or notice."[45] If the individual refuses to sign the statement, it will *not* bar the employer from administering the test, invalidate the results of any test, or restrict the employer from taking any action consistent with its policy, the terms of an applicable collective bargaining agreement, or from refusing to hire the applicant.[46]

**Testing.** Employers are authorized to conduct drug tests as a condition of employment, as a reasonable suspicion test, and a "neutral selection" test.[47] Subject to the Mississippi drug testing law and to any applicable collective bargaining agreement or contract, a private employer may require that an applicant

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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.

[40] 41 U.S.C. §§ 8101 *et seq*.; *see also* 48 C.F.R. §§ 23.500 *et seq*.

[41] MISS. CODE ANN. § 71-7-29.

[42] MISS. CODE ANN. § 71-7-3(1).

[43] MISS. CODE ANN. § 71-7-27.

[44] *See* MISS. CODE ANN. § 71-7-3(2) (identifying 10 topics to be addressed in the employer's policy).

[45] MISS. CODE ANN. § 71-7-3(6).

[46] MISS. CODE ANN. § 71-7-3(6).

[47] MISS. CODE ANN. § 71-7-5(2).

submit to neutral selection testing as a condition of employment.[48] *Neutral selection basis* is defined as "a mechanism for selecting employees for drug tests that: (i) results in an equal probability that any employee from a group of employees subject to the selection mechanism will be selected, and (ii) does not give an employer discretion to waive the selection of any employee selected under the mechanism."[49]

All specimen collection and preservation must be conducted "under reasonable and sanitary conditions" and documented according to the law; confirmation testing, not including the taking or collecting of specimen, must be conducted by a laboratory.[50] Except as otherwise provided by law, an employer may not refuse to hire an applicant on the basis of a positive test result that has not been verified by a confirmatory test.[51] Moreover, an applicant or employee with a confirmed positive drug and alcohol test result cannot, based on the results of the test alone, be defined as a person with a "handicap."[52]

An employer must pay the costs of all drug and alcohol tests that it requires of an applicant or employee. An employee or applicant must pay the costs of any additional drug and alcohol tests that the applicant or employee requests.[53]

**Additional Information on Testing of Applicants.** An employer may require a job applicant to submit to a drug or alcohol test as a condition of employment, and may refuse to hire an individual who will not submit to a test or who receives a positive confirmed test result.[54] An employer that conducts drug and alcohol testing of job applicants must notify the applicant in writing that the applicant may be tested for the presence of drugs or their metabolites, upon application for the job and prior to collection of the specimen.[55]

**Additional Information on Testing of Employees.** In addition to testing at hire and reasonable suspicion and neutral selection testing, an employer may require an employee to submit to a drug test if the test is conducted as part of a routinely scheduled employee fitness for duty medical examination that is part of the employer's established policy and/or which is scheduled routinely for all members of an employment classification or group.[56] Employers must post notice of the drug testing policies in an appropriate and conspicuous location on the employer's premises and copies of the policy must be made available for inspection during regular business hours by employees in the employer's personnel office or other suitable locations.[57]

If an employee refuses to submit to drug testing, the employer will not be barred from discharging, or disciplining, or referring the employee to a drug abuse assessment, treatment, and rehabilitation program at a site certified by the Department of Mental Health.[58] In addition, an employer may temporarily

[48] MISS. CODE ANN. § 71-7-7(1).

[49] MISS. CODE ANN. § 71-7-1(k).

[50] MISS. CODE ANN. §§ 71-7-9, 71-7-11.

[51] MISS. CODE ANN. § 71-7-9(13).

[52] MISS. CODE ANN. § 71-7-13(1).

[53] MISS. CODE ANN. § 71-7-9(16).

[54] MISS. CODE ANN. § 71-7-5(2)(a).

[55] MISS. CODE ANN. § 71-7-3(5).

[56] MISS. CODE ANN. § 71-7-5(3).

[57] MISS. CODE ANN. § 71-7-3(3).

[58] MISS. CODE ANN. § 71-7-13(7).

 

suspend or transfer an employee to another position after obtaining the results of a positive on-site initial test. An employer may also discharge an employee after obtaining the results of a positive confirmed test.[59]

**Confidentiality**. Unless the employer has received written consent from the applicant or employee, all information acquired by the employer through its drug and alcohol testing program is confidential and may not be released to any person other than the individual tested and necessary personnel.[60] Moreover, the information may be released if necessary for certain arbitration proceedings, administrative hearings, judicial proceedings, drug abuse rehabilitation, or as otherwise required by law. The information may also be released if there is a risk to public health or safety that can be "minimized or prevented," provided that a court order must be obtained unless the risk is immediate.[61]

**Drug-Free Workplace.** Under Mississippi's Drug-Free Workplace Workers' Compensation Premium Reduction Act ("Premium Reduction Act"), employers that voluntarily choose to implement a drug-free workplace program substantially in accordance with the drug testing law will qualify for a 5% premium discount on workers' compensation, if offered by the employer's insurance policy.[62] In addition to meeting the statutory requirements of the drug testing law, the employer must have a written policy statement, provide employee assistance resources, provide employee education, and provide supervisor training, which comply with the requirements set forth in the Premium Reduction Act.[63]

# 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:<br>• 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;<br>• 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[64] and a cost-sharing |

[59] MISS. CODE ANN. § 71-7-13(10).

[60] MISS. CODE ANN. § 71-7-15.

[61] MISS. CODE ANN. § 71-7-15(3).

[62] MISS. CODE ANN. §§ 71-3-205 *et seq.*

[63] MISS. CODE ANN. § 71-3-209.

[64] 26 U.S.C. § 36B.

| Table 2. Federal Documents to Provide at Hire | |
|---|---|
| **Category** | **Notes** |
| | reduction under section 1402 of the Patient Protection and Affordable Care Act[65] if the employee purchases a qualified health plan through the exchange; and<br>• 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.[66]<br><br>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.[67] |
| **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.[68]<br><br>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.[69] |
| **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.[70] In either case, |

[65] 42 U.S.C. § 18071.

[66] 29 U.S.C. § 218b.

[67] 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.

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

[69] 29 C.F.R. § 2590.606-1.

[70] 29 C.F.R. § 825.300(a).

| Table 2. Federal Documents to Provide at Hire | |
|---|---|
| **Category** | **Notes** |
| | distribution may be accomplished electronically. Employers may use a format other than the FMLA poster as a model notice, if the information provided includes, at a minimum, all of the information contained in that poster.[71]<br><br>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.[72] |
| **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.[73] 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.[74] |
| **Uniformed Services Employment and Reemployment Rights** | Employers must provide to persons covered under USERRA a notice of employee and employer rights, benefits, and obligations. Employers may meet the notice requirement by posting notice where employers customarily place notices for employees.[75] |

[71] 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.

[72] 29 C.F.R. § 825.300(a).

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

[74] 26 C.F.R. § 31.3402(f)(2)-1. The IRS provides this form at https://www.irs.gov/pub/irs-pdf/fw4.pdf.

[75] 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** |
| **Act (USERRA) Documents** | |
| **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.[76] |

### 2.1(b) State Guidelines on Hire Documentation

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

| Table 3. State Documents to Provide at Hire | |
|---|---|
| **Category** | **Notes** |
| **Benefits Leave Documents** | No notice requirement located. |
| **Fair Employment Practices Documents** | No notice requirement located. |
| **Drug-Free Workplace: General Program Documents** | As discussed in **1.3(e)(ii)**, a private employer that chooses to test under the general Mississippi drug-testing law must affirmatively elect to conduct testing in conformity with the law, and must include a statement notifying job applicants of the policy in writing. (An employer that fails to make this election may still conduct substance testing pursuant to "applicable principles of contract or common law" rather than by the drug testing law.)[77] Employers that have implemented a policy as set forth in the statute must notify an applicant in writing that the applicant may be tested for the presence of drugs or their metabolites, upon application for the job and prior to collection of the specimen.[78] Employers may ask an applicant or employee to sign a statement acknowledging that the applicant or employee has "read and understands the employer's drug and alcohol testing policy and/or notice."[79] |

[76] 29 C.F.R. § 531.59.

[77] MISS. CODE ANN. § 71-7-27.

[78] MISS. CODE ANN. § 71-7-3(5).

[79] MISS. CODE ANN. § 71-7-3(6).

| Table 3. State Documents to Provide at Hire | |
|---|---|
| **Category** | **Notes** |
| **Drug-Free Workplace: Workers' Compensation Premium Reduction Act Program Documents** | In addition to and apart from the general drug-testing statute, employers may choose to proceed with substance testing in order to receive a discount on their workers' compensation premiums. Under this program, pursuant to the Drug-Free Workplace Workers' Compensation Premium Reduction Act ("WCPRA"), a drug-free workplace must provide a written policy statement on substance abuse in order to qualify.[80] All employees must be given a written policy statement from the employer that contains:<br>• a general statement of the employer's policy on substance abuse notifying employees that the unlawful manufacture, sale, distribution, solicitation, possession with intent to sell or distribute, or use of alcohol or other drugs is prohibited in the person's workplace;<br>• a statement advising an employee or job applicant of the existence of the statutory drug-free workplace guidelines;<br>• a general statement concerning confidentiality;<br>• a statement advising an employee of the employee assistance program, external employee assistance program, or the employer's resource file of employee assistance programs and other persons, entities or organizations designed to assist employees with personal or behavioral problems; and<br>• a statement informing an employee of the provisions of the federal Drug-Free Workplace Act if applicable to the employer.[81]<br><br>Employers participating in the WCPRA must comply with the testing requirements set forth under the general drug-testing statute;[82] otherwise, however, the statutes are distinct and involve separate duties. See **1.3(e)(ii)** for details. |
| **Tax Documents** | Employees must furnish employers with a certificate (Form 89-350) showing the exemption claimed by employees for purposes of withholding.[83] |
| **Wage & Hour Documents** | No notice requirement located. |

[80] MISS. CODE ANN. § 71-3-207.

[81] MISS. CODE ANN. § 71-3-211.

[82] MISS. CODE ANN. § 71-3-209 (requiring written statements and notice, as well as requirements for employee assistance resources, employee education, and supervisor training).

[83] MISS. CODE ANN. § 27-7-335. The withholding certificate is available from the Mississippi Department of Revenue at https://www.dor.ms.gov/sites/default/files/Business/89350238.pdf.

## 2.2 New Hire Reporting Requirements

### 2.2(a) Federal Guidelines on New Hire Reporting

The federal New Hire Reporting Program requires all states to establish new hire reporting laws that comply with federal requirements.[84] State new hire reporting laws must include these minimum requirements:

1. employers must report to the appropriate state agency the employee's name, address, and Social Security number, as well as the employer's name, address, and federal tax identification number provided by the Internal Revenue Service;
2. employers may file the report by first-class mail, electronically, or magnetically;
3. if the report is transmitted by first-class mail, the report must be made not later than 20 days after the date of hire;
4. if the report is transmitted electronically or magnetically, the employer may report no later than 20 days following the date of hire or through two monthly transmissions not less than 12 days nor more than 16 days apart;
5. the format of the report must be a Form W-4 or, at the option of the employer, an equivalent form; and
6. the maximum penalty a state may set for failure to comply with the state new hire law is $25 (which increases to $500 if the failure to comply is the result of a conspiracy between the employer and the employee to not supply the required report or to supply a false or incomplete report).[85]

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

**Multistate Employers.** The New Hire Reporting Program includes a simplified reporting method for multistate employers. The statute defines *multistate employers* as employers with employees in two or more states and that file new hire reports either electronically or magnetically. The federal statute permits multistate employers to designate one state to which they will transmit all of their reports twice per 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;

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

[85] 42 U.S.C. § 653a.

- the corporate contact information (name, title, phone, email, and fax number); and
- the signature of person providing the information.

If the company is reporting new hires on behalf of subsidiaries operating under different names and FEINs, it must list the names and FEINs, and the states where those subsidiaries have employees working.

Multistate employers can notify the HHS by mail, fax, or online as follows:

**Table 4. Multistate Employer New Hire Information**

| Contact By Mail or Fax | Contact Online |
|---|---|
| Department of Health and Human Services<br>Administration for Children and Families<br>Office of Child Support Enforcement<br>Multi-State Employer Registration<br>Box 509<br>Randallstown, MD 21133<br>Fax: (410) 277-9325 | Register online by submitting a multistate employer notification form over the internet.[86]<br><br>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 Mississippi's new hire reporting law.

**Who Must Be Reported.** An employer must report employees who are newly hired, who reside or work in the state. Employees who are rehired or returned to work after lay off, furlough, separation, unpaid leave, or termination, and who reside or work in the state must also be reported.[87]

**Report Timeframe.** New hires must be reported within 15 days of hiring, rehiring, or their return to work date.[88]

**Information Required.** The report should include the employee's name, address, Social Security number, date of birth, and date upon which the employee began or resumed employment, or is scheduled to begin or otherwise resume employment. In addition, the employer's name, address, and federal and state tax identification numbers must also be included.[89] The Mississippi directory of new hires also states that the employee's gender and work state must be included in the report.

**Form & Submission of Report.** Employers may submit the federal Form W-4, the new hire form from the website, or printed lists including the required information. Reports may be sent via mail, fax, diskette, online, electronic transfer via modem, or using an electronic report.[90]

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

[87] MISS. CODE ANN. § 43-19-46(1).

[88] MISS. CODE ANN. § 43-19-46(2).

[89] MISS. CODE ANN. § 43-19-46(2).

[90] MISS. CODE ANN. § 43-19-46(2).

**Location to Send Information.**

Mississippi State Directory of New Hires
P.O. Box 437
Norwell, MA 02061
(800) 241-1330
(800) 937-8668 (fax)
https://ms-newhire.com/

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

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

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

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

Mississippi does not have a noncompetition agreement statute that applies generally to private employers. In evaluating a restrictive covenant containing a noncompete clause, the Mississippi Court of Appeals noted that while "[c]ontracts which contain noncompete agreements have been viewed by this

[91] 18 U.S.C. §§ 1832 *et seq.*

Court as contracts that restrict trade and individual freedom and are not favored by the law," courts have nevertheless held that "if such agreements are reasonable they are valid and upheld by this Court."[92] Generally, "[t]here are three aspects that are examined to determine the enforceability of a noncompete agreement: (1) the rights of the employer, (2) the rights of the employee, and (3) the rights of the public."[93]

Noncompetition agreements are only valid "within such territory and during such time as may be reasonably necessary for the protection of the employer or principal, without imposing undue hardship on the employee or agent."[94] Courts will consider the reasonableness and specificity of the noncompete, especially with respect to time and territorial limitation. Mississippi courts will balance the employer's interests against employee's interests, hardships, and public interest.[95]

**Enforceability Following Employee Discharge.** Mississippi courts will not enforce a noncompete when the employer terminates the employment relationship if the court finds the employer acted arbitrarily, capriciously, or in bad faith.[96]

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

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

Although Mississippi courts have not specifically addressed the sufficiency of consideration for noncompetes entered into at the inception of employment, courts have upheld such agreements.[97] Further, noncompetes signed as a prerequisite for continued employment constitutes adequate consideration to support an agreement.[98] However, if employment ends shortly after signing, courts may find the consideration insufficient.[99]

### 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

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92 *Redd Pest Control Co. v. Foster*, 761 So. 2d 967, 972 (Miss. Ct. App. 2000).

93 761 So. 2d at 972.

94 *Wilson v. Gamble*, 177 So. 363, 365 (Miss. 1937).

95 *Empiregas, Inc. of Kosciusko v. Bain*, 599 So. 2d 971 (Miss. 1992).

96 599 So. 2d at 975.

97 *See Business Commc'ns, Inc. v. Banks*, 91 So.3d 1 (Miss. Ct. App. 2011).

98 *Raines v. Bottrell Ins. Agency, Inc.*, 992 So. 2d 642 (Miss. Ct. App. 2008).

99 *Frierson v. Sheppard*, 154 So. 2d 151, 154 (Miss. 1963).

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.

Mississippi courts will alter a contract to enforce it to the extent reasonable.[100]

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

When an employee leaves a business, the employee will sometimes take valuable information of the business to use for competitive purposes. In addition to noncompetition agreements, Mississippi law provides other means for employers to protect themselves from a recently departed employee's misuse of proprietary information acquired from the employer. Mississippi has adopted a version of the Uniform Trade Secrets Act.[101]

**Definition of a Trade Secret.** Under the Mississippi Uniform Trade Secrets Act, a *trade secret* is defined as a compilation of information, including a formula, pattern, compilation, program, decide, method, technique, or process that:

1. derives independent economic value, present 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.[102]

Mississippi courts have often considered costumer lists to be trade secrets.[103]

**Misappropriation of a Trade Secret.** Under the Mississippi Uniform Trade Secrets Act, 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:
    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

[100] *Cordis Corp.*, 634 F. Supp. 1242.

[101] MISS. CODE ANN. §§ 75-26-3 *et seq*.

[102] MISS. CODE ANN. § 75-26-3(d).

[103] *Fred's Stores of Mississippi, Inc. v. M & H Drugs, Inc.*, 725 So. 2d 902 (Miss. 1998).

 

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.[104]

Generally, to establish trade secret misappropriation under Mississippi law, the plaintiff must demonstrate that a trade secret existed, that it was acquired through a breach of a confidential relationship or discovered by improper means, and that the use of the trade secret was without the plaintiff's authorization.[105]

Actual or threatened misappropriation may be enjoined.[106] Damages can include both the actual loss caused by the misappropriation and any unjust enrichment.[107]

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

Mississippi has no statutory guidelines addressing the ownership of employee inventions and ideas.

# 3. DURING EMPLOYMENT

## 3.1 Posting, Notice & Record-Keeping Requirements

### 3.1(a) Posting & Notification Requirements

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

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

**Table 5. Federal Posting & Notice Requirements**

| Poster or Notice | Notes |
|---|---|
| **Employee Polygraph Protection Act (EPPA)** | Employers must post and keep posted on their premises a notice explaining the EPPA.[108] |
| **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.[109] |

[104] MISS. CODE ANN. § 75-26-3(b).

[105] *Union Nat. Life Ins. Co. v. Tillman*, 143 F. Supp. 2d 638 (N.D. Miss. 2000).

[106] MISS. CODE ANN. § 75-26-5.

[107] MISS. CODE ANN. § 75-26-7.

[108] 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.

[109] 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.

| Table 5. Federal Posting & Notice Requirements | |
|---|---|
| **Poster or Notice** | **Notes** |
| **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.[110] |
| **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.[111] |
| **Migrant and Seasonal Agricultural Worker Protection Act (MSPA)** | Farm labor contractors, agricultural employers, and agricultural associations that employ or house any migrant or seasonal agricultural worker must conspicuously post at the place of employment a poster setting forth the MSPA's rights and protections, including the right to request a written statement of the information described in 29 U.S.C. § 1821(a). The poster must be provided in Spanish or other language common to migrant or seasonal agricultural workers who are not fluent or literate in English.[112] |
| **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.[113] |
| **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.[114] |
| **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.[115] |

[110] 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.

[111] 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.

[112] 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.

[113] 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.

[114] 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.

[115] 20 C.F.R. app. § 1002. This poster is available at http://www.dol.gov/vets/programs/userra/poster.htm.

| Table 5. Federal Posting & Notice Requirements | |
|---|---|
| **Poster or Notice** | **Notes** |
| 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.[116] 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.[117] |
| **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.[118] |
| **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.[119] |
| **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.[120] |

[116] 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.

[117] 41 C.F.R. §§ 60-300.44, 60-741.44.

[118] 29 C.F.R. § 5.5(a)(l)(i). This poster is available at https://www.dol.gov/whd/regs/compliance/posters/davis.htm.

[119] 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.

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

| Table 5. Federal Posting & Notice Requirements | |
|---|---|
| **Poster or Notice** | **Notes** |
| **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.[121] |
| **Notification of Employee Rights Under Federal Labor Laws** | Government contractors are required under Executive Order No. 13496 to post this notice in conspicuous locations and, if the employer posts notices to employees electronically, it must also make this poster available where it customarily places other electronic notices to employees about their jobs. Electronic posting cannot be used as a substitute for physical posting. Where a significant portion of the workforce is not proficient in English, the notice must be provided in the languages spoken by employees.[122] |
| **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.[123] |
| **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.[124]<br><br>**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.<br><br>**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 |

[121] 29 C.F.R. § 525.14. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/disab.htm.

[122] 29 C.F.R. § 471.2. This poster is available at https://www.dol.gov/olms/regs/compliance/EO13496.htm.

[123] 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.

[124] 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.

| Table 5. Federal Posting & Notice Requirements | |
|---|---|
| **Poster or Notice** | **Notes** |
| | (including electronically, if the contractor customarily corresponds with or makes information available to its employees by electronic means).[125] |
| **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.[126] |
| **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.[127] |

### 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** |
| **Drug-Free Workplace: General Program** | As discussed in **1.3(e)(ii)**, employers that implement a testing policy under the general Mississippi drug-testing law must establish a detailed written policy, provide it to applicants and employees, and conspicuously post a copy of the policy on the premises.[128] |
| **Drug-Free Workplace: Workers' Compensation Premium Reduction—** | Employers that implement a testing policy under the Workers' Compensation Premium Reduction Act (WCPRA) (qualifying them for a discount) and that sponsor an employee assistance program (EAP) must |

[125] 29 C.F.R. § 13.5.

[126] 41 C.F.R. § 60-1.35(c). This poster is available at https://www.dol.gov/agencies/ofccp/posters.

[127] 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.

[128] MISS. CODE ANN. § 71-7-3; *see also* MISS. CODE ANN. § 71-7-3(2) (identifying 10 topics to be addressed in the employer's policy).

| Table 6. State Posting & Notice Requirements | |
|---|---|
| **Poster or Notice** | **Notes** |
| **Employer With Employee Assistance Program** | post conspicuous notice about the benefits and services of the EAP. Employers must also explore options to publicize the EAP and provide notice concerning access and use of the EAP.[129] |
| **Drug-Free Workplace: Workers' Compensation Premium Reduction—Employer Without Employee Assistance Program** | Employers that implement a testing policy under the WCPRA (qualifying them for a discount) and that do *not* sponsor an EAP, must maintain a resource file of assistance providers, including substance abuse programs, mental health providers, and other individuals or organizations available to assist with personal or behavioral problems. Employers must inform employees about the resource file and provide a summary of its contents. Employers must post conspicuous notice of "a listing of multiple employee assistance providers in the area."[130] |
| **Unemployment Compensation** | All employers must post and maintain notice, where readily accessible, informing employees that the employer is covered by the state unemployment insurance program and how to file claims.[131] |
| **Workers' Compensation** | Every employer that has secured coverage under the workers' compensation law (including a self-insuring employer) must post conspicuous notice informing employees that it has secured coverage, identifying the carrier, and instructing employees who to contact if they suffer illness or an injury at work.[132] |
| **Workplace Safety: No Smoking Signs** | Generally speaking, smoking is prohibited in public buildings in Mississippi.[133] "No Smoking" signs must be posted by any individual or entity supervising a government building.[134] |

## 3.1(b) Record-Keeping Requirements

### 3.1(b)(i) Federal Guidelines on Record Keeping

Table 7 summarizes the federal record-keeping requirements.

[129] MISS. CODE ANN. § 71-3-213(a).

[130] MISS. CODE ANN. § 71-3-213(b).

[131] MISS. CODE ANN. § 71-5-515. This poster is available in English at http://mdes.ms.gov/media/30964/UI_InsuranceforEmployerLtrSizeSign1013Update.pdf and in Spanish at http://mdes.ms.gov/media/30961/UI_InsuranceforEmployerLtrSizeSign1013UpdateSpanish.pdf.

[132] MISS. CODE ANN. §§ 71-3-35, 71-3-81. This poster is available in English at http://mdes.ms.gov/media/10765/noticeofcoverageform.pdf and in Spanish at http://mdes.ms.gov/media/10768/noticeofcoverageformsp.pdf.

[133] MISS. CODE ANN. §§ 29-5-161 *et seq*.

[134] MISS. CODE ANN. § 29-5-161.

| 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:*<br>• employee's name, address, and date of birth;<br>• occupation;<br>• rate of pay; and<br>• compensation earned each week.[135] | 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:*<br>• job applications, resumes, or other forms of employment inquiry, including records pertaining to the refusal to hire any individual;<br>• promotion, demotion, transfer, selection for training, recall, or discharge of any employee;<br>• job orders submitted by the employer to an employment agency or labor organization for recruitment of personnel for job openings;<br>• test papers completed by applicants which disclose the results of any employment test considered by the employer;<br>• results of any physical examination considered by the employer in connection with a personnel action; and<br>• any advertisements or notices relating to job openings, promotions, training programs, or opportunities to work overtime.[136] | 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:*<br>• employee benefit plans, such as pension and insurance plans; and<br>• copies of any seniority systems and merit systems in writing.[137] | For the full period the plan or system is in effect, and for at least 1 year after its termination. |
| **Title VII & the Americans with Disabilities Act** | *Employers must preserve any personnel or employment record made, including:*<br>• requests for reasonable accommodation;<br>• application forms submitted by applicants; | At least 1 year from the date the records were made, or |

[135] 29 U.S.C. § 626; 29 C.F.R. § 1627.3(a).

[136] 29 C.F.R. § 1627.3(b).

[137] 29 C.F.R. § 1627.3(b).

| Table 7. Federal Record-Keeping Requirements | | |
|---|---|---|
| **Records** | **Notes** | **Retention Requirement** |
| **(ADA): Personnel Records** | • other records having to do with hiring, promotion, demotion, transfer, lay-off, or termination;<br>• rates of pay or other terms of compensation; and<br>• selection for training or apprenticeship.[138] | 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:*<br>• 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<br>• retain application forms or test papers completed by unsuccessful applicants or candidates for the position.[139] | 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).[140] | 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:*<br>• 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;<br>• the notice to the examiner identifying the person to be examined;<br>• copies of opinions, reports, or other records given to the employer by the examiner;<br>• 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 | At least 3 years following the date on which the polygraph examination was conducted. |

[138] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[139] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[140] 29 C.F.R. § 1602.7.

| Table 7. Federal Record-Keeping Requirements | | |
|---|---|---|
| **Records** | **Notes** | **Retention Requirement** |
| | under investigation and the basis for testing the particular employee; and<br>• 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.[141] | |
| **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.[142] | 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).[143] | 3 years. |
| **Equal Pay Act: Other** | *Covered employers must maintain any additional records made in the regular course of business relating to:*<br>• payment of wages;<br>• wage rates;<br>• job evaluations;<br>• job descriptions;<br>• merit and seniority systems;<br>• collective bargaining agreements; and<br>• other matters which describe any pay differentials between the sexes.[144] | At least 2 years. |
| **Fair Labor Standards Act (FLSA): Payroll Records** | *Employers must maintain the following records with respect to each employee subject to the minimum wage and/or overtime provisions of the FLSA:*<br>• full name and any identifying symbol used in place of name on time or payroll records;<br>• home address with zip code; | 3 years from the last day of entry. |

[141] 29 U.S.C. §§ 2001 *et seq.*; 29 C.F.R. § 801.30.

[142] 29 U.S.C. § 1027.

[143] 29 C.F.R. § 1620.32(a).

[144] 29 C.F.R. § 1620.32(b).

| Table 7. Federal Record-Keeping Requirements | | |
|---|---|---|
| **Records** | **Notes** | **Retention Requirement** |
| | • date of birth, if under 19;<br>• sex and occupation in which employed;<br>• time of day and day of week on which the employee's workweek begins;<br>• regular hourly rate of pay for any workweek in which overtime compensation is due;<br>• basis on which wages are paid (pay interval);<br>• amount and nature of each payment excluded from the employee's regular rate;<br>• hours worked each workday and total hours worked each workweek;<br>• total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation;<br>• total premium pay for overtime hours;<br>• total additions to or deductions from wages paid each pay period, including employee purchase orders or wage assignments;<br>• total wages paid each pay period;<br>• date of payment and the pay period covered by the payment;<br>• 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<br>• 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).[145] The record should also indicate for each week whether the employee adhered to the schedule and, if not, show the exact number of hours worked each day each week. | |
| **Fair Labor Standards Act (FLSA): Tipped Employees** | *Employers must maintain and preserve all Payroll Records noted above as well as:*<br>• a symbol, letter, or other notation on the pay records identifying each employee whose wage is determined in part by tips;<br>• weekly or monthly amounts reported by the employee to the employer of tips received (*e.g.*, information reported on Internal Revenue Service Form 4070); | |

[145] 29 C.F.R. §§ 516.2, 516.5.

| Table 7. Federal Record-Keeping Requirements | | |
|---|---|---|
| **Records** | **Notes** | **Retention Requirement** |
| | • 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);<br>• 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<br>• hours worked each workday in occupations in which the employee receives tips, and total daily or weekly straight-time earnings for such hours.[146] | |
| **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:*<br>• full name and any identifying symbol used in place of name on time or payroll records;<br>• home address with zip code;<br>• date of birth if under 19;<br>• sex and occupation in which employed;<br>• time of day and day of week on which the employee's workweek begins;<br>• total wages paid each pay period;<br>• date of payment and the pay period covered by the payment; and<br>• 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.[147] | 3 years from the last day of entry. |
| **Fair Labor Standards Act (FLSA): Agreements & Other Records** | *In addition to payroll information, employers must preserve agreements and other records, including:*<br>• collective bargaining agreements and any amendments or additions;<br>• individual employment contracts or, if not in writing, written memorandum summarizing the terms;<br>• written agreements or memoranda summarizing special compensation arrangements under FLSA sections 7(f) or 7(j); | At least 3 years from the last effective date. |

[146] 29 C.F.R. § 516.28.

[147] 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** |
| | • certain plans and trusts under FLSA section 7(e);<br>• certificates and notices listed or named in the FLSA; and<br>• sales and purchase records.[148] | |
| **Fair Labor Standards Act (FLSA): Other Records** | *In addition to other FLSA requirements, employers must preserve supplemental records, including:*<br>• basic time and earning cards or sheets;<br>• wage rate tables;<br>• order, shipping, and billing records; and<br>• records of additions to or deductions from wages.[149] | 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:*<br>• basic payroll and identifying employee data, including name, address, and occupation;<br>• rate or basis of pay and terms of compensation;<br>• daily and weekly hours per pay period;<br>• additions to or deductions from wages and total compensation paid;<br>• 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);<br>• if FMLA leave is taken in increments of less than one full day, the hours of the leave;<br>• copies of employee notices of leave furnished to the employer under the FMLA, if in writing;<br>• copies of all general and specific notices given to employees in accordance with the FMLA;<br>• any documents that describe employee benefits or employer policies and practices regarding the taking of paid and unpaid leave;<br>• premium payments of employee benefits; and<br>• 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. | At least 3 years. |

[148] 29 C.F.R. § 516.5.

[149] 29 C.F.R. § 516.6.

| Table 7. Federal Record-Keeping Requirements | | |
|---|---|---|
| **Records** | **Notes** | **Retention Requirement** |
| | *Covered employers with no eligible employees must only maintain the following records:*<br>• basic payroll and identifying employee data, including name, address, and occupation;<br>• rate or basis of pay and terms of compensation;<br>• daily and weekly hours worked per pay period;<br>• additions to or deductions from wages; and<br>• total compensation paid.<br><br>*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.*<br><br>*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:*<br>• FMLA eligibility is presumed for any employee employed at least 12 months; and<br>• 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.<br><br>*Medical records also must be retained.* Specifically, records and documents relating to certifications, re-certifications, or medical histories of employees or employees' family members, created for purposes of FMLA, must be maintained as confidential medical records in separate files/records from the usual personnel files. If the ADA is also applicable, such records must be maintained in conformance with ADA-confidentially requirements (subject to exceptions). If the Genetic Information Nondiscrimination Act of 2008 (GINA) is applicable, records and documents created for purposes of FMLA containing family medical history or genetic information as defined in | |

| Table 7. Federal Record-Keeping Requirements | | |
|---|---|---|
| **Records** | **Notes** | **Retention Requirement** |
| | GINA must be maintained in accordance with the confidentiality requirements of Title II of GINA.[150] | |
| **Federal Insurance Contributions Act (FICA)** | *Employers must keep FICA records, including:*<br>• copies of any return, schedule, or other document relating to the tax;<br>• 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:<br>▪ name, address, and account number of the employee and additional information when the employee does not provide a Social Security card;<br>▪ 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;<br>▪ amount of each such remuneration payment that constitutes wages subject to tax;<br>▪ 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<br>▪ if the total remuneration payment and the amount thereof which is taxable are not equal, the reason for this;<br>• the details of each adjustment or settlement of taxes under FICA; and<br>• 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).[151] | At least 4 years after the date the tax is due or paid, whichever is later. |
| **Immigration** | Employers must retain all completed Form I-9s.[152] | 3 years after the date of hire or 1 year following the termination |

[150] 29 U.S.C. § 2616; 29 C.F.R. § 825.500.

[151] 26 C.F.R. §§ 31.6001-1, 31.6001-2.

[152] 8 C.F.R. § 274a.2.

| Table 7. Federal Record-Keeping Requirements | | |
|---|---|---|
| **Records** | **Notes** | **Retention Requirement** |
| | | 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:*<br>• 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.[153] | 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:*<br>• employee's name, address, and account number;<br>• total amount and date of each payment;<br>• the period of services covered by the payment;<br>• the amount of remuneration that constitutes wages subject to withholding;<br>• the amount of tax collected and, if collected at a time other than the time the payment was made, the date collected;<br>• an explanation for any discrepancy between total remuneration and taxable income;<br>• the fair market value and date of each payment of noncash remuneration for services performed as a retail commissioned salesperson; and<br>• other supporting documents relating to each employee's individual tax status.[154] | 4 years after the return is due or the tax is paid, whichever is later. |
| **Income Tax: W-4 Forms** | Employers must retain all completed Form W-4s.[155] | As long as it is in effect and at least 4 years thereafter. |

[153] 26 U.S.C. § 3402; 26 C.F.R. § 1.6001-1.

[154] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

[155] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

| Table 7. Federal Record-Keeping Requirements | | |
|---|---|---|
| **Records** | **Notes** | **Retention Requirement** |
| **Unemployment Insurance** | *Employers are required to maintain all relevant records under the Federal Unemployment Tax Act, including:*<br>• total amount of remuneration paid to employees during the calendar year for services performed;<br>• amount of such remuneration which constitutes wages subject to taxation;<br>• 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;<br>• information required to be shown on the tax return and the extent to which the employer is liable for the tax;<br>• an explanation for any discrepancy between total remuneration paid and the amount subject to tax; and<br>• 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.[156] | 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:*<br>• 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;<br>• biological monitoring results which directly assess the absorption of a toxic substances or harmful physical agent by body specimens; and<br>• Material Safety Data Sheets (MSDSs), or in the absence of these documents, a chemical inventory or other record reveling the identity of a toxic substances or harmful physical agent and where and when the substance or agent was used.<br><br>*Exceptions to this requirement include:*<br>• background data to workplace monitoring need only be retained for 1 year provided that the sampling results, | At least 30 years. |

[156] 26 C.F.R. § 31.6001-4.

| Table 7. Federal Record-Keeping Requirements | | |
|---|---|---|
| **Records** | **Notes** | **Retention Requirement** |
| | collection methodology, analytic methods used, and a summary of other background data is maintained for 30 years;<br>• 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<br>• biological monitoring results designated as exposure records by a specific Fed-OSH Act standard should be retained as required by the specific standard.[157] | |
| **Workplace Safety / the Fed-OSH Act: Medical Records** | *Employers must preserve and retain "employee medical records," including:*<br>• medical and employment questionnaires or histories;<br>• results of medical examinations and laboratory tests;<br>• medical opinions, diagnoses, progress notes, and recommendations;<br>• first aid records;<br>• descriptions of treatments and prescriptions; and<br>• employee medical complaints.<br><br>*"Employee medical record" does not include:*<br>• physical specimens;<br>• records of health insurance claims maintained separately from employer's medical program;<br>• records created solely in preparation for litigation that are privileged from discovery;<br>• records concerning voluntary employee assistance programs, if maintained separately from the employer's medical program and its records; and<br>• first aid records of one-time treatment which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job, if made on-site by a nonphysician and maintained separately from the employer's medical program and its records.[158] | Duration of employment plus 30 years. |
| **Workplace Safety: Analyses Using Medical** | *Employers must preserve and retain analyses using medical and exposure records*, including any compilation of data, or other study based on information collected from individual | At least 30 years. |

[157] 29 C.F.R. § 1910.1020(d).

[158] 29 C.F.R. § 1910.1020(d).

| Table 7. Federal Record-Keeping Requirements | | |
|---|---|---|
| **Records** | **Notes** | **Retention Requirement** |
| **and Exposure Records** | 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.[159] | |
| **Workplace Safety: Injuries and Illnesses** | *Employers must preserve and retain records of employee injuries and illnesses, including:*<br>• OSHA 300 Log;<br>• the privacy case list (if one exists);<br>• the Annual Summary;<br>• OSHA 301 Incident Report; and<br>• old 200 and 101 Forms.[160] | 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:*<br>• current AAP and documentation of good faith effort; and<br>• AAP for the immediately preceding AAP year and documentation of good faith effort.[161] | 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:*<br>• 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;<br>• other records having to do with requests for reasonable accommodation, the results of any physical examination, job advertisements and postings, applications, resumes; and<br>• 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 | 3 years recommended; regulations state "not less than two years from the date of the making of the record or the personnel action involved, whichever occurs later."<br><br>If the contractor has fewer than 150 employees or does not |

[159] 29 C.F.R. § 1910.1020(d).

[160] 29 C.F.R. §§ 1904.33, 1904.44.

[161] 41 C.F.R. § 60-1.12(b).

| Table 7. Federal Record-Keeping Requirements | | |
|---|---|---|
| **Records** | **Notes** | **Retention Requirement** |
| | 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;<br>▪ 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;<br>▪ 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).<br><br>*Additionally, for any record the contractor maintains pursuant to 41 C.F.R. § 60-1.12, it must be able to identify:*<br>• gender, race, and ethnicity of each employee; and<br>• where possible, the gender, race, and ethnicity of each applicant or internet applicant.[162] | 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:*<br>• 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<br>• application forms or test papers completed by unsuccessful applicants and candidates for the same position as the aggrieved person applied and was rejected.[163] | Until final disposition of the complaint, compliance review or action. |

[162] 41 C.F.R. §§ 60-1.12, 60-300.80, and 60-741.80.

[163] 41 C.F.R. §§ 60-1.12, 60-741.80.

| Table 7. Federal Record-Keeping Requirements | | |
|---|---|---|
| **Records** | **Notes** | **Retention Requirement** |
| **Minimum Wage Under Executive Orders Nos. 13658 (contracts entered into on or after January 1, 2015), 14026 (contracts entered into on or after January 30, 2022)** | *Covered contractors and subcontractors performing work must maintain for each worker:*<br>• name, address, and Social Security number;<br>• occupation(s) or classification(s);<br>• rate or rates of wages paid;<br>• number of daily and weekly hours worked;<br>• any deductions made; and<br>• total wages paid.<br><br>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.[164] | 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:*<br>• employee's name, address, and Social Security number;<br>• employee's occupation(s) or classification(s);<br>• rate(s) of wages paid (including all pay and benefits provided);<br>• number of daily and weekly hours worked;<br>• any deductions made;<br>• total wages paid (including all pay and benefits provided) each pay period;<br>• a copy of notifications to employees of the amount of accrued paid sick leave;<br>• 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;<br>• dates and amounts of paid sick leave used by employees (unless a contractor's paid time off policy satisfies the EO's requirements, leave must be designated in records as paid sick leave pursuant to the EO);<br>• a copy of any written responses to employees' requests to use paid sick leave, including explanations for any denials of such requests;<br>• any records relating to the certification and documentation a contractor may require an employee | During the course of the covered contract as well as after the end of the contract. |

[164] 29 C.F.R. § 23.260.

| Table 7. Federal Record-Keeping Requirements | | |
|---|---|---|
| **Records** | **Notes** | **Retention Requirement** |
| | to provide, including copies of any certification or documentation provided by an employee;<br>• any other records showing any tracking of or calculations related to an employee's accrual and/or use of paid sick leave;<br>• the relevant covered contract;<br>• the regular pay and benefits provided to an employee for each use of paid sick leave; and<br>• any financial payment made for unused paid sick leave upon a separation from employment intended to relieve a contractor from its reinstatement obligation.[165] | |
| **Davis-Bacon Act** | *Davis-Bacon Act contractors or subcontractors must maintain the following records with respect to each employee:*<br>• name, address, and Social Security number;<br>• work classification;<br>• hourly rates of wages paid (including rates of contributions or costs anticipated for *bona fide* fringe benefits or cash equivalents);<br>• daily and weekly number of hours worked; and<br>• deductions made and actual wages paid.<br><br>*Contractors employing apprentices or trainees under approved programs must maintain written evidence of:*<br>• registration of the apprenticeship programs;<br>• certification of trainee programs;<br>• the registration of the apprentices and trainees;<br>• the ratios and wage rates prescribed in the program; and<br>• worker or employee employed in conjunction with the project.[166] | At least 3 years after the work. |
| **Service Contract Act** | *Service Contract Act contractors or subcontractors must maintain the following records with respect to each employee:*<br>• name, address, and Social Security number;<br>• work classification;<br>• rates of wage; | At least 3 years from the completion of the work records |

[165] 29 C.F.R. § 13.25.

[166] 29 C.F.R. § 5.5.

| Table 7. Federal Record-Keeping Requirements | | |
|---|---|---|
| **Records** | **Notes** | **Retention Requirement** |
| | • fringe benefits;<br>• total daily and weekly compensation;<br>• the number of daily and weekly hours worked;<br>• any deductions, rebates, or refunds from daily or weekly compensation;<br>• list of wages and benefits for employees not included in the wage determination for the contract;<br>• any list of the predecessor contractor's employees which was furnished to the contractor by regulation; and<br>• a copy of the contract.[167] | containing the information. |
| **Walsh-Healey Act** | *Walsh-Healey Act supply contractors must keep the following records:*<br>• wage and hour records for covered employees showing wage rate, amount paid in each pay period, hours worked each day and week;<br>• the period in which each employee was engaged on a government contract and the contract number;<br>• name, address, sex, and occupation;<br>• date of birth of each employee under 19 years of age; and<br>• a certificate of age for employees under 19 years of age.[168] | At least 3 years from the last date of entry. |

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

Table 8 summarizes the state record-keeping requirements.

| Table 8. State Record-Keeping Requirements | | |
|---|---|---|
| **Records** | **Notes** | **Retention Requirement** |
| **Income Tax** | *Every employer required to withhold taxes must keep and preserve the following records:*<br>• name, address, Social Security number, and period of employment of all employees receiving compensation from the employer; | 3 years after taxes became due or were paid, whichever is later. |

[167] 29 C.F.R. § 4.6.

[168] 41 C.F.R. § 50-201.501.

| Table 8. State Record-Keeping Requirements | | |
|---|---|---|
| **Records** | **Notes** | **Retention Requirement** |
| | • amounts and dates of all wage payments subject to state income tax withholding;<br>• employee's state income tax withholding exemption certificates;<br>• employer's state income tax withholding registration number;<br>• for nonresidents, allocation of working days in Mississippi;<br>• records of quarterly or monthly returns including dates and amounts of payment;<br>• all other wage, tax, and income/information statements and reports required to be filed with the Commission;<br>• other documents that would assist the Commission in auditing records or verifying the liability reported; and<br>• any employee W-2 copies which cannot be delivered to the employee after reasonable efforts to deliver have been made.[169] | |
| **Unemployment Insurance** | *Each employing unit must maintain accurate records showing:*<br>• all disbursements by items;<br>• the amount of each disbursement;<br>• to whom each disbursement is made;<br>• for what each disbursement is made; and<br>• the number of employees on that day in each week in which it employed the highest number.[170]<br><br>*Additional records must be kept for each individual worker and each pay period, including:*<br>• name and Social Security number;<br>• place of employment within the state;<br>• the period covered by each payment;<br>• the number of hours worked during each pay period;<br>• wages for employment showing separately money wages and cash value of other remuneration;<br>• special payments for services other than those rendered exclusively in a given quarter such as annual bonuses, gifts, prizes, etc., showing separately money | None specified. |

[169] 35-003-011 MISS. CODE R. § 20.100.

[170] MISS. CODE ANN. § 71-5-127; 20-101-101 MISS. CODE R. §§ 604.00, 601.15.

| Table 8. State Record-Keeping Requirements | | |
|---|---|---|
| **Records** | **Notes** | **Retention Requirement** |
| | wages and cash value and nature of other remuneration;<br>• the number of hours worked and wages payable each week (except for workers paid on a salary or fixed stipend); and<br>• if the employee is a salesperson, the portions of compensation which represent, respectively, expenses and remuneration.[171] | |
| **Workers' Compensation** | *Employers must keep and make available records identifying:*<br>• all payments required under the Workers' Compensation law, and the time and manner of making such payments; and<br>• all injuries, regardless of their nature, and information of disability or death in respect of such injury.[172]<br><br>*If the employer is self-insured, records of injuries for which only medical benefits are due need not be reported to the commission but must be retained by the employer. These records must include:*<br>• name and address of employee;<br>• date of the accident;<br>• name and address of employer;<br>• nature of the injury;<br>• number of days lost; and<br>• total medical expense.[173] | None specified. |

### 3.1(c) Personnel Files

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

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

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

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

[171] MISS. CODE ANN. § 71-5-127; 20-101-101 MISS. CODE R. §§ 604.00, 601.15.

[172] MISS. CODE ANN. §§ 71-3-39, 71-3-65.

[173] MISS. CODE ANN. § 71-3-67.

## 3.2 Privacy Issues for Employees

### 3.2(a) Background Screening of Current Employees

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

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

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

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

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

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

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

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

For information on Mississippi's drug testing law, see **1.3(e)(ii)**.

### 3.2(c) Marijuana Laws

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

Under federal law, it is illegal to possess or use marijuana.[174]

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

Under "Harper Grace's Law," which expires July 1, 2024, an individual may be permitted to use medical CBD oil to treat epileptic and similar conditions, but the law the contains no employment-related provisions.[175]

At the November 2020 election, voters approved Initiative 65 to permit medical marijuana. However, the state supreme court held the measure was unconstitutional.[176] Later, though, the state enacted a medical marijuana law.[177]

Under the law, employers can refuse to hire, discharge, discipline, or otherwise take adverse employment action against an individual with respect to hiring, discharging, tenure, terms, conditions, or privileges of employment as a result, in whole or in part, of that individual's medical cannabis use, regardless of the individual's impairment or lack of impairment resulting from medical cannabis use.[178] Individuals cannot commence or undertake any legal action against an employer for refusing to hire, discharging, disciplining,

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[174] 21 U.S.C. §§ 811-12, 841 *et seq*.

[175] *See* MISS. CODE ANN. § 41-29-136.

[176] *In re Initiative Measure No. 65 v. Watson*, 338 So.3d 599 (Miss. 2021).

[177] MISS. CODE ANN. §§ 41-137-1 — 41-137-67

[178] MISS. CODE ANN. § 41-137-13(1)(c).

or otherwise taking adverse employment action against an individual with respect to hiring, discharging, tenure, terms, conditions, or privileges of employment due to the individual's medical cannabis use.[179]

The medical marijuana law provides that employers can establish or enforce a drug-testing policy.[180] Additionally, employers can discipline an employee for ingesting medical cannabis in the workplace or for working while under the influence of medical cannabis.[181]

Employers need not permit, accommodate, or allow medical cannabis use, or modify any job or working conditions of any employee who engages in medical cannabis use or who for any reason seeks to engage in medical cannabis use.[182]

Generally, the medical marijuana law does not create a private right of action by an employee against an employer,[183] and does not interfere with, impair, or impede any federal restrictions or requirements on employment or contracting, including, but not limited to, regulations adopted by the U.S. Department of Transportation.[184]

Finally, numerous provisions in the law provide that certain entities need not cover and pay, or reimburse, individuals for medical cannabis use costs.[185]

### 3.2(d) Data Security Breach

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

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

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

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[179] MISS. CODE ANN. § 41-137-13(1)(f).

[180] MISS. CODE ANN. § 41-137-13(1)(d).

[181] MISS. CODE ANN. § 41-137-19(2). *See also, e.g.*, MISS. CODE ANN. § 41-137-13(1)(g)(h)(law does not affect workers' compensation premium discount available to employers who establish a drug-free workplace program, or an employer's right to deny or establish legal defenses to the payment of workers' compensation benefits to an employee due to a positive drug test or refusal to submit to or cooperate with a drug test), and MISS. CODE § 71-3-7(4) (benefits when medical cannabis use the proximate cause of injury), 71-3-121 (post-injury testing).

[182] MISS. CODE ANN. § 41-137-13(1)(b).

[183] MISS. CODE ANN. § 41-137-13(1)(f).

[184] MISS. CODE ANN. § 41-137-13(1)(e).

[185] MISS. CODE ANN. § 41-137-13(1)(a) (employer, self-insured group providing coverage for a medical, pharmacy or health care service, etc.), MISS. CODE ANN. § 41-137-19(1) (private insurer); MISS. CODE § 83-9-22(3) (health coverage plan).

- 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.[186]

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.[187]

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

In Mississippi, when a covered entity becomes aware of a security breach, notice is required.[188] A covered entity is not required to disclose a breach of the security system if, after a reasonable investigation and after consultation with relevant federal, state, or local responsible law enforcement agencies, the covered entity determines that there is not a reasonable likelihood that harm to the consumers has resulted or will result. The determination must be documented in writing and be maintained for five years.

A *security breach* is an unauthorized acquisition of electronic files, media, databases, or computerized data containing personal information of any resident of this state when access to the personal information has not been secured by encryption or by any other method or technology that renders the personal information unreadable or unusable.[189]

**Covered Entities & Information.** Any person who conducts business in Mississippi that maintains computerized data which includes personal information that the person does not own or license is covered under this statute.

If a covered entity maintains and complies with a notification procedure as part of an information security policy for the treatment of personal information and that policy affords the same or greater protection for affected individuals, then it is compliant with Mississippi's data security breach statute. Similarly, any person that complies with the notification requirements or security breach procedures of their primary or functional federal regulator are compliant with the statute.[190]

*Personal information* is an individual's first name or first initial and last name in combination with any one or more of the following:

- Social Security number;

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[186] 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.

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

[188] MISS. CODE ANN. § 75-24-29.

[189] MISS. CODE ANN. § 75-24-29(2)(a).

[190] MISS. CODE ANN. § 75-24-29(4).

- driver's license number, state identification card number, or, tribal identification card number; or
- an account number or credit or debit card number in combination with any required security code, access code, or password that would permit access to an individual's financial account.

Exceptions include:

- publicly-available information that is lawfully made available to the general public from federal, state, or local government records or widely distributed media; and
- data that is encrypted or otherwise altered by any method that renders the data unreadable or unusable.[191]

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

- written notice;
- electronic notice for those consumers whose primary means of communications with the covered entity is electronic means and, if the notice and is compliant with the federal e-sign act;
- telephonic notice; or
- substitute notice if the covered entity demonstrates that:
  - the cost of providing notice would exceed $5,000;
  - the affected class of persons to be notified exceeds 5,000; and
  - the entity does not have sufficient contact information.

Substitute notice must consist of the following:

- electronic mail notice when the covered entity has an electronic mail address for the subject persons;
- conspicuous posting of the notice on the website of the covered entity if the covered entity maintains a website; and
- notification by or statewide media including newspapers, radio and television.[192]

**Timing of Notice.** Notice must be given without unreasonable delay. However, notification may be delayed if:

- a law enforcement agency indicates that notification will impede a criminal investigation and requests a delay;
- a covered entity needs time to determine the scope of the breach and restore the integrity and confidentiality of the system;
- a covered entity needs time to restore the reasonable integrity of the data system; and

[191] MISS. CODE ANN. § 75-24-29(2)(b).

[192] MISS. CODE ANN. § 75-24-29(6).

 

- a covered entity needs time to identify affected individuals.[193]

## 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.[194] Thus, an employer must determine whether the FLSA or state law imposes a more stringent minimum wage, overtime, or child labor obligation and, if so, apply the more stringent of the two standards. If an employee is exempt from either federal or state law, but not both, then the employee must be paid for work in accordance with whichever law applies.

### 3.3(a)(i) Federal Minimum Wage Obligations

The current federal minimum wage is $7.25 per hour for most nonexempt employees.[195]

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.[196]

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.[197]

### 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.[198] 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

Mississippi has no minimum wage provisions. Employers covered by the FLSA should consult the federal provisions.

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[193] MISS. CODE ANN. § 75-24-29(5).

[194] 29 U.S.C. § 218(a).

[195] 29 U.S.C. § 206.

[196] 29 U.S.C. §§ 3, 6.

[197] 29 U.S.C. § 3(m)(2)(B).

[198] 29 U.S.C. § 207.

### 3.3(c) State Guidelines on Overtime Obligations

Mississippi law does not have a separate overtime provision. Therefore, the payment of overtime in Mississippi is regulated by the FLSA, which establishes a 40-hour overtime standard for covered employees.

## 3.4 Meal & Rest Period Requirements

### 3.4(a) Federal Meal & Rest Period Guidelines

### 3.4(a)(i) Federal Meal & Rest Periods for Adults

Federal law contains no generally applicable meal period requirements for adults. Under the FLSA, *bona fide* meal periods (which do not include coffee breaks or time for snacks and which ordinarily last 30 minutes or more) are not considered "hours worked" and can be unpaid.[199] Employees must be completely relieved from duty for the purpose of eating regular meals. Employees are *not* relieved if they are required to perform any duties—active or inactive—while eating. It is not necessary that employees be permitted to leave the premises if they are otherwise completely freed from duties during meal periods.

Federal law contains no generally applicable rest period requirements for adults. Under the FLSA, rest periods of short duration, running from five to 20 minutes, must be counted as "hours worked" and must be paid.[200]

### 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.[201] 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.[202] 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.[203] Exemptions apply for smaller employers and air carriers.[204]

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[199] 29 C.F.R. § 785.19.

[200] 29 C.F.R. § 785.18.

[201] 29 U.S.C. § 218d.

[202] 29 U.S.C. § 218d(b)(2).

[203] 29 U.S.C. § 218d(a).

[204] 29 U.S.C. § 218d(c), (d).

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.[205] Lactation is considered a related medical condition.[206] 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.[207] For more information on these topics, see **LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES**.

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

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

There are no generally applicable meal or rest period requirements for adults in Mississippi.

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

There are no generally applicable meal or rest period requirements for minors in Mississippi.

### 3.4(b)(iii) Lactation Accommodation Under State Law

In Mississippi, individuals are permitted to breast feed in public or any place where the individual is permitted to be.[208] Specific to the employment context, Mississippi employers may not prohibit employees from expressing breast milk during any meal or rest period provided by the employer.[209]

## 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.[210] 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."[211]

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"

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[205] 42 U.S.C. § 2000gg–1.

[206] 29 C.F.R. § 1636.3.

[207] 29 C.F.R. § 1636.3.

[208] MISS. CODE ANN. § 17-25-9.

[209] MISS. CODE ANN. § 71-1-55.

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

[211] *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").

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

Mississippi law does not define what work activities are considered to be compensable activities, and state law does not address reporting time, on-call pay, travel time, split shifts, and other circumstances where the compensability of an employee's activities may be in question. Employers covered by the FLSA should consult the federal provisions.

## 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.[212] 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.[213] 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

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

**General Restrictions.** Mississippi restricts the employment of minors under age 16 by age and by the type of job (see Table 9). Note that Mississippi law contains prohibitions for children 14 and 15 years, but does not prohibit any occupation for those 16 and 17 years of age. Employers should adhere to the more stringent federal standard in order to ensure full compliance.

**Table 9. State Restrictions on Type of Employment by Age**

| Age Range | Restrictions |
|---|---|
| **Under Age 16** | In Mississippi, minors under 16 may not work in a mill, cannery, workshop, factory, or manufacturing establishment unless they comply with the compulsory school attendance law.[214] |

[212] 29 C.F.R. §§ 570.36, 570.50.

[213] 29 C.F.R. § 570.6.

[214] MISS. CODE ANN. § 71-1-19.

| Table 9. State Restrictions on Type of Employment by Age | |
|---|---|
| **Age Range** | **Restrictions** |
| **Under Age 14** | In Mississippi, a minor under age 14 may not work in a mill, cannery, workshop, factory, or manufacturing establishment.[215] |

**Restrictions on Selling or Serving Alcohol.** In Mississippi, individuals under age 21 may not be bartenders or tend bar. However, individuals under age 21 may clear or bus tables that have glasses or other containers that contain or did contain alcohol, and they may stock, bag, or otherwise handle purchases of alcohol. Individuals ages 18 to 20 may take and deliver alcohol when waiting tables.[216]

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

In Mississippi, minors ages 14 and 15 cannot work in any mill, cannery, workshop, factory, or manufacturing establishment:

- more than eight hours in a day;
- more than 44 hours in a week; or
- between 7:00 P.M. and 6:00 A.M.[217]

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

The restrictions on occupations and hours of work do not apply to fruit and vegetable canneries.[218]

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

Mississippi has no work permit requirements. However, for minors under age 16, employers must obtain and maintain an affidavit from the employee's parent or guardian, and a certificate from the minor's superintendent or school principal, stating the minor's place and date of the birth, the last school attended, the grade of study pursued, the school's name, and the name of the teacher in charge.[219]

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

Mississippi law makes it a misdemeanor for an employer to violate the state's child labor provisions. Upon conviction, the employer will incur a fine of not less than $50 nor more than $100, or may be sentenced to the county jail for not less than 10 days nor more than 60 days, or both.[220]

[215] MISS. CODE ANN. § 71-1-17.

[216] MISS. CODE ANN. § 67-1-81.

[217] MISS. CODE ANN. § 71-1-21.

[218] MISS. CODE ANN. § 71-1-31.

[219] MISS. CODE ANN. § 71-1-19.

[220] MISS. CODE ANN. § 71-1-29.

## 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).[221]

**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.[222]

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.[223]

**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.[224] The "prepaid rule" regulation defines a *payroll card account* as an account that is directly or indirectly established through an employer and to which electronic fund transfers of the consumer's wages, salary, or other employee compensation such as commissions are made on a recurring basis, whether the account is operated or managed by the employer, a third-party payroll processor, a depository institution, or any other person.[225]

Employers that use payroll card accounts must comply with several requirements set forth in the prepaid rule. Employers must give employees certain disclosures before the employees choose to be paid via a payroll card account, including a short-form disclosure, a long-form disclosure, and other information that

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[221] 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").

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

[223] 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.

[224] 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/.

[225] 12 C.F.R. § 1005.2(b)(3)(i)(A).

must be disclosed in close proximity to the short-form disclosure. Employees must receive the short-form disclosure and either receive or have access to the long-form disclosure before the account is activated. All disclosures must be provided in writing. Importantly, within the short-form disclosure, employers must inform employees in writing and before the card is activated that they need not receive wages by payroll card. This disclosure must be very specific. It must provide a clear fee disclosure and include the following statement or an equivalent: "You do not have to accept this payroll card. Ask your employer about other ways to receive your wages." Alternatively, a financial institution or employer may provide a statement that the consumer has several options to receive wages or salary, followed by a list of the options available to the consumer, and directing the consumer to tell the employer which option the customer chooses using the following language or similar: "You have several options to receive your wages: [list of options]; or this payroll card. Tell your employer which option you choose." This statement must be located above the information about fees. A short-form disclosure covering a payroll card account also must contain a statement regarding state-required information or other fee discounts or waivers.[226] 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.[227]

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.[228]

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

Federal law does not specify the timing of wage payment and does not prohibit payment on a semi-monthly or monthly basis. However, all wages that are required by the FLSA are generally considered to be due on the payday for the pay period in which the wages were earned. FLSA regulations state that if an employer cannot calculate how much it owes an employee in overtime by payday, it must pay that employee overtime as soon as possible and no later than the next payday.[229]

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

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

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[226] 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.

[227] 12 C.F.R. § 1005.18.

[228] *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.

[229] 29 C.F.R. § 778.106; *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30b04, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf.

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

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

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

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

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

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

The FLSA does not have a general expense reimbursement obligation. Nonetheless, it prohibits employers from circumventing minimum wage and overtime laws by passing onto employees the cost of items that are primarily for the benefit or convenience of the employer, if doing so reduces an employee's wages below the highest applicable minimum wage rate or cuts into overtime premium pay.[230] 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.[231] Accordingly, among other items, an employer may be required to reimburse an employee for expenses related to work uniforms,[232] tools and equipment,[233] and business transportation and travel.[234] 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.[235]

### 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;[236]

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[230] *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).

[231] 29 C.F.R. §§ 531.35, 531.36, and 531.37.

[232] 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.

[233] 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).

[234] 29 C.F.R. § 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c04.

[235] 29 C.F.R. § 778.217.

[236] 29 C.F.R. § 531.38.

- amounts ordered by a court to pay an employee's creditor, trustee, or other third party, under garnishment, wage attachment, trustee process, or bankruptcy proceedings (the employer or anyone acting on its behalf cannot profit from the transaction);[237]
- 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);[238]
- 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;[239]
- 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;[240] 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.[241]

Additionally, while the FLSA contains no express provisions concerning deductions relating to overpayments made to an employee, loans and advances, or negative vacation balance, informal guidance from the DOL suggests such deductions may nonetheless be permissible. While this informal guidance may be interpreted to permit a deduction for loans to employees, employers should consult with counsel before deducting from an employee's wages. An employer can deduct the principal of a loan or wage advance, even if the deduction cuts into the minimum wage or overtime owed. However, deductions for interest or administrative costs on the loan or advance are illegal to the extent that they cut into the minimum wage or overtime pay. Loans or advances must be verified.[242]

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[237] 29 C.F.R. § 531.39. The amount subject to withholding is governed by the federal Consumer Credit Protection Act. 15U.S.C. §§ 1671 *et seq*.

[238] 29 C.F.R. § 531.40.

[239] 29 C.F.R. § 531.40.

[240] 29 U.S.C. § 203. However, the cost cannot be treated as wages if prohibited under a collective bargaining agreement.

[241] 29 C.F.R. § 825.213.

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

 

An employer may also be able to deduct for wage overpayments even if the deduction cuts into the employee's FLSA minimum wage or overtime pay. The deduction can be made in the next pay period or several pay periods later. An employer cannot, however, charge an administrative fee or charge interest that brings the payment below the minimum wage.[243] 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.[244]

**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.[245]

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.[246]

**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.[247]

### 3.7(b) State Guidelines on Wage Payment

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

Mississippi does not have a statute governing the authorized instruments of payment for employee wages. Employers covered by the FLSA should consult the federal provisions.

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

Mississippi does not have a generally applicable provision regarding frequency of wage payment. There are provisions that apply only to certain manufacturing companies and public utilities. Thus, all employees, except those employed in certain manufacturing facilities or those employed by a public

[243] 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.

[244] 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.

[245] 29 C.F.R. § 531.36.

[246] 29 C.F.R. § 531.37.

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

service corporation, may be paid on a monthly or semi-monthly basis. Rules applicable to certain manufacturing or public service corporation employers are discussed below.

**Manufacturing.** Employers engaged in manufacturing with 50 or more employees, that employ public labor, must pay their employees once every two weeks or twice during each calendar month, or on the second and fourth Saturday of each month. The payday may not be later than 10 days after the end of the pay period. For purposes of this provision, *employee* does not include any individual employed in a *bona fide* executive, administrative, or professional capacity.[248]

**Public Service Corporations.** Public service corporations must pay their employees once every two weeks or twice during each calendar month, or on the second and fourth Saturday of each month. The payday may not be later than 15 days after the end of the pay period. For purposes of this provision, *employee* does not include any individual employed in a *bona fide* executive, administrative or professional capacity.[249]

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

Mississippi law does not address when an employer must pay final wages to an employee who is terminated from employment or voluntarily resigns. It is recommended, however, that employers pay final wages no later than the next regularly scheduled pay date following the employee's termination or resignation.

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

Mississippi does not require employers to furnish their employees with earning statements each pay period. In the absence of an applicable state law, an employer would be subject only to the relevant federal law. Although federal law does require employers to provide W-2 forms once a year, the law does not generally require statements with each wage payment.

### 3.7(b)(v) Wage Transparency

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

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

There are no general notice requirements under Mississippi law regarding making a change to regular paydays or an employee's rate of pay. Employers, however, should consider providing employees with advance written notice before a change occurs.

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

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

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

Mississippi law contains no express provisions concerning deductions.

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[248] MISS. CODE ANN. § 71-1-35.

[249] MISS. CODE ANN. § 71-1-35.

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

**Orders of Support.** Upon receiving an income withholding order for child support, a Mississippi employer must begin withholding from the affected employee's wages at the first payday that occurs 14 days after receipt of the order. Employers must withhold according to the limits established in the federal Consumer Credit Protection Act (CCPA): 25% of the employee's disposable pay or 30 times the federal minimum wage, whichever is less. The employer must then pay over the amount withheld within seven days after payday to the state child support enforcement agency. An employer may also deduct from the employee's wages an administrative fee of $2 per withholding.[250]

If an employee will receive a lump-sum payment of more than $500 for bonuses, awards, incentive payments, commissions, or vacation or sick pay outside the employer's normal pay cycle, the employer is required to notify the state child support enforcement agency at least 45 days in advance of the payment. The employer must not release the payment prior to 30 days after the planned date of the payment, or the date the employer receives authorization from the agency, whichever is earlier.[251]

Mississippi law prohibits an employer from discharging, disciplining, refusing to hire, or otherwise penalizing any employee because of the duty to withhold income pursuant to an order of support.[252]

**Debt Collection.** If an employer receives a writ of garnishment against an employee's wages, the employer must file a response to the writ within 30 days. The response must confirm whether the employee is in fact employed by the employer and provide information regarding wages owed to the employee, other income the employee may have from outside sources, and the employer's regular pay periods and pay days.[253]

In Mississippi, the amount that may be withheld for garnishment is based on the federal garnishment limits under the CCPA.[254] The employee's wages are not subject to the garnishment for the first 30 days after the employer is served with the garnishment writ, and are also is not subject to the writ if the debt is less than $100.[255] Garnishment continues until the underlying debt is paid. Unlike with child support withholding, the employer must accumulate all amounts withheld until the total amount of the debt is reached. The employer then makes one payment to the issuing court.[256]

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

An employer that violates any wage payment provision for which a penalty is not otherwise provided commits a misdemeanor. If convicted, the violator will be fined between $25 and $250 for each offense. Each day's violation is a separate offense.[257] Because Mississippi law does not include much in the way of regulation of wages and hours, there is not an administrative mechanism for filing a claim for unpaid wages.

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[250] MISS. CODE ANN. § 93-11-111.

[251] MISS. CODE ANN. § 93-11-111.

[252] MISS. CODE ANN. § 93-11-111.

[253] MISS. CODE ANN. § 11-35-25.

[254] MISS. CODE ANN. § 85-3-4.

[255] MISS. CODE ANN. § 11-35-23.

[256] MISS. CODE ANN. § 11-35-23.

[257] MISS. CODE ANN. § 71-1-53.

## 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).[258] 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.[259] Further, the U.S. Supreme Court, in *Massachusetts v. Morash*, noted that extensive state regulation of vesting, funding, and participation rights of vacation benefits may provide greater protections for employees than ERISA and, as a result, the court was reluctant to have ERISA preempt state law in situations where it was not clearly indicated.[260]

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

Employers in Mississippi are not required to provide paid vacation time to their employees. However, once an employer does establish a policy and promises vacation pay and other types of additional compensation, the employer may not arbitrarily withhold or withdraw these fringe benefits retroactively, and the employer must apply the vacation policy in a nondiscriminatory manner. Therefore, employers should draft clear, precise, and complete policies and procedures regarding these benefits, as they can become contractual obligations and subject the employer to liability if withheld or reduced without notice. In Mississippi, because the right to vacation pay is treated as a matter of contract[261] and there are no statutory or regulatory provisions to the contrary, an employer is free to cap vacation accrual, include a "use-it-or-lose-it" provision, and/or require forfeiture of accrued vacation upon termination.

### 3.8(b) Holidays & Days of Rest

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

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

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

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

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[258] 29 U.S.C. § 1002.

[259] 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.

[260] 490 U.S. 107, 119 (1989).

[261] *See, e.g.*, *Fuselier, Ott & McKee, P.A. v. Moeller*, 507 So. 2d 63 (Miss. 1987).

### 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.[262] 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).[263] However, under COBRA, only an employee and the employee's spouse and dependent children are considered "qualified beneficiaries."[264] 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

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

## 3.9 Leaves of Absence

### 3.9(a) Family & Medical Leave

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

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

- for the birth or placement of a child for adoption or foster care;[265]

[262] 29 U.S.C. § 1144.

[263] 29 U.S.C. § 1161.

[264] 29 U.S.C. § 1167(3).

[265] 29 C.F.R. §§ 825.102, 825.112, 825.113, 825.120, and 826.121.

- to care for an immediate family member (spouse, child, or parent) with a serious health condition;[266]
- to take medical leave when the employee is unable to work because of a serious health condition;[267]
- 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.[268] 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.[269] 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

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

## 3.9(b) Paid Sick Leave

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

Federal law does not require private employers (that are not government contractors) to provide employees paid sick leave. Executive Order No. 13706 requires certain federal contractors and subcontractors to provide employees with a minimum of 56 hours of paid sick leave annually, to be accrued at a rate of at least one hour of paid sick leave for every 30 hours worked.[270] The paid sick leave requirement applies to certain contracts solicited—or renewed, extended, or amended—on or after January 1, 2017, including all contracts and subcontracts of any tier thereunder. For more information on this topic, see **LITTLER ON GOVERNMENT CONTRACTORS & EQUAL EMPLOYMENT OPPORTUNITY OBLIGATIONS**.

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

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

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[266] 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).

[267] 29 C.F.R. §§ 825.112, 825.113.

[268] 29 U.S.C. § 2611(4); 29 C.F.R. §§ 825.104 to 825.109.

[269] 29 U.S.C. § 2611(2); 29 C.F.R. §§ 825.110 to 825.111.

[270] 80 Fed. Reg. 54,697-54,700 (Sept. 10, 2015).

## 3.9(c) Pregnancy Leave

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

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

**Pregnancy Discrimination Act (PDA).** Under the PDA, which as part of Title VII applies to employers with 15 or more employees, disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions must be treated the same as disabilities caused or contributed to by other medical conditions under an employer's health or disability insurance or sick leave plan.[271] 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.[272] FMLA leave may also be used for the birth or placement of a child; however, the use of intermittent leave (as opposed to leave taken on an intermittent or reduced schedule) is subject to the employer's approval.

**Americans with Disabilities Act (ADA).** Pregnancy-related impairments may constitute disabilities for purposes of the ADA. The federal Equal Employment Opportunity Commission (EEOC) takes the position that leave is a reasonable accommodation for pregnancy-related impairments, and may be granted in addition to what an employer would normally provide under a sick leave policy for reasons related to the impairment.[273] An employee may also be allowed to take leave beyond the maximum FMLA leave if the additional leave would be considered a reasonable accommodation.

Several states provide greater protections for employees with respect to pregnancy. For example, states may have specific laws prohibiting discrimination based on pregnancy or providing separate protections for pregnant individuals, including the requirement that employers provide reasonable accommodations to pregnant employees to enable them to continue working during their pregnancies, provided that no undue hardship on the employer's business operations would result. These protections are discussed in

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[271] 42 U.S.C. § 2000e(k); *see also* 29 C.F.R. § 1604.10.

[272] 29 C.F.R. § 825.202.

[273] EEOC, Notice 915.003, *EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues* (June 25, 2015), *available at* https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm; *see also* EEOC, *Facts About Pregnancy Discrimination* (Sept.8, 2008), *available at* https://www.eeoc.gov//facts/fs-preg.html.

3.11(c). To the extent that a state law focuses primarily on providing job-protected leave for employees with disabling pregnancy-related health conditions, that state law is discussed below.

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

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

### 3.9(d) Adoptive Parents Leave

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

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

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

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

### 3.9(e) School Activities Leave

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

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

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

Mississippi 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

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

### 3.9(g) Voting Time

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

There is no federal law concerning time off to vote.

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

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

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

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

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

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

Mississippi 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.[274] 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.[275] 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 must not persuade, or attempt to persuade, any juror to avoid jury service, or intimidate, threaten, or subject to adverse employment action an employee as a result of jury service, provided the employee notified the employer that they have been summoned to serve within a reasonable period of time after receiving the summons.[276]

An employer may not require or request that employees use annual, vacation, or sick leave for time spent responding to a jury duty summons, participating in the jury selection process or serving on a jury. Employers are not required to provide annual leave, vacation, or sick leave to an employee who is not otherwise entitled to such benefits, however.[277]

A violation of these requirements constitutes an "interference with the administration of justice" and is subject to a contempt of court finding.[278]

Courts will automatically postpone or reschedule service of a summoned juror employed by an employer with five or less full-time employees (or their equivalent), if another employee of that employer has been summoned for the same period.[279]

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[274] 28 U.S.C. § 1875.

[275] *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).

[276] MISS. CODE ANN. § 13-5-35(1).

[277] MISS. CODE ANN. § 13-5-35(2).

[278] MISS. CODE ANN. § 13-5-35(3).

[279] MISS. CODE ANN. § 13-5-35(4).

## 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

An employee is eligible for time off if:

- the employee is a victim of the crime at issue in the proceedings; or
- the victim is deceased or incapacitated, and the employee is the victim's parent, guardian, immediate family member, or lawful representative.[280]

An eligible employee may take time off of work to respond to a subpoena to testify in a criminal proceeding or participate in the reasonable preparation of a criminal proceeding.[281]

There is no requirement that the employee be compensated for absences taken pursuant to the statute.

## 3.9(k) Military-Related Leave

### 3.9(k)(i) Federal Guidelines on Military-Related Leave

Two federal statutes primarily govern military-related leave: the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Family and Medical Leave Act (FMLA). For more detailed information on these statutes, including notice and other requirements, see **LITTLER ON LEAVES OF ABSENCE: MILITARY & CIVIC DUTY LEAVES**.

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

Some states provide greater protections for employees with respect to military leave. USERRA, however, establishes a "floor" with respect to the rights and benefits an employer is required to provide to an employee to take leave, return from leave, and be free from discrimination. Any state law that seeks to supersede, nullify, or diminish these rights is void under USERRA.[282]

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[280] MISS. CODE ANN. §§ 99-43-3, 99-43-45.

[281] MISS. CODE ANN. § 99-43-45.

[282] 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

**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.[283] 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.[284] 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.** Permanent employees who are members of the U.S. reserves, or who are former members of the U.S. military service discharged or released under conditions other than dishonorable, are entitled to a leave of absence to perform duties or receive training with the armed forces of the state of Mississippi or any other state, or the U.S. armed forces.[285]

The period of absence for military duty or training is to be construed as an absence with leave but may be without pay.[286]

Returning employees must be reinstated to their former position or to a similar position with the same status, pay, and seniority provided they give evidence of having satisfactorily completed duty or training and are still qualified to do the job.[287]

**Other Military-Related Protections: Antidiscrimination.** An employer may not discharge or otherwise discriminate against an individual because of membership in the U.S. armed forces or U.S. reserves.[288]

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(2) USERRA supersedes any state law that would reduce, limit, or eliminate any right or benefit USERRA provides (38 U.S.C. § 4302(b)).

[283] 29 C.F.R. § 825.126(a).

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

[285] MISS. CODE ANN. § 33-1-19.

[286] MISS. CODE ANN. § 33-1-19.

[287] MISS. CODE ANN. § 33-1-19.

[288] MISS. CODE ANN. § 33-1-15.

### 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

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

## 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.[289] Employers are also required to comply with all applicable occupational safety and health standards.[290] 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.[291] 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

Mississippi does not have an approved state plan under the Fed-OSH Act that covers public or private-sector employees. Accordingly, employers must abide by the Fed-OSH Act.

### 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

An operator of a moving motor vehicle is currently prohibited from writing, sending, or reading a text message and from accessing, reading, or posting to a social networking site using a hand-held mobile

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[289] 29 U.S.C. § 654(a)(1). An *employer* is defined as "a person engaged in a business affecting commerce that has employees." 29U.S.C. § 652(5). The definition of employer does not include federal or state agencies (except for the U.S. House of Representatives and Senate). Under some state plans, however, state agencies may be subject to the state safety and health plan.

[290] 29 U.S.C. § 654(a)(2).

[291] 29 U.S.C. § 667(c)(2).

telephone while driving the motor vehicle. The prohibition against use of a hand-held mobile telephone while driving does not apply to a voice-operated or hands-free device.[292] The use of a cell phone for the purpose of making a telephone call is not addressed by the statute.

Mississippi's prohibition against texting applies to employees driving for work purposes and could expose an employer to liability. Employers therefore should be cognizant of, and encourage compliance with, the restriction.

For purposes of the current statute, a *hand-held mobile telephone* is a mobile telephone or other portable electronic communication device with which a user engages in a call or writes, sends or reads a text message using at least one hand. The definition does not include a voice-operated or hands-free device. *Voice operated or hands-free device* is a device that allows the user to write, send, or read a text message without the use of either hand except to activate, deactivate, or initiate a feature or function. A *text message* includes a text-based message, instant message, electronic message, and email, but does not include an emergency, traffic or weather alert or a message related to the operation or navigation of the motor vehicle.[293]

## 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.** An employer may prohibit the carrying of a concealed pistol or revolver by placing a written notice of the prohibition.[294] The written notice must be clearly readable at a distance of no less than 10 feet and must state that the "carrying of a pistol or revolver is prohibited."[295]

**Firearms in Company Parking Lots.** In contrast to an employer's ability to restrict firearms in the workplace, an employer may not establish, maintain, or enforce any policy or rule prohibiting a person from transporting or storing a firearm in a locked vehicle in any parking lot, parking garage, or other designated parking area, except for parking areas in which access is restricted or limited through the use of a gate, security station, or other means of restricting or limiting general public access onto the property. This restriction on employer's right to prohibit firearms does not apply to company-owned vehicles.

An employer shall not be liable in a civil action for damages resulting from the firearms allowed in company parking lots.[296] An employer, however, may be held liable for wrongful discharge in violation of public policy if it terminates an at-will employee for storing a firearm in their vehicle in a manner consistent with section 45-9-55.[297]

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[292] MISS. CODE ANN. § 63-33-1.

[293] MISS. CODE ANN. § 63-33-1.

[294] MISS. CODE ANN. § 45-9-101(13).

[295] MISS. CODE ANN. § 45-9-101(13).

[296] MISS. CODE ANN. § 45-9-55.

[297] *Swindol v. Aurora Flight Scis. Corp*., 194 So. 3d 847 (Miss. 2016).

### 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

Mississippi's smoking prohibition does not extend to all workplaces; smoking is only prohibited in government buildings and workplaces, and in college or university classroom buildings.[298]

### 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

Mississippi law does not address suitable seating requirements for employees.

### 3.10(f) Workplace Violence Protection Orders

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

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

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

Mississippi law does not address employer workplace violence protection orders.

## 3.11 Discrimination, Retaliation & Harassment

### 3.11(a) Protected Classes & Other Fair Employment Practices Protections

#### 3.11(a)(i) Federal FEP Protections

The federal equal employment opportunity laws that apply to most employers include: (1) Title VII of the Civil Rights Act of 1964 ("Title VII");[299] (2) the Americans with Disabilities Act (ADA);[300] (3) the Age Discrimination in Employment Act (ADEA);[301] (4) the Equal Pay Act;[302] (5) the Genetic Information Nondiscrimination Act of 2009 (GINA);[303] (6) the Civil Rights Acts of 1866 and 1871;[304] and (7) the Civil

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[298] MISS. CODE ANN. §§ 29-5-161 *et seq*.

[299] 42 U.S.C. §§ 2000e *et seq.* Title VII applies to employers with 15 or more employees. 42U.S.C. § 2000e(b).

[300] 42 U.S.C. §§ 12101 *et seq.* The ADA applies to employers with 15 or more employees. 42U.S.C. § 12111(5).

[301] 29 U.S.C. §§ 621 *et seq*. The ADEA applies to employers with 20 or more employees. 29U.S.C. § 630.

[302] 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.

[303] 42 U.S.C. §§ 2000ff *et seq*. GINA applies to employers with 15 or more employees. 42U.S.C. § 2000ff (refers to 42 U.S.C. § 2000e(f)).

[304] 42 U.S.C. §§ 1981, 1983.

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);[305]
- disability (includes having a "record of" an impairment or being "regarded as" having an impairment);
- age (40); or
- genetic information.

The Equal Employment Opportunity Commission (EEOC) is the agency charged with handling claims under the antidiscrimination statutes.[306] 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.[307]

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

Mississippi does not have a general antidiscrimination statute; the only covered protections in Mississippi are for military status.[308] Because there is no state statute, Mississippi does not have a state administrative agency to accept discrimination charges and, therefore, plaintiffs should file their charges of discrimination within 180 days with the EEOC.

### 3.11(a)(iii) Additional Discrimination Protections

**Tobacco Products.** It is unlawful for a public or private employer to require, as a condition of employment, that any employee or applicant for employment abstain from smoking or using tobacco products during nonworking hours. However, individuals must comply with applicable laws or policies regulating smoking on the employer's premises during working hours.[309] The state statute covers all employers, employees, and applicants.[310]

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[305] 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.

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

[307] 29 C.F.R. § 1601.13. Note that for ADEA charges, only state laws extend the filing limit to 300 days. 29C.F.R. § 1626.7.

[308] MISS. CODE ANN. § 33-1-15.

[309] MISS. CODE ANN. § 71-7-33.

[310] MISS. CODE ANN. § 71-7-1.

### 3.11(a)(iv) Local FEP Protections

In addition to the federal and state laws, employers with operations in Jackson are subject to a local fair employment practices ordinances. Specifically, employers employing one or more employees in the city of Jackson must extend antidiscrimination protections on the basis of: race; color; religion; national origin; sex; sexual orientation; gender identity; age (40 or older); disability; marital status; familial status; and veteran status.[311] The City of Jackson initiates, investigates, seeks to conciliate, holds hearings on, and passes upon complaints alleging violations of the discrimination provisions.[312]

### 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."[313] The prohibition does not apply to payments made under: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a differential based on a factor other than sex.

An employee alleging a violation of the Equal Pay Act must first exhaust administrative remedies by filing a complaint with the EEOC within 180 days of the alleged unlawful employment practice. Under the federal Lilly Ledbetter Fair Pay Act of 2009, for purposes of the statute of limitations for a claim arising under the Equal Pay Act, an unlawful employment practice occurs with respect to discrimination in compensation when: (1) a discriminatory compensation decision or other practice is adopted; (2) an individual becomes subject to such a decision or practice; or (3) an individual is affected by application of such decision or practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.[314]

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

The Mississippi Equal Pay Act prohibits an employer of five or more employees from paying an employee a wage at a rate less than the rate at which an employee of the opposite sex in the same establishment is paid for equal work on a job, the performance of which requires equal skill, education, effort and responsibility, and which is performed under similar working conditions. *Employee* means any individual who works 40 or more hours per week for a covered employer. *Wage* means and includes all compensation paid by an employer or the employer's agent for the performance of service by an employee, including the cash value of all compensation paid in any medium other than cash. *Rate*, with reference to wages, means the basis of compensation for services by an employee for an employer and includes compensation based on time spent in the performance of such services, on the number of operations accomplished, or on the quality produced or handled.[315]

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311 JACKSON, MISS., CODE OF ORDINANCES §§ 86-301 (definitions), 86-302, and 86-303 (exceptions, including religious).

312 JACKSON, MISS., CODE OF ORDINANCES §§ 86-304, 86-305.

313 29 U.S.C. § 206(d)(1).

314 42 U.S.C. § 2000e-5.

315 MISS. CODE ANN. § 71-17-3, as amended by H.B. 770 (Miss. 2022).

However, the Act permits a wage differential if made based on:

- a seniority system;
- a merit system;
- a system that measures earnings by quantity or quality of production; or
- any other factor other than sex, including but not limited to the following factors:
  - the salary history or continuity of employment history demonstrated by the employee as compared to employees of the opposite sex in the same establishment;
  - the extent to which there was competition with other employers for the employee's services as compared to employees of the opposite sex in the same establishment; and
  - the extent to which the employee attempted to negotiate for higher wages as compared to employees of the opposite sex in the same establishment.[316]

*Skill* means and will be measured by factors such as experience, ability, education, and training that are required to perform a job. *Effort* means the amount of physical or mental exertion needed to perform a job. *Responsibility* means the degree of accountability required to perform the job. *Working conditions* means and includes the following factors: (1) the physical surroundings of a job including, but not limited to, temperature, fumes and ventilation; and (2) the hazards of the job.[317]

An employer paying a wage differential in violation of the statute cannot reduce the wage rate of any employee in order to comply with the statute.[318]

An individual alleging a violation of the Act may file a civil suit in the circuit court in the county in Mississippi where the cause of action occurred no later than two years from the day the employee knew or should have known the employer was in violation of the law. If an employee brings a claim under the federal Equal Pay Act of 1963, the employee cannot maintain a separate action under the Mississippi Equal Pay Act. If an employee brings a claim under the Mississippi Equal Pay Act, then later initiates a claim under the federal Equal Pay Act, the state law claim must be dismissed with prejudice. An employee who seeks relief under the Mississippi Equal Pay Act must first waive any right to relief under the federal Equal Pay Act.[319]

## 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.

316 MISS. CODE ANN. § 71-17-5(1)(a)-(d); as amended by H.B. 770 (Miss. 2022).

317 MISS. CODE ANN. § 71-17-3; as amended by H.B. 770 (Miss. 2022).

318 MISS. CODE ANN. § 71-17-5(3); as amended by H.B. 770 (Miss. 2022).

319 MISS. CODE ANN. § 71-17-7(2); as amended by H.B. 770 (Miss. 2022).

 

Additionally, the Pregnant Workers Fairness Act (PWFA) makes it an unlawful employment practice for an employer of 15 or more employees to:

- fail or refuse to make reasonable accommodations for the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on its business operations;
- require a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process;
- deny employment opportunities to a qualified employee, if the denial is based on the employer's need to make reasonable accommodations for the qualified employee;
- require a qualified employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided; or
- take adverse action related to the terms, conditions, or privileges of employment against a qualified employee because the employee requested or used a reasonable accommodation.[320]

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).[321]

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.[322] 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.[323] 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

[320] 42 U.S.C. § 2000gg-1. The regulations provide definitions of *pregnancy*, *childbirth*, and *related medical conditions*. 29 C.F.R. § 1636.3.

[321] 29 C.F.R. § 1636.3.

[322] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1636.3.

[323] 29 C.F.R. § 1636.3.

 

perform (or apply to perform) an essential function of the position, the employee will not be considered "qualified."[324]

An employer is not required to seek documentation from an employee to support the employee's request for accommodation but may do so when it is reasonable under the circumstances for the employer to determine whether the employee has a limitation within the meaning of the PWFA and needs an adjustment or change at work due to the limitation.

Reasonable accommodation is not required if providing the accommodation would impose an undue hardship on the employer's business operations. An *undue hardship* is an action that fundamentally alters the nature or operation of the business or is unduly costly, extensive, substantial, or disruptive. When determining whether an accommodation would impose an undue hardship, the following factors are considered:

- the nature and net cost of the accommodation;
- the overall financial resources of the employer;
- the number of employees employed by the employer;
- the number, type, and location of the employer's facilities; and
- the employer's operations, including:
  - the composition, structure, and functions of the workforce; and
  - the geographic separateness and administrative or fiscal relationship of the facility where the accommodation will be provided.[325]

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.[326]

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**.

[324] 29 C.F.R. § 1636.4.

[325] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1630.2(p).

[326] 29 C.F.R. § 1636.3.

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

Mississippi law does not address pregnancy accommodations for private-sector employees.

### 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.[327] Multiple decisions of the U.S. Supreme Court[328] 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 role that training plays in establishing a legal defense to harassment and discrimination claims.[329] 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 Mississippi.

## 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.

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

[328] *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).

[329] 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.

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

Mississippi does not have a general whistleblower law providing protections for private-sector whistleblowers, although there are whistleblower protections for public employees.[330]

### 3.12(b) Labor Law

### 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)[331] and the Railway Labor Act (RLA)[332] are the two main federal laws governing employer relations with unions in the private sector. The NLRA regulates labor relations for virtually all private-sector employers and employees, other than rail and air carriers and certain enterprises owned or controlled by such carriers, which are covered by the RLA. The NLRA's main purpose is to: (1) protect employees' right to engage in or refrain from *concerted activity* (*i.e.*, group activities attempting to improve working conditions) through representation by labor unions; and (2) regulate the collective bargaining process by which employers and unions negotiate the terms and conditions of union members' employment. The National Labor Relations Board (NLRB or "Board") enforces the NLRA and is responsible for conducting union elections and enforcing the NLRA's prohibitions against "unfair" conduct by employers and unions (referred to as *unfair labor practices*). For more information on union organizing and collective bargaining rights under the NLRA, see LITTLER ON UNION ORGANIZING and LITTLER ON COLLECTIVE BARGAINING.

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

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

Mississippi is a right-to-work state.[333] Under Mississippi's Right-to-Work Law, employers are prohibited from entering into any agreement to deny employment due to nonunion membership, or making union membership a condition of employment. Employers are prohibited from requiring that any person become or remain a member of any labor union as a condition of employment, or abstain or refrain from membership in any labor union as a condition of employment. Employers also may not require employees to pay any dues, fees, or other charges as a condition of employment.[334]

# 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

330 MISS. CODE ANN. §§ 25-9-171 *et seq.*

331 29 U.S.C. §§ 151 to 169.

332 45 U.S.C. §§ 151 *et seq*.

333 MISS. CODE ANN. §§ 71-1-47 *et seq.*

334 MISS. CODE ANN. § 71-1-47.

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).[335] The notice must be provided to affected nonunion employees, the representatives of affected unionized employees, the state's dislocated worker unit, and the local government where the closing or layoff is to occur.[336] 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

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

### 4.1(c) State Mass Layoff Notification Requirements

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

That being said, it appears that initial claims for unemployment benefits can be submitted together in the event of a layoff from the same employer, for the same time period. This approach seems to require some voluntary coordination between the employer and the unemployment agency. If initial claims are submitted in a group or groups for affected employees, the effective date of the claims will be determined by the agency based on the first day of unemployment, provided the person files in the specified manner, at a designated time, date, and place agreed on by the employer and the agency.[337]

## 4.2 Documentation to Provide When Employment Ends

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

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

**Table 10. Federal Documents to Provide at End of Employment**

| Category | Notes |
|---|---|
| **Health Benefits: Consolidated Omnibus Budget Reconciliation Act (COBRA)** | Under COBRA, the administrator of a covered group health plan must provide written notice to each covered employee and spouse of the covered employee (if any) of the right to continuation coverage provided under the plan.[338] The notice must be provided not later than the earlier of:<br>• 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 |

[335] 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.

[336] 20 C.F.R. §§ 639.4, 639.6.

[337] 20-101-101 MISS. CODE R. § 302.00. This regulation is authorized by two Mississippi code provisions. *See* MISS. CODE ANN. §§ 71-5-115, 71-5-117.

[338] 29 C.F.R. § 2590.606-1. Model notices and general information about COBRA is available from the U.S. Department of Labor's Employee Benefits Security Administration at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra.

| Table 10. Federal Documents to Provide at End of Employment | |
|---|---|
| **Category** | **Notes** |
| | days after the date on which the plan first becomes subject to the continuation coverage requirements; or<br>• 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.[339] |

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

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

| Table 11. State Documents to Provide at End of Employment | |
|---|---|
| **Category** | **Notes** |
| **Health Benefits: Mini-COBRA, etc.** | Mississippi state law requires employers of fewer than 20 employees to provide posttermination continued coverage for up to 12 months.[340] However, the law does not require such employers to provide notification of continued coverage to an employee upon termination.[341] |
| **Unemployment Notice** | **Generally.** Mississippi does not require that employees be provided notice about unemployment benefits when employment ends. Nonetheless, the employer generally must post in places readily accessible to individuals, and provide a copy of, printed statements concerning benefit rights, claims for benefits and other matters relating to unemployment. Accordingly, it is recommended that an employer provide a copy of the unemployment notice when employment ends.[342]<br><br>**Multistate Workers.** Mississippi does not require that employees be notified as to the jurisdiction under whose unemployment compensation law services have been covered. It is recommended, however, that an employer provide notice of the jurisdiction where services will be |

[339] 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.

[340] MISS. CODE ANN. § 83-9-51.

[341] MISS. CODE ANN. § 83-9-51(8).

[342] MISS. CODE ANN. § 71-5-515. This notice is available in English at http://mdes.ms.gov/media/30964/UI_InsuranceforEmployerLtrSizeSign1013Update.pdf and in Spanish at http://mdes.ms.gov/media/30961/UI_InsuranceforEmployerLtrSizeSign1013UpdateSpanish.pdf.

| Table 11. State Documents to Provide at End of Employment | |
|---|---|
| **Category** | **Notes** |
| | covered for unemployment purposes. Additionally, employers should follow that state's general notice requirement, if applicable.[343] |

## 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

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

[343] *See* MISS. CODE ANN. § 71-5-13 (Reciprocal Arrangements); *see also* 20-101-101 MISS. CODE R. §§ 318.00 to 318.07 (Payment of Benefits to Interstate Claimants).