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STATE

Littler on

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

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

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

DISCLAIMER

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

ACKNOWLEDGEMENTS

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

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

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

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1.1 Classifying Workers: Employees v. Independent Contractors

1.1(a) *Federal Guidelines on Classifying Workers*

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

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

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

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

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

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

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

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

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

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

1.1(b) *State Guidelines on Classifying Workers*

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

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

Table 1. State Tests for Classifying Workers

Purpose of Determining Employee Status	State Agency	Test to Apply
Fair Employment Practices Laws	SDDLR, Division of Human Rights	Federal common-law agency test.[6]

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

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

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

[6] There are no state cases and no administrative decisions examining the application of the South Dakota Human Relations Act (SDHRA) to independent contractors. Moreover, there are no relevant statutory definitions. However, the Eighth Circuit Court of Appeals has stated "we predict the Supreme Court of South Dakota would conclude that § 20-13-10 [of the SDHRA] does not apply to independent contractors," observing "[i]n interpreting the SDHRA, the South Dakota Supreme Court has followed federal court decisions construing analogous federal anti-discrimination statutes." *Alexander v. Avera St. Luke's Hosp.*, 768 F.3d 756, 765 (8th Cir. 2014). The court then speculated that, in the interest of "construing federal and state anti-discrimination statutes in harmony," the South Dakota Supreme Court would apply the federal common-law agency test set forth in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992), which determines independent contractor versus employee status in cases under Title of the Civil Rights Act of 1964. *Alexander*, 768 F.3d at 765. Under *Darden,* in determining whether a

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
Income Taxes	Not applicable	South Dakota does not have personal state income tax.
Unemployment Insurance	SDDLR, Unemployment Insurance	Statutory "AC" test. *Employment* "means any service performed, including service in interstate commerce, by . . . [a]ny individual who, under the usual common-law rules applicable in determining the employer-employee relationship has the status of an employee."[7] Service an individual performs for wages is *presumed employment* unless and until it is shown that: 1. the individual is "free from control or direction over the performance of the service," both under the contract and in fact; and 2. the individual is "customarily engaged in an independently established trade, occupation, profession, or business."[8]

hired party is an employee under the common law of agency, courts consider "the hiring party's right to control the manner and means by which the product is accomplished." 503 U.S. at 323. Relevant factors include:

> the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

503 U.S. at 323-24.

[7] S.D. CODIFIED LAWS § 61-1-10.

[8] S.D. CODIFIED LAWS § 61-1-11. There is a "[a] two-part burden of proof [which] applies to determine employee/independent contractor status under SDCL 61-1-11." *Moonlight Rose Co. v. South Dakota Unemployment Ins. Div.*, 668 N.W.2d 304, 309-10 (S.D. 2003) (citation omitted). First, the South Dakota Department of Labor must show the individual provided services for wages, then the burden shifts to the employer to provide evidence that the individual met both factors set forth in the statute and is therefore an independent contractor, rather than an employee. 668 N.W.2d at 310. To meet the second prong, which is that the individual is customarily engaged in an independently established trade, occupation, profession, or business, the employer must show the individual:

1. [was] engaged in an enterprise that was created and exists apart from [his or her] relationship with [the employer] and that the enterprise would survive the termination of that relationship;
2. ha[s] a proprietary interest in the enterprise to the extent that [he or she] can operate without hindrance from any other individual;
3. due to [his or her] skill, [is] engaged in an economic enterprise such that [he or she] bear[s] the risk of unemployment; and

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
		The SDDLR has published guidance that lists the following factors as indicative of *employee* status: "1. Insulated from loss and restricted in the amount of gain 2. Hired for an ongoing period 3. Must follow your instructions on how to do the job 4. Trained by the employer 5. Adhering to work hours set by the employer 6. Working on a regular basis 7. Equipment and supplies provided by employer 8. Do not have an ongoing business of their own."[9] The following factors are more indicative of *independent contractor* status: "1. Realizing a profit or loss based on their success in performing the work 2. Working when and for whom they choose 3. Providing their own supplies and equipment 4. Having a significant investment in the facility or equipment used for work 5. Making their services available to the general public."[10]

4. remain[s] employed as a function of market forces and the demand for [his or her] skills, rather than the response of an employer to similar economic realities.

668 N.W.2d at 310; *see also TAK Commc'n v. South Dakota Unemployment Ins. Div.*, 736 N.W.2d 840, 843 (S.D. 2007). Moreover, "[a]ll four prongs of this test, either explicitly or implicitly, require that the individual have some relationship with an economic enterprise that is independent of the relationship with the company that is allegedly subject to unemployment insurance taxation." *Moonlight Rose*, 668 N.W.2d at 310.

[9] South Dakota Dep't of Labor & Regulation, Reemployment Assistance Tax Unit, *Independent Contractor or Employee* Fact Sheet, *available at* https://dlr.sd.gov/ra/businesses/documents/independent_contractor_or_employee_fact_sheet.pdf. In this fact sheet, the SDDLR also explains the meaning of terms in the statutory test set forth in South Dakota Codified Law section 61-1-11:

> The first portion of the statute concerns control. Although individuals may have freedom of action in the way work can be performed, control can still be exercised through other means such as written or verbal agreements or a contract. What really matters is who has the legal right to control the outcome of the work. The second portion of the statute concerns whether the individual is customarily engaged in an independently established trade, occupation, profession, or business. The word *independently* means a trade, occupation, profession, or business must be established independently of, and exist separately from, the services rendered to the alleged employer. The present tense "is" indicates the individual must be engaged in such independent activity at the time of rendering the service to the alleged employer.

[10] South Dakota Dep't of Labor & Regulation, Unemployment Ins. Tax Unit, *Independent Contractor or Employee?*.

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
Wage & Hour Laws	SDDLR, Wage and Hour	Common-law "AC" test. Two primary factors are used to determine whether a worker is an employee or an independent contractor: 1. whether the worker "was free from control or direction over the performance of the services, both under contract of service and in fact;" and 2. whether the worker "was customarily engaged in an independently established trade, occupation, profession or business."[11]
Workers' Compensation	SDDLR, Workers' Compensation	Common-law "AC" test. The same two-factor common-law test cited above in the wage and hour section is applied to determine independent contractor status in workers' compensation cases.[12] South Dakota also recognizes a rebuttable presumption: "Any independent contractor who is not an employer or a general contractor and is not covered under a workers' compensation insurance policy may sign an *affidavit of exempt status* under the South Dakota Workers' Compensation Law . . . the affidavit of exempt status creates a *rebuttable presumption* that the affiant is not an employee for the purposes of the South Dakota Workers' Compensation Act and the person possessing the affidavit is not liable for a workers' compensation claim made by the affiant or any subcontractor of the affiant."[13]

[11] *St. Paul Reinsurance Co. v. Baldwin*, 503 F. Supp. 2d 1255, 1263-64 (D.S.D. 2007) (quoting *Egemo v. Flores*, 470 N.W.2d 817, 820-21 (S.D. 1991). The first factor, the "right to control" test, focuses on: (1) direct evidence of the right to control; (2) the method of payment; (3) the furnishing of equipment; and (4) the right to terminate the employment relationship at will and without liability. *St. Paul Reinsurance Co.*, 503 F. Supp. 2d at 1264. The second factor, the "independently established" test, has four parts and considers: (1) an enterprise independently established; (2) an enterprise created and existing separate and apart from the relationship with the particular employer; (3) an enterprise that will survive the termination of that relationship; and (4) an enterprise in which the individual possesses a proprietary interest to the extent that it can be operated without hindrance from any other individual. 503 F. Supp. 2d at 1265.

[12] *See Davis v. Frizzell*, 504 N.W.2d 330, 331-32 (S.D. 1993); *Dumire v. Martin*, 174 N.W.2d 215, 217 (S.D. 1970).

[13] S.D. CODIFIED LAWS § 62-1-19 (emphasis added). The affidavit must meet the statutory requirements and must be completed on a form prescribed by the South Dakota Division of Insurance. S.D. CODIFIED LAWS § 62-1-20 (setting

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
Workplace Safety	Not applicable	There are no relevant statutory definitions or court decisions identifying a test for independent contractor status in this context. South Dakota 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 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,

forth the requirements). However, an employer is not required to accept any affidavit of exempt status as a substitute for a certification of workers' compensation coverage. S.D. CODIFIED LAWS § 62-1-19. Moreover, "[a]ny person who solicits or provides false information on an affidavit of exempt status under the South Dakota Workers' Compensation Law with actual knowledge is guilty of a Class 2 misdemeanor." S.D. CODIFIED LAWS § 62-1-21.

[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.

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*

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

1.3 Restrictions on Background Screening & Privacy Rights in Hiring

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

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

There is no applicable federal law restricting employer inquiries into an applicant's criminal history. However, the federal Equal Employment Opportunity Commission (EEOC) has issued enforcement guidance pursuant to its authority under Title VII of the Civil Rights Act of 1964 ("Title VII").[17] 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.

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[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] 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.

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

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

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

While South Dakota places no statutory restrictions on a private employer's use of arrest records, the South Dakota Division of Human Rights takes the position that asking or checking into an applicant's arrest, court, or conviction record is "suspect," unless substantially related to the functions of the employment.[18] South Dakota 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*

South Dakota places no statutory restrictions on a private employer's use of conviction records. However, as discussed in **1.3(a)(ii)**, inquiries and use of conviction records should be substantially related to job function.

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

A person may move to have their arrest record expunged in South Dakota. No person as to whom an order of expungement has been entered will be found guilty of perjury or of giving a false statement by reason of their failure to acknowledge the arrest, indictment, or trial in response to any inquiry made of the person for any purpose.[19]

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[20] governs an employer's acquisition and use of virtually any type of information gathered by a "consumer reporting agency"[21] 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

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[18] South Dakota Div. of Human Rights, *Pre-Employment Inquiry Guide*, *available at* https://dlr.sd.gov/human_rights/publications/preemployment.pdf.

[19] S.D. CODIFIED LAWS §§ 23A-3-26, 23A-3-32.

[20] 15 U.S.C. §§ 1681 *et seq*.

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

employer that intends to take an adverse employment action, such as refusing to hire the applicant, based wholly or partly on information contained in a consumer report must also follow certain notification requirements. For additional information on the FCRA, see LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING.

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

Discrimination Concerns. While federal law does not prevent employers from asking about financial information provided they follow the FCRA, as noted above, federal antidiscrimination law prohibits employers from applying a financial requirement differently based on an individual's protected status—*e.g.*, race, national origin, religion, sex, disability, age, or genetic information. The EEOC also cautions that an employer must not have a financial requirement "if it *does not help the employer to accurately identify* responsible and reliable employees, and if, at the same time, the requirement significantly disadvantages people of a particular [protected category]."[22]

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

South Dakota 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.

[22] 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*

South Dakota 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.[23] 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*

South Dakota 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.[24] The Drug-

[23] 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.

[24] 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.[25] 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*

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

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

1.3(f)(i) *State Restrictions on Job Application Fees, Deductions, or Other Charges*

Employers cannot require employees to pay the cost of medical examinations or of furnishing medical records. The definition of employee includes "any person who may be permitted, required, or directed by any employer, in consideration of direct or indirect gain or profit, to engage in any employment."[26]

2. TIME OF HIRE

2.1 Documentation to Provide at Hire

2.1(a) *Federal Guidelines on Hire Documentation*

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

Table 2. Federal Documents to Provide at Hire

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

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.

[25] 41 U.S.C. §§ 8101 *et seq*.; *see also* 48 C.F.R. §§ 23.500 *et seq*.

[26] S.D. CODIFIED LAWS § 60-11-2.

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	36B of the Internal Revenue Code of 1986[27] and a cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act[28] if the employee purchases a qualified health plan through the exchange; and • that if the employee purchases a qualified health plan through the exchange, the employee may lose the employer contribution (if any) to any health benefits plan offered by the employer and that all or a portion of such contribution may be excludable from income for federal income tax purposes.[29] 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.[30]
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.[31] 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.[32]
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

[27] 26 U.S.C. § 36B.

[28] 42 U.S.C. § 18071.

[29] 29 U.S.C. § 218b.

[30] 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.

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

[32] 29 C.F.R. § 2590.606-1.

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	general notice to each new employee upon hiring.[33] In either case, distribution may be accomplished electronically. Employers may use a format other than the FMLA poster as a model notice, if the information provided includes, at a minimum, all of the information contained in that poster.[34] 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.[35]
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.[36] 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.[37]
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

[33] 29 C.F.R. § 825.300(a).

[34] 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.

[35] 29 C.F.R. § 825.300(a).

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

[37] 26 C.F.R. § 31.3402(f)(2)-1. The IRS provides this form at https://www.irs.gov/pub/irs-pdf/fw4.pdf.

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
Act (USERRA) Documents	may meet the notice requirement by posting notice where employers customarily place notices for employees.[38]
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.[39]

2.1(b) *State Guidelines on Hire Documentation*

South Dakota law does not require any specific documents to be provided to new employees at the time of hire. Employers should refer to federal law.

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.[40] 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

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

[39] 29 C.F.R. § 531.59.

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

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).[41]

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

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

- Federal Employer Identification Number (FEIN);
- employer's name, address, and telephone number related to the FEIN;
- state selected for reporting purposes;
- other states in which the company has employees;
- the corporate contact information (name, title, phone, email, and fax number); and
- the signature of person providing the information.

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

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

Table 3. Multistate Employer New Hire Information

Contact By Mail or Fax	Contact Online
Department of Health and Human Services Administration for Children and Families Office of Child Support Enforcement Multi-State Employer Registration Box 509 Randallstown, MD 21133 Fax: (410) 277-9325	Register online by submitting a multistate employer notification form over the internet.[42] 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.

[41] 42 U.S.C. § 653a.

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

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

The following is a summary of the key elements of South Dakota's new hire reporting law.[43]

Who Must Be Reported. Employers must report newly-hired employees and those rehired 30 days or more after termination or layoff.

Report Timeframe. Employers must report new hires no later than 20 days after the hiring date. Employers that submit reports magnetically or electronically should report twice per month, not fewer than 12 nor more than 16 days apart.

Information Required. The report must include the employee's name, address, and Social Security number along with the employer's name, address, and federal tax identification number.

Form & Submission of Report. The federal Form W-4 or an equivalent form is acceptable for reporting.

Reports may be submitted by mail, fax, magnetically (diskette or cartridge), electronically, or telephone.

Location to Send Information.

New Hire Reporting Center S.D. Department of Labor
P.O. Box 4700
Aberdeen, SD 57402-4700
(888) 827-6078
(605) 626-2942
(888) 835-8659 (fax)
(605) 626-2842 (fax)
https://dlr.sd.gov/ra/new_hire_reporting/default.aspx

Multistate Employers. Employers that have employees who are employed in two or more states and which transmit reports magnetically or electronically may comply with the new hire reporting requirements by designating one state in which the employer will transmit the required report. Any multistate employer that elects to report in this manner must notify the secretary of HHS in writing as to which state the employer will transmit the report.[44]

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.

[43] S.D. CODIFIED LAWS § 25-7A-3.3; South Dakota Dep't of Labor & Regulation, *New Hire Reporting: Frequently Asked Questions*, *available at* https://dlr.sd.gov/ra/new_hire_reporting/faq.aspx.

[44] S.D. CODIFIED LAWS § 25-7A-3.3.

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.[45] 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*

South Dakota law permits the use of restrictive covenants in employment contracts.[46] At any point during the employment relationship, the employer and employee can enter an agreement warranting that the employee will not:

- engage, directly or indirectly, in the same business or profession as that of their employer for any period not exceeding two years from the date of the termination of the agreement; and
- solicit the employer's existing customers within a specified geographic area for any period not exceeding two years from the date of termination of the agreement, if the employer continues to carry on a like business therein.[47]

Assuming the agreement meets the statutory requirements under section 53-9-11, the restrictive covenant will be enforced without making a further showing of reasonableness.[48]

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[45] 18 U.S.C. §§ 1832 *et seq.*

[46] S.D. CODIFIED LAWS § 53-9-11.

[47] S.D. CODIFIED LAWS § 53-9-11.

[48] *Hot Stuff Foods, L.L.C. v. Mean Gene's Enters., Inc.*, 468 F. Supp. 2d 1078, 1101 (D.S.D. 2006).

Employers can also use nondisclosure covenants to prevent the disclosure of the employer's trade secrets, confidential business practices, prices lists, and unique marketing strategies.[49] South Dakota courts will enforce a nondisclosure agreement if:

- a trade secret or confidential relationship exists;
- the employer has not disclosed the information to others not in a confidential relationship; and
- the information is not legitimately discovered and openly used by others.[50]

In addition, all employees in South Dakota have a statutory duty of loyalty: "[a]n employee who has any business to transact on his own account, similar to that entrusted to him by his employer, must always give the latter the preference."[51] Employees owe a duty of loyalty to their employer, and while employed, must not act contrary to the employer's interests. Additional restrictions apply to noncompete agreements related to health care providers.[52]

Enforceability Following Employee Discharge. In South Dakota, noncompete agreements remain enforceable following employee discharge. When an employee is fired without good cause, however, courts apply a balancing test to determine reasonableness that is otherwise not used for noncompetes entered into under section 53-9-11.[53]

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.

South Dakota's statute specifically provides that an employee and employer may enter into a noncompete agreement at the beginning of employment.[54] The signing of a noncompete agreement at the beginning of employment constitutes adequate consideration.[55] South Dakota statutes governing contracts in general state "a contract in writing may be altered by a contract in writing without new consideration," and therefore new consideration is not necessary for an alteration of an existing employment contract or

[49] *Central Monitoring Serv., Inc. v. Zakinski*, 553 N.W.2d 513, 516 n.7 (S.D. 1996).

[50] *Raven Indus., Inc. v. Lee*, 783 N.W.2d 844, 849 (S.D. 2010) (citing *1st Am. Sys., Inc. v. Rezatto*, 311 N.W.2d 51, 57 (S.D. 1981).

[51] S.D. CODIFIED LAWS § 60-2-13.

[52] *Setliff v. Akins*, 616 N.W.2d 878, 886 (S.D. 2000).

[53] *Central Monitoring Serv.*, 553 N.W.2d 513, 519-21 (S.D. 1996); *see also Hot Stuff Foods, L.L.C.*, 468 F. Supp. at 1101.

[54] S.D. CODIFIED LAWS § 53-9-11.

[55] *Central Monitoring Serv., Inc. v. Zakinski*, 553 N.W.2d 513, 517 n.9 (S.D. 1996).

noncompete agreement.[56] However, a decision by the South Dakota Supreme Court suggests that one of the statutes governing contracts would not support a completely new noncompete entered into during employment without new consideration.[57] In this case, additional consideration was unnecessary where an employee was asked to sign a noncompete six months after he began employment. However, the court broadly construed the noncompete as "part and parcel" of the original employment agreement.

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

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

South Dakota courts will likely enforce reasonable provisions and modify unreasonable provisions because it follows the "rule of partial enforcement, whereby an overly broad non-compete provision is modified and enforced so as to conform to statutory mandates" in sale of business or stock buy-back agreements.[58]

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

Like many states, South Dakota has adopted the Uniform Trade Secret Act.[59] The South Dakota Uniform Trade Secret Act defines trade secrets as:

> information, including a formula, pattern, compilation, program, device, method, technique or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainably by proper means by, other persons who can obtain economic value from its disclosure or use; and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[60]

Misappropriation, or *trade secret theft*, is defined as:

- 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

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[56] S.D. CODIFIED LAWS § 53-8-7; *see also* S.D. CODIFIED LAWS § 53-8-6 (oral contracts; same); *American Rim & Brake v. Zoellner*, 382 N.W.2d 421 (S.D. 1986) (noncompete, an updated, less restrictive version of a previous agreement and accompanied by no additional consideration, enforced because of section 53-8-7).

[57] *Central Monitoring Serv., Inc.*, 553 N.W.2d 513, 517 (S.D. 1996) ("Clearly, under SDCL 53-8-6, if the non-compete agreement between [the parties] is an alteration of the existing employment contract, no new consideration is required. However, if the non-compete agreement is a completely new contract, new consideration is required.").

[58] *See Franklin v. Forever Venture, Inc.* 696 N.W.2d 545, 551 (S.D. 2005) (sale of business context); *Ward v. Midcom, Inc.*, 575 N.W.2d 233 (S.D. 1998) (stock buy-back agreement, subject to sale of business exception in section 53-9-9).

[59] S.D. CODIFIED LAWS § 37-29-1.

[60] S.D. CODIFIED LAWS § 37-29-1(4).

- disclosure or use of another person's trade secrets without the other's express or implied consent by a person who:
  - used improper means to acquire knowledge of the trade secret; or
  - at the time of the disclosure or use, knew or had reason to know that his knowledge of the trade secret was: (1) derived from or through a person who had utilized improper means to acquire it; or (2) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or (3) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
- before a material change of his position, knew or had reason to know that the information was a trade secret and that knowledge of it had been acquired by accident or mistake.[61]

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

South Dakota does not have any statutory guidelines addressing ownership of employee inventions or 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 4 details the federal workplace posting and notice requirements.

Table 4. 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.[62]
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.[63]

[61] S.D. CODIFIED LAWS § 37-29-1(2).

[62] 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.

[63] 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 4. 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.[64]
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.[65]
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.[66]
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.[67]
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.[68]
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.[69]

[64] 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.

[65] 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.

[66] 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.

[67] 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.

[68] 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.

[69] 20 C.F.R. app. § 1002. This poster is available at http://www.dol.gov/vets/programs/userra/poster.htm.

Table 4. 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.[70] 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.[71]
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.[72]
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.[73]
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.[74]

[70] 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.

[71] 41 C.F.R. §§ 60-300.44, 60-741.44.

[72] 29 C.F.R. § 5.5(a)(l)(i). This poster is available at https://www.dol.gov/whd/regs/compliance/posters/davis.htm.

[73] 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.

[74] 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 4. 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.[75]
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.[76]
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.[77]
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.[78] **Pay Period or Monthly Notice.** A contractor must inform an employee in writing of the amount of accrued paid sick leave no less than once each pay period or each month, whichever is shorter. Additionally, this information must be provided when employment ends and when an employee's accrued but unused paid sick leave is reinstated. Providing these notifications via a pay stub meets the compliance requirements of the executive order. **Pay Stub / Electronic.** A contractor's existing procedure for informing employees of available leave, such as notification accompanying each paycheck or an online system an employee can check at any time, may be used to satisfy or partially satisfy these requirements if it is written

[75] 29 C.F.R. § 525.14. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/disab.htm.

[76] 29 C.F.R. § 471.2. This poster is available at https://www.dol.gov/olms/regs/compliance/EO13496.htm.

[77] 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.

[78] 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 4. 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).[79]
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.[80]
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.[81]

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

Table 5 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 5. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Unemployment Compensation	Employers must post and maintain the notice regarding eligibility for unemployment benefits and how to apply, in places readily accessible to employees. The poster will be mailed directly to the employer from the Unemployment Insurance Division and also is available online.[82]

[79] 29 C.F.R. § 13.5.

[80] 41 C.F.R. § 60-1.35(c). This poster is available at https://www.dol.gov/agencies/ofccp/posters.

[81] 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.

[82] S.D. CODIFIED LAWS § 61-7-1. This poster is available in English and Spanish at https://dlr.sd.gov/employment_laws/posting_requirements.aspx.

Table 5. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Workplace Safety: Safety & Health on the Job	Under the workers' compensation law, all employers must display "informational postings" promoting workplace safety in visible locations throughout the business premises.[83]
Workplace Safety: No Smoking Signs	Generally speaking, smoking is prohibited in enclosed places of employment in South Dakota.[84] Employers are responsible for informing violators of the smoking ban, where smoking is prohibited. Accordingly, it is recommended that employers post a notice at building entrances and exits to remind individuals that smoking in public places or places of employment is prohibited by law.[85]

3.1(b) *Record-Keeping Requirements*

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

Table 6 summarizes the federal record-keeping requirements.

Table 6. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Age Discrimination in Employment Act (ADEA): Payroll Records	*Covered employers must maintain the following payroll or other records for each employee:* • employee's name, address, and date of birth; • occupation; • rate of pay; and • compensation earned each week.[86]	At least 3 years from the date of entry.
Age Discrimination in Employment Act (ADEA): Personnel Records	*Employers that maintain the following personnel records in the course of business are required by the ADEA to keep them for the specified period of time:* • job applications, resumes, or other forms of employment inquiry, including records pertaining to the refusal to hire any individual;	At least 1 year from the date of the personnel action to which any records relate.

[83] S.D. CODIFIED LAWS § 62-2-11; *see also* S.D. CODIFIED LAWS § 58-20-21 (referencing the need to post as required by section 62-2-11 in the context of annual workplace safety reviews); S.D. ADMIN. R. 47:03:03:01. There is no required format for these postings. The employer may create this poster, obtain a copy from a worker compensation carrier, or may purchase from a vendor. Sample posters are available in English and Spanish at http://dlr.sd.gov/employment_laws/posting_requirements.aspx.

[84] S.D. CODIFIED LAWS § 34-46-15.

[85] S.D. CODIFIED LAWS § 34-46-15 (recommended, as the owner or manager of a place of employment must inform violators of the law).

[86] 29 U.S.C. § 626; 29 C.F.R. § 1627.3(a).

Table 6. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• promotion, demotion, transfer, selection for training, recall, or discharge of any employee; • job orders submitted by the employer to an employment agency or labor organization for recruitment of personnel for job openings; • test papers completed by applicants which disclose the results of any employment test considered by the employer; • results of any physical examination considered by the employer in connection with a personnel action; and • any advertisements or notices relating to job openings, promotions, training programs, or opportunities to work overtime.[87]	
Age Discrimination in Employment (ADEA): Benefit Plan Documents	*Employer must keep on file any:* • employee benefit plans, such as pension and insurance plans; and • copies of any seniority systems and merit systems in writing.[88]	For the full period the plan or system is in effect, and for at least 1 year after its termination.
Title VII & the Americans with Disabilities Act (ADA): Personnel Records	*Employers must preserve any personnel or employment record made, including:* • requests for reasonable accommodation; • application forms submitted by applicants; • other records having to do with hiring, promotion, demotion, transfer, lay-off, or termination; • rates of pay or other terms of compensation; and • selection for training or apprenticeship.[89]	At least 1 year from the date the records were made, or from the date of the personnel action involved, whichever is later.
Title VII & the Americans with Disabilities Act (ADA): Complaints of Discrimination	*When a charge of discrimination has been filed or an action brought against the employer, it must:* • make and keep such records relevant to the determination of whether unlawful employment practices have been or are being committed, including personnel or employment records relating to the aggrieved person and to all other employees holding	Until final disposition of the charge or action (*i.e.*, until the statutory period for bringing an action has

[87] 29 C.F.R. § 1627.3(b).

[88] 29 C.F.R. § 1627.3(b).

[89] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

Table 6. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	positions similar to that held or sought by the aggrieved person; and • retain application forms or test papers completed by unsuccessful applicants or candidates for the position.[90]	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).[91]	Most recent form must be retained for 1 year.
Employee Polygraph Protection Act (EPPA)	*Records pertaining to a polygraph test must be maintained for the specified time period including, but not limited to, the following:* • a copy of the statement given to the examinee regarding the time and place of the examination and the examinee's right to consult with an attorney; • the notice to the examiner identifying the person to be examined; • copies of opinions, reports, or other records given to the employer by the examiner; • where the test is conducted in connection with an ongoing investigation involving economic loss or injury, a statement setting forth the specific incident or activity under investigation and the basis for testing the particular employee; and • where the test is conducted in connection with an ongoing investigation of criminal or other misconduct involving loss or injury to the manufacture, distribution, or dispensing of a controlled substance, records specifically identifying the loss or injury in question and the nature of the employee's access to the person or property that is the subject of the investigation.[92]	At least 3 years following the date on which the polygraph examination was conducted.
Employee Retirement Income Security Act (ERISA)	Employers that sponsor an ERISA-qualified plan must maintain records that provide in sufficient detail the information from which any plan description, report, or certified information filed under ERISA can be verified, explained, or checked for accuracy and completeness. This	At least 6 years after documents are filed or would have been filed but

[90] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[91] 29 C.F.R. § 1602.7.

[92] 29 U.S.C. §§ 2001 *et seq.*; 29 C.F.R. § 801.30.

Table 6. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	includes vouchers, worksheets, receipts, and applicable resolutions.[93]	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).[94]	3 years.
Equal Pay Act: Other	*Covered employers must maintain any additional records made in the regular course of business relating to:* • payment of wages; • wage rates; • job evaluations; • job descriptions; • merit and seniority systems; • collective bargaining agreements; and • other matters which describe any pay differentials between the sexes.[95]	At least 2 years.
Fair Labor Standards Act (FLSA): Payroll Records	*Employers must maintain the following records with respect to each employee subject to the minimum wage and/or overtime provisions of the FLSA:* • full name and any identifying symbol used in place of name on time or payroll records; • home address with zip code; • date of birth, if under 19; • sex and occupation in which employed; • time of day and day of week on which the employee's workweek begins; • regular hourly rate of pay for any workweek in which overtime compensation is due; • basis on which wages are paid (pay interval); • amount and nature of each payment excluded from the employee's regular rate; • hours worked each workday and total hours worked each workweek; • total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation; • total premium pay for overtime hours;	3 years from the last day of entry.

[93] 29 U.S.C. § 1027.

[94] 29 C.F.R. § 1620.32(a).

[95] 29 C.F.R. § 1620.32(b).

Table 6. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• total additions to or deductions from wages paid each pay period, including employee purchase orders or wage assignments; • total wages paid each pay period; • date of payment and the pay period covered by the payment; • records of retroactive payment of wages, including the amount of such payment to each employee, the period covered by the payment, and the date of the payment; and • for employees working on a fixed schedule, the schedule of daily and weekly hours the employee normally works (instead of hours worked each day and each workweek).[96] The record should also indicate for each week whether the employee adhered to the schedule and, if not, show the exact number of hours worked each day each week.	
Fair Labor Standards Act (FLSA): Tipped Employees	*Employers must maintain and preserve all Payroll Records noted above as well as:* • a symbol, letter, or other notation on the pay records identifying each employee whose wage is determined in part by tips; • weekly or monthly amounts reported by the employee to the employer of tips received (*e.g.*, information reported on Internal Revenue Service Form 4070); • amount by which the wages of each tipped employee have been deemed to be increased by tips as determined by the employer (not in excess of the difference between $2.13 and the applicable federal minimum wage); • hours worked each workday in which an employee does not receive tips, and total daily or weekly straight-time payment made by the employer for such hours; and • hours worked each workday in occupations in which the employee receives tips, and total daily or weekly straight-time earnings for such hours.[97]	

[96] 29 C.F.R. §§ 516.2, 516.5.

[97] 29 C.F.R. § 516.28.

Table 6. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Fair Labor Standards Act (FLSA): White Collar Exemptions	*For bona fide executive, administrative, and professional employees and outside sales employees (e.g., white collar employees) the following information must be maintained:* • full name and any identifying symbol used in place of name on time or payroll records; • home address with zip code; • date of birth if under 19; • sex and occupation in which employed; • time of day and day of week on which the employee's workweek begins; • total wages paid each pay period; • date of payment and the pay period covered by the payment; and • basis on which wages are paid in sufficient detail to permit calculation for each pay period of the employee's total remuneration for employment including fringe benefits and prerequisites.[98]	3 years from the last day of entry.
Fair Labor Standards Act (FLSA): Agreements & Other Records	*In addition to payroll information, employers must preserve agreements and other records, including:* • collective bargaining agreements and any amendments or additions; • individual employment contracts or, if not in writing, written memorandum summarizing the terms; • written agreements or memoranda summarizing special compensation arrangements under FLSA sections 7(f) or 7(j); • certain plans and trusts under FLSA section 7(e); • certificates and notices listed or named in the FLSA; and • sales and purchase records.[99]	At least 3 years from the last effective date.
Fair Labor Standards Act (FLSA): Other Records	*In addition to other FLSA requirements, employers must preserve supplemental records, including:* • basic time and earning cards or sheets; • wage rate tables; • order, shipping, and billing records; and • records of additions to or deductions from wages.[100]	At least 2 years from the date of last entry.

[98] 29 C.F.R. §§ 516.2, 516.3. Presumably the regulation's reference to "prerequisites" is an error and should refer to "perquisites."

[99] 29 C.F.R. § 516.5.

[100] 29 C.F.R. § 516.6.

Table 6. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Family and Medical Leave Act (FMLA)	*Covered employers must make, keep, and maintain records pertaining to their compliance with the FMLA, including:* • basic payroll and identifying employee data, including name, address, and occupation; • rate or basis of pay and terms of compensation; • daily and weekly hours per pay period; • additions to or deductions from wages and total compensation paid; • dates FMLA leave is taken by FMLA-eligible employees (leave must be designated in records as FMLA leave, and leave so designated may not include leave required under state law or an employer plan not covered by FMLA); • if FMLA leave is taken in increments of less than one full day, the hours of the leave; • copies of employee notices of leave furnished to the employer under the FMLA, if in writing; • copies of all general and specific notices given to employees in accordance with the FMLA; • any documents that describe employee benefits or employer policies and practices regarding the taking of paid and unpaid leave; • premium payments of employee benefits; and • records of any dispute between the employer and an employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and the disagreement. *Covered employers with no eligible employees must only maintain the following records:* • basic payroll and identifying employee data, including name, address, and occupation; • rate or basis of pay and terms of compensation; • daily and weekly hours worked per pay period; • additions to or deductions from wages; and • total compensation paid. *Covered employers in a joint employment situation must keep all the records required in the first series with respect to any primary employees, and must keep the records*	At least 3 years.

Table 6. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	required by the second series with respect to any secondary employees. *Also, if an FMLA-eligible employee is not subject to the FLSA record-keeping requirements for minimum wage and overtime purposes (i.e., not covered by, or exempt from FLSA) an employer does not need to keep a record of actual hours worked, provided that:* • FMLA eligibility is presumed for any employee employed at least 12 months; and • with respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written, maintained record. *Medical records also must be retained.* Specifically, records and documents relating to certifications, re-certifications, or medical histories of employees or employees' family members, created for purposes of FMLA, must be maintained as confidential medical records in separate files/records from the usual personnel files. If the ADA is also applicable, such records must be maintained in conformance with ADA-confidentially requirements (subject to exceptions). If the Genetic Information Nondiscrimination Act of 2008 (GINA) is applicable, records and documents created for purposes of FMLA containing family medical history or genetic information as defined in GINA must be maintained in accordance with the confidentiality requirements of Title II of GINA.[101]	
Federal Insurance Contributions Act (FICA)	*Employers must keep FICA records, including:* • copies of any return, schedule, or other document relating to the tax; • records of all remuneration (cash or otherwise) paid to employees for employment services. The records must show with respect to each employee receiving such remuneration:	At least 4 years after the date the tax is due or paid, whichever is later.

[101] 29 U.S.C. § 2616; 29 C.F.R. § 825.500.

Table 6. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	▪ name, address, and account number of the employee and additional information when the employee does not provide a Social Security card; ▪ total amount and date of each payment of remuneration (including any sum withheld as tax or for any other reason) and the period of services covered by such payment; ▪ amount of each such remuneration payment that constitutes wages subject to tax; ▪ amount of employee tax, or any amount equivalent to employee tax, collected with respect to such payment, and, if collected at a time other than the time such payment was made, the date collected; and ▪ if the total remuneration payment and the amount thereof which is taxable are not equal, the reason for this; • the details of each adjustment or settlement of taxes under FICA; and • records of all remuneration in the form of tips received by employees, employee statements of tips under section 6053(a) (unless otherwise maintained), and copies of employer statements furnished to employees under section 6053(b).[102]	
Immigration	Employers must retain all completed Form I-9s.[103]	3 years after the date of hire or 1 year following the termination of employment, whichever is later.
Income Tax: Accounting Records	*Any taxpayer required to file an income tax return must maintain accounting records that will enable the filing of tax returns correctly stating taxable income each year, including:* • regular books of account or records, including inventories, sufficient to establish the amount of gross income, deductions, credits, or other matters required	Required to be maintained for "so long as the contents [of the records] may become material in the

[102] 26 C.F.R. §§ 31.6001-1, 31.6001-2.

[103] 8 C.F.R. § 274a.2.

Table 6. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	to be shown by such person in any return of such tax or information.[104]	administration of any internal revenue law;" this could be as long as 15 years in some cases.
Income Tax: Employee Payment Records	*Employers are required to maintain records reflecting all remuneration paid to each employee, including:* • employee's name, address, and account number; • total amount and date of each payment; • the period of services covered by the payment; • the amount of remuneration that constitutes wages subject to withholding; • the amount of tax collected and, if collected at a time other than the time the payment was made, the date collected; • an explanation for any discrepancy between total remuneration and taxable income; • the fair market value and date of each payment of noncash remuneration for services performed as a retail commissioned salesperson; and • other supporting documents relating to each employee's individual tax status.[105]	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.[106]	As long as it is in effect and at least 4 years thereafter.
Unemployment Insurance	*Employers are required to maintain all relevant records under the Federal Unemployment Tax Act, including:* • total amount of remuneration paid to employees during the calendar year for services performed; • amount of such remuneration which constitutes wages subject to taxation; • amount of contributions paid into state unemployment funds, showing separately the payments made and not deducted from the remuneration of its employees, and	At least 4 years after the later of the date the tax is due or paid for the period covered by the return.

[104] 26 U.S.C. § 3402; 26 C.F.R. § 1.6001-1.

[105] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

[106] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

Table 6. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	payments made and deducted or to be deducted from employee remuneration; • information required to be shown on the tax return and the extent to which the employer is liable for the tax; • an explanation for any discrepancy between total remuneration paid and the amount subject to tax; and • the dates in each calendar quarter on which each employee performed services not in the course of the employer's trade or business, and the amount of the cash remuneration paid for those services.[107]	
Workplace Safety / the Fed-OSH Act: Exposure Records	*Employers must preserve and retain employee exposure records, including:* • environmental monitoring or measuring of a toxic substance or harmful physical agent, including personal, area, grab, wipe, or other form of sampling, as well as related collection and analytical methodologies, calculations, and other background data relevant to an interpretation of the results obtained; • biological monitoring results which directly assess the absorption of a toxic substances or harmful physical agent by body specimens; and • Material Safety Data Sheets (MSDSs), or in the absence of these documents, a chemical inventory or other record reveling the identity of a toxic substances or harmful physical agent and where and when the substance or agent was used. *Exceptions to this requirement include:* • background data to workplace monitoring need only be retained for 1 year provided that the sampling results, collection methodology, analytic methods used, and a summary of other background data is maintained for 30 years; • MSDSs need not be retained for any specified time so long as some record of the identity of the substance, where it was used and when it was used is retained for at least 30 years; and	At least 30 years.

[107] 26 C.F.R. § 31.6001-4.

Table 6. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• biological monitoring results designated as exposure records by a specific Fed-OSH Act standard should be retained as required by the specific standard.[108]	
Workplace Safety / the Fed-OSH Act: Medical Records	*Employers must preserve and retain "employee medical records," including:* • medical and employment questionnaires or histories; • results of medical examinations and laboratory tests; • medical opinions, diagnoses, progress notes, and recommendations; • first aid records; • descriptions of treatments and prescriptions; and • employee medical complaints. *"Employee medical record" does not include:* • physical specimens; • records of health insurance claims maintained separately from employer's medical program; • records created solely in preparation for litigation that are privileged from discovery; • records concerning voluntary employee assistance programs, if maintained separately from the employer's medical program and its records; and • first aid records of one-time treatment which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job, if made on-site by a nonphysician and maintained separately from the employer's medical program and its records.[109]	Duration of employment plus 30 years.
Workplace Safety: Analyses Using Medical and Exposure Records	*Employers must preserve and retain analyses using medical and exposure records*, including any compilation of data, or other study based on information collected from individual employee exposure or medical records, or information collected from health insurance claim records, provided that the analysis has been provided to the employer or no further work is being done on the analysis.[110]	At least 30 years.

[108] 29 C.F.R. § 1910.1020(d).

[109] 29 C.F.R. § 1910.1020(d).

[110] 29 C.F.R. § 1910.1020(d).

Table 6. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Workplace Safety: Injuries and Illnesses	*Employers must preserve and retain records of employee injuries and illnesses, including:* • OSHA 300 Log; • the privacy case list (if one exists); • the Annual Summary; • OSHA 301 Incident Report; and • old 200 and 101 Forms.[111]	5 years following the end of the calendar year that the record covers.
Additional record-keeping requirements apply to government contractors. The list below, while nonexhaustive, highlights some of these obligations.		
Affirmative Action Programs (AAP)	*Contractors required to develop written affirmative action programs must maintain:* • current AAP and documentation of good faith effort; and • AAP for the immediately preceding AAP year and documentation of good faith effort.[112]	Immediately preceding AAP year.
Equal Employment Opportunity: Personnel & Employment Records	*Government contractors covered by Executive Order No. 11246 and those required to provide affirmative action to persons with disabilities and/or disabled veterans and veterans of the Vietnam Era must retain the following records:* • records pertaining to hiring, assignment, promotion, demotion, transfer, lay off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship; • other records having to do with requests for reasonable accommodation, the results of any physical examination, job advertisements and postings, applications, resumes; and • any and all expressions of interest through the internet or related electronic data technologies as to which the contractor considered the individual for a particular position, such as on-line resumes or internal resume databases, records identifying job seekers contacted regarding their interest in a particular position, regardless of whether the individual qualifies as an internet applicant under 41 C.F.R. § 60–1.3, tests and test results, and interview notes;	3 years recommended; regulations state "not less than two years from the date of the making of the record or the personnel action involved, whichever occurs later." If the contractor has fewer than 150 employees or does not have a contract of at least $150,000, the minimum retention period is one year from

[111] 29 C.F.R. §§ 1904.33, 1904.44.

[112] 41 C.F.R. § 60-1.12(b).

Table 6. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	▪ for purposes of record keeping with respect to internal resume databases, the contractor must maintain a record of each resume added to the database, a record of the date each resume was added, the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used and the date of the search; ▪ for purposes of record keeping with respect to external resume databases, the contractor must maintain a record of the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used, the date of the search, and the resumes of job seekers who met the basic qualifications for the particular position who are considered by the contractor). *Additionally, for any record the contractor maintains pursuant to 41 C.F.R. § 60-1.12, it must be able to identify:* • gender, race, and ethnicity of each employee; and • where possible, the gender, race, and ethnicity of each applicant or internet applicant.[113]	the date of making the record or the personnel action, whichever occurs later.
Equal Employment Opportunity: Complaints of Discrimination	*Where a complaint of discrimination has been filed, an enforcement action commenced, or a compliance review initiated, employers must maintain:* • personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person; and • application forms or test papers completed by unsuccessful applicants and candidates for the same position as the aggrieved person applied and was rejected.[114]	Until final disposition of the complaint, compliance review or action.
Minimum Wage Under Executive Orders Nos. 13658 (contracts	*Covered contractors and subcontractors performing work must maintain for each worker:* • name, address, and Social Security number; • occupation(s) or classification(s);	3 years.

[113] 41 C.F.R. §§ 60-1.12, 60-300.80, and 60-741.80.

[114] 41 C.F.R. §§ 60-1.12, 60-741.80.

Table 6. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
entered into on or after January 1, 2015), 14026 (contracts entered into on or after January 30, 2022)	• rate or rates of wages paid; • number of daily and weekly hours worked; • any deductions made; and • total wages paid. These records must be available for inspection and transcription by authorized representatives of the Wage and Hour Division (WHD) of the U.S. Department of Labor. The contractor must also permit authorized representatives of the WHD to conduct interviews with workers at the worksite during normal working hours.[115]	
Paid Sick Leave Under Executive Order No. 13706	*Contractors and subcontractors performing work subject to Executive Order No. 13706 must keep the following records:* • employee's name, address, and Social Security number; • employee's occupation(s) or classification(s); • rate(s) of wages paid (including all pay and benefits provided); • number of daily and weekly hours worked; • any deductions made; • total wages paid (including all pay and benefits provided) each pay period; • a copy of notifications to employees of the amount of accrued paid sick leave; • a copy of employees' requests to use paid sick leave (if in writing) or (if not in writing) any other records reflecting such employee requests; • dates and amounts of paid sick leave used by employees (unless a contractor's paid time off policy satisfies the EO's requirements, leave must be designated in records as paid sick leave pursuant to the EO); • a copy of any written responses to employees' requests to use paid sick leave, including explanations for any denials of such requests; • any records relating to the certification and documentation a contractor may require an employee to provide, including copies of any certification or documentation provided by an employee;	During the course of the covered contract as well as after the end of the contract.

[115] 29 C.F.R. § 23.260.

Table 6. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• any other records showing any tracking of or calculations related to an employee's accrual and/or use of paid sick leave; • the relevant covered contract; • the regular pay and benefits provided to an employee for each use of paid sick leave; and • any financial payment made for unused paid sick leave upon a separation from employment intended to relieve a contractor from its reinstatement obligation.[116]	
Davis-Bacon Act	*Davis-Bacon Act contractors or subcontractors must maintain the following records with respect to each employee:* • name, address, and Social Security number; • work classification; • hourly rates of wages paid (including rates of contributions or costs anticipated for *bona fide* fringe benefits or cash equivalents); • daily and weekly number of hours worked; and • deductions made and actual wages paid. *Contractors employing apprentices or trainees under approved programs must maintain written evidence of:* • registration of the apprenticeship programs; • certification of trainee programs; • the registration of the apprentices and trainees; • the ratios and wage rates prescribed in the program; and • worker or employee employed in conjunction with the project.[117]	At least 3 years after the work.
Service Contract Act	*Service Contract Act contractors or subcontractors must maintain the following records with respect to each employee:* • name, address, and Social Security number; • work classification; • rates of wage; • fringe benefits; • total daily and weekly compensation;	At least 3 years from the completion of the work records containing the information.

[116] 29 C.F.R. § 13.25.

[117] 29 C.F.R. § 5.5.

Table 6. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• the number of daily and weekly hours worked; • any deductions, rebates, or refunds from daily or weekly compensation; • list of wages and benefits for employees not included in the wage determination for the contract; • any list of the predecessor contractor's employees which was furnished to the contractor by regulation; and • a copy of the contract.[118]	
Walsh-Healey Act	*Walsh-Healey Act supply contractors must keep the following records:* • wage and hour records for covered employees showing wage rate, amount paid in each pay period, hours worked each day and week; • the period in which each employee was engaged on a government contract and the contract number; • name, address, sex, and occupation; • date of birth of each employee under 19 years of age; and • a certificate of age for employees under 19 years of age.[119]	At least 3 years from the last date of entry.

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

Table 7 summarizes the state record-keeping requirements.

Table 7. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Fair Employment Practice: Equal Pay	*Every employer with more than 25 employees must make, keep, and maintain records of:* • wage and wage rates; • job classifications; and • other terms and conditions of employment.[120]	For a reasonable period of time.

[118] 29 C.F.R. § 4.6.

[119] 41 C.F.R. § 50-201.501.

[120] S.D. CODIFIED LAWS § 60-12-17.

Table 7. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Income Tax	The taxpayer must retain the confirmation number they receive from the operator or internet filing in an ETF and ETP transaction.[121]	At least 3 years.
Unemployment Compensation	*Employers must maintain payroll records that show the following:* • each employee's name and Social Security number; • the point at which services were performed by the employee; • the number of hours employed in each week and the wages paid for the week; • date of hire, rehire, or return to work after a temporary layoff; • time lost, if any, by each employee due to unavailability for work; • the date and reason each employee was separated from employment; • the hours worked and the wages received for services in exempt employment; and • total wages paid to each employee during each calendar quarter, showing: money wages; cash value of other remuneration including gratuities and tips; and deductions from wages for expenses incurred by each employee.[122]	4 years.
Workers' Compensation: Injury Records	Every covered employer must keep records of all injuries, fatal or otherwise, sustained by employees in the course of course of their employment.[123]	At least 4 years from the date of injury.
Workers' Compensation: Payroll Records	*All books, records, and payrolls of employers covered under the workers' compensation law, which show or refer to the amount of wage expenditure of the employer, must be open for inspection by the Department of Labor and Regulation, for the purpose of determining the correctness of:* • wage expenditure; • the number of employees; and • any other information necessary to administer the workers' compensation provisions.[124]	None specified.

[121] S.D. ADMIN. R. 64:01:01:27.

[122] S.D. CODIFIED LAWS § 61-3-2; S.D. ADMIN. R. 47:06:02:01.

[123] S.D. CODIFIED LAWS § 62-6-1.

[124] S.D. CODIFIED LAWS § 62-6-4.

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*

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

3.2 Privacy Issues for Employees

3.2(a) *Background Screening of Current Employees*

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

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

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

South Dakota has no statutory guidelines on criminal, credit, or social media screenings of current employees. For more information on background screenings, see **1.3**.

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

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

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

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

South Dakota does not have a drug and alcohol testing law that applies generally to private employers.

3.2(c) *Marijuana Laws*

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

Under federal law, it is illegal to possess or use marijuana.[125]

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

At the November 2020 election, voters approved medical[126] and recreational[127] ballot measures. However, the state supreme court affirmed a state trial court judge's grant of summary judgment to parties challenging the recreational marijuana ballot measure amending the state constitution.[128] Per the judge, the measure was unconstitutional because it violated the single-subject rule and therefore was void and had no effect. Additionally, because the measure had to be submitted to voters through the constitutional convention process, but had not been, the failure to do so voided the amendment and had no effect.

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[125] 21 U.S.C. §§ 811-12, 841 *et seq*.

[126] S.D. Initiated Measure 26 (2020); S.D. CODIFIED LAWS §§ 34-20G-1 *et seq*.

[127] S.D. Const. amend. A.

[128] *Thom v. Barnett*, 2021 WL 641591 (S.D. Cir. Feb. 8, 2021), *affirmed*, 967 N.W.2d 261 (S.D. 2021).

Under the medical marijuana law, a registered qualifying patient who uses cannabis for a medical purpose must be afforded all the same rights under state and local law as the person would be afforded if solely prescribed a pharmaceutical medication, as it pertains to any interaction with a person's employer, and drug testing by a person's employer.[129] However, an employer need not allow ingestion, possession, transfer, or transportation of cannabis in the workplace or allow any employee to work while under the influence of cannabis.[130] Under the law, undertaking any task under the influence of cannabis, when doing so would constitute negligence or professional malpractice, is unlawful.[131] The law allows an employer to establish and enforce a drug-free workplace policy that includes a drug-testing program for applicants and employees. **Effective July 1, 2024**, the amended law does not create a private cause of action for employment discrimination or wrongful termination arising from an employer's enforcement of a drug-free workplace policy that complies with the law.[132]

Additionally, employees cannot perform any safety-sensitive job under the influence of cannabis; the law defines *safety-sensitive job* as "any position with tasks or duties that an employer reasonably believes could: (a) Cause the illness, injury, or death of an individual; or (b) Result in serious property damage," and *under the influence of cannabis* as "any abnormal mental or physical condition that tends to deprive a person of clearness of intellect and control that the person would otherwise possess, as the result of consuming any degree of cannabis or cannabis products."[133] **Effective July 1, 2024**, if a person is employed in or seeking employment in a safety sensitive job, the amended law does not prohibit adverse employment actions nor an employer's refusal to hire the person where the adverse employment action or the refusal to hire is based solely on a positive test result for cannabis metabolites.[134]

Note that the rights the law provides do not apply to the extent they conflict with an employer's obligations under federal law or regulations or to the extent they would disqualify an employer from a monetary or licensing-related benefit under federal law or regulation.[135] The law does not require a private health insurer, workers' compensation insurance carrier, or self-insured employer providing workers' compensation benefits is not required to reimburse a person for costs associated with medical cannabis use.[136]

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

[129] S.D. CODIFIED LAWS § 34-20G-22.

[130] S.D. CODIFIED LAWS § 34-20G-24, 34-20G-28.

[131] S.D. CODIFIED LAWS § 34-20G-18.

[132] S.D. CODIFIED LAWS § 34-20G-24 (as amended by S.B. 12 (S.D. 2024)).

[133] S.D. CODIFIED LAWS § 34-20G-1.

[134] S.D. CODIFIED LAWS §§ 34-20G-22 (as amended by S.B. 12 (S.D. 2024)).

[135] S.D. CODIFIED LAWS § 34-20G-23.

[136] S.D. CODIFIED LAWS § 34-20G-27.

include the value of the identity protection services in the employee's gross income and wages.

- An individual whose personal information may have been compromised in a data breach is not required to include in their gross income the value of the identity protection services.
- The value of the provided identity theft protection services is not required to be reported on an information return (such as Form W-2 or Form 1099-MISC) filed with respect to affected employees.[137]

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.[138]

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

South Dakota law requires, following discovery of a data security breach, the information holder to disclose the breach to any resident whose personal or protected information was, or is reasonably believed to have been acquired by an unauthorized person. However, an entity is not required to make a disclosure if, following an appropriate investigation and notice to the state attorney general, the information holder reasonably determines that the breach will not likely result in harm to the affected residents. The information holder is required to document the no-harm determination in writing and maintain the documentation for not less than three years.

Covered Entities. The data security breach law covers any person or business that conducts business in South Dakota and that owns or licenses computerized personal or protected information of South Dakota residents. Exceptions include:

- any entity that is subject to and complies with title V of the Gramm-Leach-Bliley Act; and
- entities covered under and in compliance with federal HIPAA laws and regulations.

Personal Information is defined as an individual's first name or first initial and last name, in combination with any one or more of the following: (1) Social Security number; (2) driver's license number or other unique identification number created or collected by the government; (3) account, credit card, or debit card number in combination with any required security code, password, routing number, PIN, or any other additional information required to access a person's financial account; (4) health information; or (5) an identification number assigned to a person by the person's employer in combination with any required security code, access code, password, or biometric data generated from measurements or analysis of human body characteristics for authentication purposes.

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[137] 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.

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

Protected information, is also protected and includes a username or email address, in combination with a password, security question answer, or other information that permits access to an online account and account number or credit or debit card number, in combination with any required security code, access code, or password that permits access to a person's financial account. Exceptions to these definitions include data that is lawfully made available to the general public from federal, state, or local government records, data the is encrypted and the encryption key has not been compromised, or data that has been redacted.

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

- written notice;
- electronic notice, if the notice is consistent with federal provisions or if the information holder's primary method of communication with the resident has been by electronic means; or
- substitute notice if it is demonstrated that:
  - the cost of notice would exceed $250,000;
  - the affected number exceeds 500,000 people; or
  - the person does not have sufficient contact information.

Substitute notice must consist of the following:

- email notice, if the information holder has an email address for the subject persons;
- conspicuous posting of the notice on the information holder's website, if the information holder maintains a website; and
- notification to statewide media.

Exception. The law provides an exception for a covered entity who, maintains and complies with a notification procedure as part of an information security policy for the treatment of personal information, is compliant with this statute. The policy must afford the same or greater protection to the affected individuals as this statute.

Timing of Notice. Notice must be given within 60 days of the discovery of the breach unless a longer period of time is required due to the legitimate needs of law enforcement. If the notification is delayed, the notification must be made not later than 30 days after the law enforcement agency determines that notification will not compromise the criminal investigation.

The statute also requires the entity to notify, without unreasonable delay, all consumer reporting agencies and any other credit bureau or agency that compiles and maintains files on consumers on a nationwide basis, of the timing, distribution, and content of the notice. Further, any breach involving more than 250 residents must be disclosed to the state Attorney General by mail or electronically.

Penalties. The attorney general may prosecute each failure to disclose a data security breach as a deceptive act or practice. In addition to any remedy provided by law, the attorney general may bring an action to recover on behalf of the state a civil penalty of not more than $10,000 per day per violation. The attorney general may also recover attorney's fees and any costs associated with any action brought under this section.

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.[139] 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.[140]

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.[141]

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.[142]

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

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[139] 29 U.S.C. § 218(a).

[140] 29 U.S.C. § 206.

[141] 29 U.S.C. §§ 203, 206.

[142] 29 U.S.C. § 3(m)(2)(B).

[143] 29 U.S.C. § 207.

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

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

The minimum wage in South Dakota is $11.20 per hour for most nonexempt employees. The minimum wage is indexed annually to inflation, but in no case can it be decreased, *e.g.*, on January 1, 2025, it will increase to $11.50.[144]

3.3(b)(ii) *Tipped Employees*

Tipped employees are paid differently. If an employee earns tips, the minimum cash wage that a tipped employee must be paid is $5.60 per hour (50% of the minimum wage). Therefore, an employer may take a maximum tip credit of $5.60 per hour. Note that if an employee does not make $5.60 in tips per hour the employer must make up the difference between the wage actually made and the minimum wage. 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.[145] On January 1, 2025, both rates will increase to $5.75.

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

South Dakota's minimum wage provisions do not apply to the following workers:

- babysitters;
- outside salespersons; and
- employees employed by an amusement or recreational establishment, an organized camp, or a religious or nonprofit educational conference center if one of the following apply:
  - the establishment, camp, or center does not operate for more than seven months in any calendar year; or
  - during the preceding calendar year, the average receipts of the establishment, camp, or center for any six months of the calendar year were not more than 33 ⅓% of its average receipts for the other six months of the year.[146]

South Dakota also permits payment of a subminimum wage in limited circumstances. An employee who is under 20 years of age may be paid a training wage known as an *opportunity wage*.[147] If an employer obtains a permit from the South Dakota Department of Labor and Regulation, the employer may pay subminimum wage to an apprentice, a person learning the business or work in which employed, or a person with a developmental disability.[148]

3.3(c) *State Guidelines on Overtime Obligations*

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

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[144] S.D. CODIFIED LAWS § 60-11-3.

[145] S.D. CODIFIED LAWS §§ 60-11-3, 60-11-3.1.

[146] S.D. CODIFIED LAWS § 60-11-3.

[147] S.D. CODIFIED LAWS § 60-11-4.1.

[148] S.D. CODIFIED LAWS § 60-11-5.

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.[149] 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.[150]

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.[151] 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.[152] 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.[153] Exemptions apply for smaller employers and air carriers.[154]

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

[149] 29 C.F.R. § 785.19.

[150] 29 C.F.R. § 785.18.

[151] 29 U.S.C. § 218d.

[152] 29 U.S.C. § 218d(b)(2).

[153] 29 U.S.C. § 218d(a).

[154] 29 U.S.C. § 218d(c), (d).

medical conditions.[155] Lactation is considered a related medical condition.[156] 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.[157] 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 South Dakota.

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

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

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

South Dakota exempts breast feeding from its public indecency statutes.[158] Additionally, a mother may breast feed her child in any public or private location where she and child are otherwise authorized to be present if the mother complies with all other state and municipal laws. Although the law does not specifically mention employers, it can be construed to include places of employment.

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.[159] 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."[160]

As a general rule, employee work time is compensable if expended for the employer's benefit, if controlled by the employer, or if allowed by the employer. All time spent in an employee's principal duties and all time spent in essential ancillary activities must be counted as work time. An employee's *principal duties* include an employee's productive tasks. However, the phrase is expansive enough to encompass not only those tasks an employee is employed to perform, but also tasks that are an "integral and indispensable" part of the principal activities. For more information on this topic, including information on whether time

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[155] 42 U.S.C. § 2000gg–1.

[156] 29 C.F.R. § 1636.3.

[157] 29 C.F.R. § 1636.3.

[158] S.D. CODIFIED LAWS § 22-22-24.1.

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

[160] *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").

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*

South Dakota 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.[161] 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.[162] 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. South Dakota restricts the employment of minors under age 16 by age and by the type of job (see Table 8). Note that South Dakota law contains prohibitions for children 15 years and younger, 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 8. State Restrictions on Type of Employment by Age

Age Range	Restrictions
Under Age 16	Minors under age 16 cannot work in any occupation dangerous to life, health, or morals, or in any manner be exploited by any employer.[163] However, minors over age 14 *may be employed* to dispense gasoline, gasohol, diesel fuel, and oil at gasoline service establishments.[164]

[161] 29 C.F.R. §§ 570.36, 570.50.

[162] 29 C.F.R. § 570.6.

[163] S.D. CODIFIED LAWS § 60-12-3.

[164] S.D. CODIFIED LAWS § 60-12-3.

Table 8. State Restrictions on Type of Employment by Age	
Age Range	**Restrictions**
Under Age 14	Minors under age 14 cannot be employed at any time in any factory or workshop, or about any mine.[165]

Restrictions on Selling or Serving Alcohol. On-sale licensees cannot permit anyone under age 21 to sell, serve, dispense or consume alcoholic beverages on its premises. However, certain on-sale licensees may permit individuals age 18 or older to sell and serve or dispense alcoholic beverages (including taking orders and delivering drinks as a part of waiting tables, but not including tending bar or mixing drinks) if not less than 50% of the gross business transacted is from the sale of food and the licensee or an employee that is at least age 21 is on the premises when the beverage is sold or dispensed.

On-sale or off-sale licensees cannot permit anyone under age 21 to sell, serve, dispense, or consume alcoholic beverages on its premises.[166] However, certain on-sale licensees may permit individuals age 18 or older to sell and serve alcoholic beverages if less than 50% of the gross business transacted is from the sale of alcoholic beverages or the licensee or an employee who is at least age 21 is on the premises when the beverage is sold or dispensed.[167]

Seating Requirements for Minors. In mercantile or manufacturing establishments, and hotels and restaurants where minors work, suitable seats must be maintained in the room where minors work and use of seats must be permitted as may be necessary to preserve minors' health.[168]

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

In South Dakota, minors under age 16 cannot work:

- more than four hours on a school day;
- more than eight hours on a nonschool day;
- more than 20 hours in a school week;
- more than 40 hours a week in a nonschool week; or
- after 10:00 P.M. in any day that precedes a school day.[169]

Minors under 14 cannot be employed in any mercantile establishment (except during hours when public schools are not in session, and in no case after 7:00 P.M.).[170]

[165] S.D. CODIFIED LAWS § 60-12-2.

[166] S.D. CODIFIED LAWS §§ 35-4-79, 35-4-79.1.

[167] S.D. CODIFIED LAWS §§ 35-4-79, 35-4-79.1.

[168] S.D. CODIFIED LAWS §§ 60-12-3, 60-12-5, and 60-12-9.

[169] S.D. CODIFIED LAWS §§ 60-12-1, 60-12-1.1.

[170] S.D. CODIFIED LAWS § 60-12-2.

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

At the state labor department's discretion, minors under 16 who would otherwise be barred from employment may be authorized to work when it appears that the labor is necessary for their support or that of their family.[171]

The restrictions on employment of minors under age 16 does not apply to minors employed by their parents or to minors who have successfully completed a safety course and received a license, permit, or certificate from a state or federal agency to operate agricultural equipment or otherwise to be employed in any occupation in an agricultural occupation within the scope of the license, permit, or certificate.[172]

The maximum hour restrictions do not apply to emancipated minors under age 16, minors employed as actors or performers, or minors involved in the rouging or detasselling of hybrid seedcorn.[173]

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

There are no general employment certificate or work permit requirements in South Dakota. However, work permits may be provided to minors under age 16 who would otherwise be barred from employment but have been authorized to work by the state labor department. Employers must keep a list of all such employed minors, as well as any corresponding permits.[174]

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

The South Dakota Department of Labor and Regulation enforces the state's child labor laws. All places where minors are employed and whose employment is in any manner regulated by these statutes is at all times subject to visitation and inspection by the department.[175] The employment of a minor in violation of the South Dakota child labor laws is a Class 2 misdemeanor.[176]

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).[177]

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[171] S.D. CODIFIED LAWS § 60-12-5.

[172] S.D. CODIFIED LAWS § 60-12-3.

[173] S.D. CODIFIED LAWS § 60-12-1.

[174] S.D. CODIFIED LAWS §§ 60-12-5, 60-12-6.

[175] S.D. CODIFIED LAWS §§ 60-12-11, 60-12-13.

[176] S.D. CODIFIED LAWS §§ 60-12-1 to 60-12-9.

[177] 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").

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.[178]

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.[179]

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.[180] 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.[181]

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

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

[179] 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.

[180] 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/.

[181] 12 C.F.R. § 1005.2(b)(3)(i)(A).

statement regarding state-required information or other fee discounts or waivers.[182] 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.[183]

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.[184]

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.[185]

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

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

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

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

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

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

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

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[182] 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.

[183] 12 C.F.R. § 1005.18.

[184] *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.

[185] 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)(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.[186] 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.[187] Accordingly, among other items, an employer may be required to reimburse an employee for expenses related to work uniforms,[188] tools and equipment,[189] and business transportation and travel.[190] 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.[191]

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;[192]
- 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);[193]
- 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);[194]
- 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;

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[186] *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).

[187] 29 C.F.R. §§ 531.35, 531.36, and 531.37.

[188] 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.

[189] 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).

[190] 29 C.F.R. § 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c04.

[191] 29 C.F.R. § 778.217.

[192] 29 C.F.R. § 531.38.

[193] 29 C.F.R. § 531.39. The amount subject to withholding is governed by the federal Consumer Credit Protection Act. 15 U.S.C. §§ 1671 *et seq*.

[194] 29 C.F.R. § 531.40.

  - 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;[195]
- 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;[196] 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.[197]

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.[198]

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.[199] 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.[200]

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

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[195] 29 C.F.R. § 531.40.

[196] 29 U.S.C. § 203. However, the cost cannot be treated as wages if prohibited under a collective bargaining agreement.

[197] 29 C.F.R. § 825.213.

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

[199] 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.

[200] 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.

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.[201]

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.[202]

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.[203]

3.7(b) *State Guidelines on Wage Payment*

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

Authorized Instruments. South Dakota employers may pay wages in cash, by check, or direct deposit, unless an employer and employee agree to another form of payment.[204]

Direct Deposit. Mandatory direct deposit is permitted in South Dakota. An employer may pay wages to employees by direct deposit unless the employer and employee agree to another form of payment.[205]

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

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

An employer must pay its employees at least once each calendar month, unless otherwise provided by law, or on regular paydays designated in advance by the employer.[206] Thus, an employer may also elect to pay its employees on a semi-monthly basis.

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

Employees who quit or are discharged must receive their unpaid wages no later than the next regular pay day for which those hours would normally have been paid, or, if an employee possesses company property on that date, wages can be paid when the property is returned.[207] Employers are cautioned, however,

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[201] 29 C.F.R. § 531.36.

[202] 29 C.F.R. § 531.37.

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

[204] S.D. CODIFIED LAWS § 60-11-9.

[205] S.D. CODIFIED LAWS § 60-11-9.

[206] S.D. CODIFIED LAWS § 60-11-9.

[207] S.D. CODIFIED LAWS §§ 60-11-10, 60-11-11.

that withholding an employee's final paycheck while awaiting the return of company property is likely to violate the federal FLSA.

If work is suspended due to a labor dispute, unpaid wages and compensation must be paid on the next regular payday without abatement or reduction.[208]

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

South Dakota 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 Form W-2s once a year, the law does not generally require statements with each wage payment.

3.7(b)(v) *Wage Transparency*

South Dakota 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 South Dakota 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*

An employer must indemnify an employee for all the employee's necessarily expends or loses as a direct consequence of discharging employment duties.[209] Despite this general indemnity provision, South Dakota law does not expressly address how uniform, tool, equipment, and other 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*

South Dakota law contains no express provisions governing wage deductions.

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

Orders of Support. An employer must comply with a court order requiring withholding from an employee's wages for child support. The employer must begin the withholding starting with the first pay period after service of the order of support and must transmit the amount withheld to the North Dakota Department of Social Services within seven business days of each payday.[210] The amount withheld for support may not exceed 50% of an employee's wages, salaries, commissions, bonuses, compensation as an independent contractor, workers' compensation, reemployment assistance, unemployment compensation, or disability benefits.[211] In addition to the amount designated in the order for withholding,

[208] S.D. CODIFIED LAWS § 60-11-12.

[209] S.D. CODIFIED LAWS § 60-2-1.

[210] S.D. CODIFIED LAWS § 25-7A-34.

[211] S.D. CODIFIED LAWS § 25-7A-32.

the employer may also deduct an administrative fee of up to $3 per month to cover the expenses involved in transmitting the amount withheld.[212]

If the employee's employment terminates, the employer must "cooperate in providing information" to assist in the enforcement of the support order, including the employee's last known address and the name and address of any new employer, if known.[213] An employer cannot discharge, discipline, or otherwise discriminate against an employee because the employee's wages are subject to an income withholding order.[214]

Debt Collection. Upon being served with a writ of garnishment against an employee's wages, the employer must complete the affidavit attached to the writ and submit this response within 30 days.[215] The affidavit serves to verify that the employee is in fact employed and owed wages by the employer.[216] State law limits the disposable earnings subject to garnishment for any workweek to the lesser of:

- 20% of disposable earnings for that workweek; or
- the amount by which the employee's disposable earnings for that workweek exceed 40 times the federal minimum wage, or the applicable state minimum wage if that amount is greater or, in the case of earnings for any pay period other than a week, any equivalent multiple thereof under South Dakota regulations in effect at the time the earnings are payable, less $25 a week for each dependent family member residing with the employee who is subject to the garnishment.[217]

A writ of garnishment remains in effect for 120 days. If the writ is for a continuing lien on the employee's wages, the employer must continue to withhold wages as they accrued through the last payroll period ending on or before 120 days from the date of service, until the garnishment amount is satisfied, or until the employment relationship ends, whichever occurs first.[218]

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

The South Dakota Department of Labor and Regulation enforces the state's minimum wage and wage payment laws.[219] An employee asserting violations of the minimum wage or wage payment laws may file an administrative claim with the department, which is authorized to investigate and resolve the claim.[220] The employee may alternatively elect to file a civil action to recover unpaid or underpaid wages; such actions must be filed within two years of the alleged violation.[221] If the employer is found to have been oppressive, fraudulent, or malicious in the failure to pay wages due to the employee, the measure of

[212] S.D. CODIFIED LAWS § 25-7A-34.

[213] S.D. CODIFIED LAWS § 25-7A-36.

[214] S.D. CODIFIED LAWS § 25-7A-45.

[215] S.D. CODIFIED LAWS §§ 21-18-6, 21-18-7.

[216] S.D. CODIFIED LAWS § 21-18-6.

[217] S.D. CODIFIED LAWS § 21-18-51.

[218] S.D. CODIFIED LAWS § 21-18-14.1.

[219] S.D. CODIFIED LAWS § 60-5-11.

[220] S.D. CODIFIED LAWS §§ 60-11-17, 60-11-18; S.D. ADMIN. R. 47:04:01:01.

[221] S.D. CODIFIED LAWS § 15-2-15.

damages is double the amount of wages for which the employer is liable.[222] Further, an employer that intentionally refuses to pay wages due and payable commits a Class 2 misdemeanor.[223]

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).[224] 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.[225] 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.[226]

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

Employers in South Dakota 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 South Dakota, because the right to vacation pay is treated as a matter of contract or employment policy[227] 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.

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[222] S.D. CODIFIED LAWS § 60-11-7.

[223] S.D. CODIFIED LAWS § 60-11-15.

[224] 29 U.S.C. § 1002.

[225] 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.

[226] 490 U.S. 107, 119 (1989).

[227] *See, e.g.*, *Johnson v. Petroleum Carriers*, 240 N.W.2d 114 (S.D. 1976).

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

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

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

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

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

Whether such state laws apply to an employer's benefit plans depends on whether the benefits are subject to ERISA. Most state and local laws that relate to an employer's provision of health benefit plans for employees are preempted by ERISA. Self-insured plans, for example, are preempted by ERISA. If the plan is preempted by ERISA, employers may not be required to comply with the states' directives on requiring coverage for domestic partners or parties to a civil union.[228] 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).[229] However, under COBRA, only an employee and the employee's spouse and dependent children are considered "qualified beneficiaries."[230] 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*

South Dakota does not recognize 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:

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[228] 29 U.S.C. § 1144.

[229] 29 U.S.C. § 1161.

[230] 29 U.S.C. § 1167(3).

- for the birth or placement of a child for adoption or foster care;[231]
- to care for an immediate family member (spouse, child, or parent) with a serious health condition;[232]
- to take medical leave when the employee is unable to work because of a serious health condition;[233]
- 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.[234] 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.[235] 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*

South Dakota 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.[236] 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*

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

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[231] 29 C.F.R. §§ 825.102, 825.112, 825.113, 825.120, and 826.121.

[232] 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).

[233] 29 C.F.R. §§ 825.112, 825.113.

[234] 29 U.S.C. § 2611(4); 29 C.F.R. §§ 825.104 to 825.109.

[235] 29 U.S.C. § 2611(2); 29 C.F.R. §§ 825.110 to 825.111.

[236] 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.[237] 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 their own serious health condition, such as severe morning sickness.[238] 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.[239] 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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[237] 42 U.S.C. § 2000e(k); *see also* 29 C.F.R. § 1604.10.

[238] 29 C.F.R. § 825.202.

[239] 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*

In South Dakota, written or unwritten employment policies and practices, except for insurance, must be applied to pregnancy and childbirth on the same terms and conditions as they are applied to other temporary disabilities.[240] Therefore, an employer must provide leave for disability due to pregnancy on the same terms as leave for other temporary disabilities.

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*

South Dakota 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*

South Dakota 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*

South Dakota 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*

South Dakota employers must provide two consecutive hours of paid leave if the employee does not have two consecutive nonworking hours available to vote while the polls are open.[241] Employers may designate

[240] S.D. CODIFIED LAWS §§ 20-13-1, 20-13-10; S.D. ADMIN. R. 20:03:09:12.

[241] S.D. CODIFIED LAWS § 12-3-5.

when the leave may be taken. However, employers that refuse to provide the paid leave or penalize the employee for requesting or using leave are guilty of a Class 2 misdemeanor.[242]

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*

State Legislature. Employers must grant a leave of absence to an employee to serve in their capacity as a member of the state legislature. The leave may be unpaid; however, the employee may not lose seniority, job status, or other employment benefits due to the leave. Any agreement that restricts an employee's right to serve in the legislature is void.[243]

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.[244] 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.[245] 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. Employers may not discharge or suspend an employee because the employee served on a jury.[246] An employee returning from jury service is entitled to the same job, pay, and seniority as the employee held before performing jury duty. Employers are not required to compensate an employee for time spent on jury service.[247] Employers that discharge or suspend employees because of jury service are guilty of a Class 2 misdemeanor.[248]

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[242] S.D. CODIFIED LAWS § 12-3-5.

[243] S.D. CODIFIED LAWS § 2-4-1.1.

[244] 28 U.S.C. § 1875.

[245] *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).

[246] S.D. CODIFIED LAWS § 16-13-41.1.

[247] S.D. CODIFIED LAWS § 16-13-41.2.

[248] S.D. CODIFIED LAWS § 16-13-41.1.

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*

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

3.9(k) *Military-Related Leave*

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

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

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.[249]

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

[249] USERRA provides that: (1) nothing within USERRA is intended to supersede, nullify, or diminish a right or benefit provided to an employee that is greater than the rights USERRA provides (38 U.S.C. § 4302(a)); and (2) USERRA supersedes any state law that would reduce, limit, or eliminate any right or benefit USERRA provides (38 U.S.C. § 4302(b)).

member of the National Guard who faces recall to active duty if a qualifying exigency exists.[250] 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.[251] 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. Members of the National Guard of any state who are ordered to active duty service by the Governor of the State of South Dakota or the President of the United States are entitled to all protections afforded to persons serving on federal active duty by the Servicemembers Civil Relief Act of 2003 and USERRA.[252]

Other Military-Related Protections: Spousal Unemployment. An individual is eligible for unemployment benefits if the individual voluntarily quits employment to relocate in order to accompany a spouse who has been reassigned from one military assignment.[253] Benefits paid for relocating military spouses will not be charged to an employer's experience rating.[254]

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*

Child Care Leave. Employers may not provide for child care leave that discriminates on the basis of sex.[255]

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

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[250] 29 C.F.R. § 825.126(a).

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

[252] S.D. CODIFIED LAWS § 33A-2-9.

[253] S.D. CODIFIED LAWS § 61-6-9.1.

[254] S.D. CODIFIED LAWS § 61-5-39.

[255] S.D. ADMIN. R. 20:03:09:12.

[256] 29 U.S.C. § 654(a)(1). An *employer* is defined as "a person engaged in a business affecting commerce that has employees." 29 U.S.C. § 652(5). The definition of employer does not include federal or state agencies (except for

standards.[257] 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.[258] 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*

South Dakota 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*

South Dakota law prohibits the use of mobile electronic devices while driving.[259] *Mobile electronic device* means any hand-held or portable electronic device capable of providing wireless data or voice communication between two or more persons or amusement, including a cellular telephone, broadband personal communication device, two-way messaging device, text messaging device, pager, electronic device that can receive or transmit text or character-based images, access or store data, or connect to the internet, personal digital assistant, laptop computer, computer tablet, stand-alone computer, portable computing device, mobile device with a touchscreen display that is designed to be worn, electronic game, equipment that is capable of playing a video, taking photographs, capturing images, or recording or transmitting video, and any similar device that is readily removable from a vehicle and is used to write, send, or read text or data or capture images or video through manual input. The term does not include a radio designed for the citizens band service or the amateur radio service of the Federal Communications Commission or a commercial two-way radio communications device.[260]

The prohibition does not apply to the following:

- a law enforcement officer, firefighter, emergency medical technician, paramedic, operator of an authorized emergency vehicle, or similarly engaged paid or volunteer public safety first

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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.

[257] 29 U.S.C. § 654(a)(2).

[258] 29 U.S.C. § 667(c)(2).

[259] S.D. CODIFIED LAWS § 32-26-47.1.

[260] S.D. CODIFIED LAWS § 32-26-46.

responder during the performance of that person's official duties, and a public utility employee or contractor acting within the scope of that person's employment;

- using the phone for emergency purposes;
- using GPS or another navigation system, provided that the operator of the vehicle is not manually entering information into the global positioning or navigation system feature of the device;
- reading, selecting, or entering a telephone number or name in a mobile electronic device for the purpose of making or receiving a telephone call and using the device for the call, or if a person otherwise activates or deactivates a feature or function of a mobile electronic device; or
- using the device in a voice-operated or hands-free mode if the operator of the motor vehicle does not use the operator's hands to operate the device, except to activate or deactivate a feature or function of the device.[261]

The law also specifically prohibits any person from accessing, reading, or posting to a social network site while operating a motor vehicle. *Operate* means to drive or assume physical control of a motor vehicle upon a highway, including operation while temporarily stationary because of traffic, road conditions, a traffic light, or a stop sign. The term does not include a motor vehicle that is lawfully parked.[262]

South Dakota's restrictions apply to employees driving for work purposes and could expose an employer to liability. Employers therefore should be cognizant of, and encourage compliance with, state law.

3.10(c) *Firearms in the Workplace*

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

Federal law does not address firearms in the workplace.

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

South Dakota does not have a statute addressing the possession or storage of firearms in the workplace or in company parking lots.

3.10(d) *Smoking in the Workplace*

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

Federal law does not address smoking in the workplace.

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

In South Dakota, smoking, including the use of an electronic smoking device, generally is prohibited in enclosed places of employment.[263] A person, including an employer, that controls a place of employment must inform violators of the smoking prohibition. Violators, or those who fail to inform violators, are guilty of a petty offense.[264] Given the employer's responsibility for helping enforce the ban, it is recommended

[261] S.D. CODIFIED LAWS § 32-26-47.1.

[262] S.D. CODIFIED LAWS §§ 32-26-46; 32-26-47.2.

[263] S.D. CODIFIED LAWS § 34-46-14.

[264] S.D. CODIFIED LAWS § 34-46-15.

that employers post a notice at building entrances and exits to remind individuals that smoking in public places or places of employment is prohibited by law.[265]

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*

South Dakota's statute addressing seating requirements applies only to minors. In any mercantile or manufacturing establishment, hotel, or restaurant where children are employed, suitable seats must be maintained in the room where minor employees work. Minors must be permitted to use the seats.[266]

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*

South Dakota 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");[267] (2) the Americans with Disabilities Act (ADA);[268] (3) the Age Discrimination in Employment Act (ADEA);[269] (4) the Equal Pay Act;[270] (5) the Genetic Information Nondiscrimination Act of 2009 (GINA);[271] (6) the Civil Rights Acts of 1866 and 1871;[272] and (7) the Civil

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[265] S.D. CODIFIED LAWS § 34-46-14 (recommended, as the owner or manager of a place of employment must inform violators of the law); *see also* S.D. CODIFIED LAWS §§ 34-16-17 to 34-16-21 (setting forth exceptions and restrictions on vapor products).

[266] S.D. CODIFIED LAWS § 60-12-9.

[267] 42 U.S.C. §§ 2000e *et seq.* Title VII applies to employers with 15 or more employees. 42 U.S.C. § 2000e(b).

[268] 42 U.S.C. §§ 12101 *et seq.* The ADA applies to employers with 15 or more employees. 42 U.S.C. § 12111(5).

[269] 29 U.S.C. §§ 621 *et seq*. The ADEA applies to employers with 20 or more employees. 29 U.S.C. § 630.

[270] 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.

[271] 42 U.S.C. §§ 2000ff *et seq*. GINA applies to employers with 15 or more employees. 42 U.S.C. § 2000ff (refers to 42 U.S.C. § 2000e(f)).

[272] 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);[273]
- 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.[274] 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.[275]

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

South Dakota's primary FEP protections are found in the South Dakota Human Relations Act. The Act prohibits discrimination on the basis of the following:

- race;
- color;
- creed;
- religion;
- sex (including pregnancy, childbirth, and related medical conditions);
- disability (including blindness or partial blindness);
- ancestry; and
- national origin.[276]

[273] 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.

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

[275] 29 C.F.R. § 1601.13. Note that for ADEA charges, only state laws extend the filing limit to 300 days. 29 C.F.R. § 1626.7.

[276] S.D. CODIFIED LAWS §§ 20-13-10 to 20-13-12.

The above protections are also extended to interns. *Intern* is defined as a student or trainee who works, sometimes without pay, at an organization, industry, trade, or occupation in order to gain work experience or earn academic credit.[277]

The South Dakota Human Relations Act applies to all employers within South Dakota that hire or employ one or more employees and employers located anywhere that hire or employ one or more employees whose services are partially or wholly performed in South Dakota. These protections also apply to interns.[278]

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

Agency Enforcement. The South Dakota Human Relations Act is enforced by the South Dakota Division of Human Rights (Division).[279] Individuals have 180 days from the last date of discrimination to file a charge of discrimination with the Division.[280]

Investigation. The Division will conduct an investigation to determine whether discrimination took place. Investigations are often handled by telephone and by mail, but on-site investigations also occur. The Division typically conducts investigations by voluntary compliance. However, it does have subpoena authority.[281]

Conciliation. Upon completion of an investigation, each party will receive a written report containing a summary and analysis of the facts, and a decision. If it finds that discrimination occurred, the Division will set a conciliation conference and attempt to settle the matter.[282] If this effort fails, either party can choose to take the matter to Circuit Court within 20 days.[283]

Hearing. If Circuit Court is not chosen, the matter is scheduled for a public hearing in front of the South Dakota Commission of Human Rights (Commission).[284] If the Commission finds the employer engaged in discrimination, it can order remedies including reinstatement with back pay, and compensation incidental to the violation, other than pain and suffering, punitive, or consequential damages.[285]

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

Genetic Information. Employers may not seek to obtain, obtain, or use genetic information to distinguish or discriminate against employees or prospective employees with respect to any right or benefit otherwise

[277] S.D. CODIFIED LAWS §§ 20-13-1; 20-13-10.

[278] S.D. CODIFIED LAWS § 20-13-1.

[279] S.D. CODIFIED LAWS § 20-13-7; *see also* https://dlr.sd.gov/human_rights/default.aspx.

[280] S.D. CODIFIED LAWS § 20-13-31.

[281] S.D. ADMIN. R. 20:03:03:02.

[282] S.D. ADMIN. R. 20:03:04:03.

[283] S.D. CODIFIED LAWS § 20-13-35.1.

[284] S.D. ADMIN. R. 20:03:05:01.

[285] S.D. CODIFIED LAWS § 20-13-42.

due or available.[286] An aggrieved employee or prospective employee may bring a civil suit for damages in circuit court and the court may award attorneys' fees and costs in addition to any damages awarded.[287]

Tobacco Products. It is an unfair employment practice for an employer to terminate the employment of an employee due to the employee's use of tobacco products off the employer's premises during nonworking hours, unless the restriction:

- relates to a *bona fide* occupational requirement and is reasonably and rationally related to the employment activities and responsibilities of the employee or group of employees rather than to all of the employer's employees; or
- is necessary to avoid a conflict of interest or the appearance of a conflict of interest with any responsibility to the employer.[288]

The law does not apply to full-time fire fighters.[289] Further, it is not an unfair employment practice for an employer to offer, impose, or have in effect a health or life insurance policy that makes distinctions between employees with respect to the type or cost of coverage based on the employees' use of tobacco products.[290]

Effective July 1, 2024, South Dakota has added a definition of antisemitism to the Human Relations Act, to be considered in deciding whether violations of its fair employment laws have occurred. The definition of antisemitism is "a certain perception of Jews, which may be expressed as hatred towards Jews. Rhetorical and physical manifestations of antisemitism are directed towards Jewish or non-Jewish individuals and/or their property, towards Jewish community institutions and religious facilities.[291]

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

In addition to the federal and state laws, employers with operations in Sioux Falls are subject to a local fair employment practice ordinance. Specifically, any person within the city of Sioux Falls who hires or employs any employee, and any person wherever situated who hires or employs any employee whose services are to be partially or wholly performed in Sioux Falls must extend antidiscrimination protections on the basis of: ancestry; color; creed; disability; national origin; race; religion; and sex.[292] Any person claiming to be aggrieved by a discriminatory practice may file with the Commission on Human Relations a verified written complaint within six months after the alleged discriminatory or unfair practice occurred. Nothing contained in the ordinance may be construed to limit the right of the complainant to make and file a complaint, or to preclude, abridge, or restrict the right of appeal or the right of anyone concerned or affected to a review of the facts and issues in the courts of competent jurisdiction.[293]

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[286] S.D. CODIFIED LAWS § 60-2-20.

[287] S.D. CODIFIED LAWS § 60-2-20.

[288] S.D. CODIFIED LAWS § 60-4-11.

[289] S.D. CODIFIED LAWS § 60-4-11.

[290] S.D. CODIFIED LAWS § 60-4-11.

[291] S.D. CODIFIED LAWS § 20-13-57.

[292] SIOUX FALLS, S.D., CODE OF ORDINANCES §§ 98.001 (exceptions, including religious corporations, associations, or societies with respect to the hiring or employment of individuals of a particular religion when the religion is a *bona fide* occupational qualification for employment), 98.003.

[293] SIOUX FALLS, S.D., CODE OF ORDINANCES §§ 98.032, 98.040, and 98.042.

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."[294] 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.[295]

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

In South Dakota, employers are prohibited from discriminating between employees on the basis of sex by paying wages to any employee in any occupation in this state at a rate less than the rate at which the employer pays any employee of the opposite sex for comparable work on jobs which have comparable requirements relating to skill, effort, and responsibility, but not to physical strength.[296] S.D. Codified Laws § 60-12-15. The prohibition does not apply to differentials paid pursuant to established seniority systems, job descriptive systems, merit increase systems, or executive training programs that do not discriminate on the basis of sex.[297]

An employee alleging a violation may file a civil action within two years of the alleged violation.[298]

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.

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294 29 U.S.C. § 206(d)(1).

295 42 U.S.C. § 2000e-5.

296 S.D. Codified Laws § 60-12-15.

297 S.D. Codified Laws § 60-12-16.

298 S.D. Codified Laws §§ 60-12-18, 60-12-20.

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.[299]

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).[300]

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.[301] 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.[302] 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

[299] 42 U.S.C. § 2000gg-1. The regulations provide definitions of *pregnancy*, *childbirth*, and *related medical conditions*. 29 C.F.R. § 1636.3.

[300] 29 C.F.R. § 1636.3.

[301] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1636.3.

[302] 29 C.F.R. § 1636.3.

perform (or apply to perform) an essential function of the position, the employee will not be considered "qualified."[303]

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.[304]

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.[305]

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**.

[303] 29 C.F.R. § 1636.4.

[304] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1630.2(p).

[305] 29 C.F.R. § 1636.3.

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

Other than the statute noted at 3.9(c)(ii), South Dakota 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.[306] Multiple decisions of the U.S. Supreme Court[307] 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.[308] 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 South Dakota.

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

[307] *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).

[308] 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*

South Dakota law protects employees against retaliation for filing complaints in a variety of contexts, including human rights, wage and hour, equal pay, or the state's collective bargaining statutes.[309]

3.12(b) *Labor Laws*

3.12(b)(i) *Federal Labor Laws*

Labor law refers to the body of law governing employer relations with unions. The National Labor Relations Act (NLRA)[310] and the Railway Labor Act (RLA)[311] 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) *State Labor Laws*

South Dakota is a right-to-work state. No person may be denied employment due to membership or nonmembership in any labor organization.[312] Likewise, no agreements may be made that interfere with the right to work of any South Dakota citizen.[313]

4. END OF EMPLOYMENT

4.1 Plant Closings & Mass Layoffs

4.1(a) *Federal WARN Act*

The federal Worker Adjustment and Retraining Notification (WARN) Act requires a covered employer to give 60 days' notice prior to: (1) a *plant closing* involving the termination of 50 or more employees at a single site of employment due to the closure of the site or one or more operating units within the site; or (2) a *mass layoff* involving either 50 or more employees, provided those affected constitute 33% of those

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309 *See* S.D. CODIFIED LAWS §§ 20-13-26 (human rights law), 60-11-17.1 (wage and hour law), 60-12-21 (equal pay law), or 60-9A-12(4) (collective bargaining law).

310 29 U.S.C. §§ 151 to 169.

311 45 U.S.C. §§ 151 *et seq*.

312 S.D. Const. art VI, § 2; S.D. CODIFIED LAWS § 60-8-3.

313 S.D. CODIFIED LAWS § 60-8-4.

working at the single site of employment, or at least 500 employees (regardless of the percentage of the workforce they constitute).[314] 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.[315] 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*

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

4.1(c) *State Mass Layoff Notification Requirements*

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

4.2 Documentation to Provide When Employment Ends

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

Table 9 lists the documents that must be provided when employment ends under federal law.

Table 9. 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.[316] The notice must be provided not later than the earlier of: • the date that is 90 days after the date on which the individual's coverage under the plan commences or, if later, the date that is 90 days after the date on which the plan first becomes subject to the continuation coverage requirements; or • the first date on which the administrator is required to furnish the covered employee, spouse, or dependent child of such employee notice of a qualified beneficiary's right to elect continuation coverage.
Retirement Benefits	The Internal Revenue Service requires the administrator of a retirement plan to provide notice to terminating employees within certain time

[314] 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.

[315] 20 C.F.R. §§ 639.4, 639.6.

[316] 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 9. Federal Documents to Provide at End of Employment	
Category	**Notes**
	frames that describe their retirement benefits and the procedures necessary to obtain them.[317]

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

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

Table 10. State Documents to Provide at End of Employment	
Category	**Notes**
Health Benefits: Mini-COBRA, etc.	While South Dakota has a mini-COBRA law, notice of termination is required only if a business is ceasing operations. In those cases, written notice of termination of group coverage must be provided by the employer to each employee having coverage within 10 days of termination.[318]
Unemployment Notice	**Generally.** Employers must post and maintain statements concerning unemployment in places readily accessible to employees, and must make printed statements available to employees at the time they become unemployed.[319] **Multistate Workers**. When an individual covered by an election is separated from employment, an employer must notify the individual at the time of separation under which jurisdiction the individual's services have been covered. If, at the time of termination, the individual is not located in the elected jurisdiction, an employer must notify the individual of the procedure for filing interstate benefit claims.[320] In addition to this notice requirement, employers must comply with the covered jurisdiction's general notice requirement, if applicable.

4.3 Providing References for Former Employees

4.3(a) *Federal Guidelines on References*

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

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[317] 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.

[318] S.D. CODIFIED LAWS § 58-18C-4; *see also* S.D. Dept. of Labor & Regulation, Division of Insurance, COBRA and State Continuation for Employers, available at https://dlr.sd.gov/insurance/cobra/state_continuation.aspx.

[319] S.D. CODIFIED LAWS § 61-7-1. The poster is available in English at https://dlr.sd.gov/ra/publications/posting_notice_to_employees_print.pdf. The poster is also available in Spanish.

[320] S.D. ADMIN. R. 47:06:03:05.

4.3(b) *State Guidelines on References*

Employers may disclose, in writing, information about the job performance of an employee or former employee to a prospective employee at the written request of the prospective employer, employee, or former employee.[321] The employer is presumed to be acting in good faith and may not be held liable for the disclosure or its consequences. The written response must be made available to the employee or former employee upon written request. The presumption of good faith may be rebutted upon a showing that the employer: (1) recklessly, knowingly, or with a malicious purpose, disclosed false or deliberately misleading information; or (2) disclosed information subject to a nondisclosure agreement or information that is confidential under any federal or state law.[322]

[321] S.D. CODIFIED LAWS § 60-4-12.

[322] S.D. CODIFIED LAWS § 60-4-12.