Littler | Employer Library

STATE

Littler on

Tennessee 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 Tennessee 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.

TABLE OF CONTENTS

1. PRE-HIRE

1.1 Classifying Workers: Employees v. Independent Contractors

1.1(a) *Federal Guidelines on Classifying Workers*

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

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

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

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

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

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

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

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

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

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

1.1(b) *State Guidelines on Classifying Workers*

In Tennessee, as elsewhere, an individual who provides services to another for payment is generally 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).

Tennessee has a single test for determining employment status for the purposes of the following laws: unemployment; the Wage Regulation Act; the state Occupational Health and Safety Act; and, the Drug-Free Workplace Programs law. This test applies to all actions occurring on or after that date.[5] The employment status test adopts the Internal Revenue Service (I.R.S.)'s twenty-factor test found in I.R.S. Revenue Ruling 87-41.

The IRS factors focus on whether the engaging entity has the right to control the means by which the worker performs his or her services as well as the end results. In sum, the twenty-factors, as set forth in I.R.S. Revenue Ruling 87-41 and the amended state laws, are:

1. *Instructions.* A worker who is required to comply with other persons' instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions.
2. *Training*. Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner.
3. *Integration.* Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business.

---

[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] TENN. CODE ANN. §§ 50-2-111, 50-3-103, 50-7-207, and 50-9-103.

4. *Services Rendered Personally.* If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results.

5. *Hiring, Supervising, and Paying Assistants.* If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the workers on the job. However, if one worker hires, supervises, and pays the other assistants pursuant to a contract under which the worker agrees to provide materials and labor and under which the worker is responsible only for the attainment of a result, this factor indicates an independent contractor status.

6. *Continuing Relationship.* A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals.

7. *Set Hours of Work.* The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control.

8. *Full Time Required.* If the worker must devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and impliedly restrict the worker from doing other gainful work. An independent contractor, on the other hand, is free to work when and for whom he or she chooses.

9. *Doing Work on Employer's Premises.* If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required.

10. *Order or Sequence Set.* If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own pattern of work but must follow the established routines and schedules of the person or persons for whom the services are performed. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. It is sufficient to show control, however, if such person or persons retain the right to do so.

11. *Oral or Written Reports.* A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control.

12. *Payment by Hour, Week, Month.* Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. Payment made by the

job or on a straight commission generally indicates that the worker is an independent contractor.

13. *Payment of Business and/or Traveling Expenses.* If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities.
14. *Furnishing of Tools and Materials.* The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer- employee relationship.
15. *Significant Investment*. If the worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees (such as the maintenance of an office rented at fair value from an unrelated party), that factor tends to indicate that the worker is an independent contractor. On the other hand, lack of investment in facilities indicates dependence on the person or persons for whom the services are performed for such facilities and, accordingly, the existence of an employer-employee relationship. Special scrutiny is required with respect to certain types of facilities, such as home offices.
16. *Realization of Profit or Loss.* A worker who can realize a profit or suffer a loss as a result of the worker's services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor, but the worker who cannot is an employee. For example, if the worker is subject to a real risk of economic loss due to significant investments or a bona fide liability for expenses, such as salary payments to unrelated employees, that factor indicates that the worker is an independent contractor. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and thus does not constitute a sufficient economic risk to support treatment as an independent contractor.
17. *Working for More Than One Firm at a Time.* If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. However, a worker who performs services for more than one person may be an employee of each of the persons, especially where such persons are part of the same service arrangement.
18. *Making Service Available to General Public.* The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship.
19. *Right to Discharge.* The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications.
20. *Right to Terminate.* If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer employee relationship.[6]

[6] I.R.S. Revenue Ruling 87-41 (internal citations omitted) and TENN. CODE ANN. §§ 50-2-111, 50-3-103, 50-7-207, and 50-9-103; *see generally* Treas. Reg. § 31.3121(d)-(1)(c); I.R.S., Internal Revenue Manual, *Technical Guidelines for*

To reduce instances of misclassification of employees as independent contractors, Tennessee has entered into a partnership with the U.S. Department of Labor, Wage and Hour Division to work cooperatively through information sharing, joint enforcement efforts, and coordinated outreach and education efforts.[7] Specifically, the Bureau of Workers' Compensation has an agreement with the Wage and Hour Division.[8]

Table 1. State Tests for Classifying Workers

Purpose of Determining Employee Status	State Agency	Test to Apply
Fair Employment Practices Laws	Tennessee Human Rights Commission	Common-law agency test.[9]
Income Taxes	Not applicable	Tennessee has no personal state income tax.
Unemployment Insurance	Tennessee Department of Labor & Workforce Development	Statutory, 20-factor I.R.S. test.[10]
Wage & Hour Laws	Tennessee Department of Labor & Workforce Development, Labor Standards Unit	The Tennessee Wage Regulation Act applies to an individual if the individual performs services for an employer for wages and the services performed by the individual qualify as an employer-employee relationship with the employer under 20-factor I.R.S. test.[11]

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.

[7] More information about the U.S. Department of Labor Misclassification Initiative is available on the Wage and Hour Division website, *Misclassification of Employees as Independent Contractors*, at https://www.dol.gov/whd/workers/misclassification/.

[8] U.S. Dep't of Labor, Wage & Hour Div. & Tennessee Bureau of Workers' Comp., *Agreement* (Jan. 12, 2017), *available at* https://www.dol.gov/whd/workers/MOU/tn.pdf.

[9] Courts apply the same analysis to age discrimination claims brought under the Tennessee Human Rights Act (THRA) as to those brought under the ADEA, and thus the common-law agency test set forth for determining independent contractor status for ADEA cases also applies in Tennessee human rights cases. *Clough v. State Farm Mut. Ins. Co.*, 2014 WL 1330309 (W.D. Tenn. Mar. 28, 2014) (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992)). Under *Darden*, in determining whether a hired party is an employee under the general 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; *see also Bredesen v. Tennessee Judicial Selection Comm'n*, 214 S.W.3d 419, 430-31 (Tenn. 2007) (THRA interpreted consistently with Title VII; applying federal common-law agency principles to conclude nominee to fill judicial vacancy was not an employee for purposes of THRA).

[10] TENN. CODE ANN. § 50-7-207(b)(2)(B). However, services performed by leased-operators or owner-operators of motor vehicles or vehicles under contracts to common carriers doing interstate business while engaged in interstate commerce generally are exempt from the unemployment law, regardless of whether a common law relationship of master and servant exists. TENN. CODE ANN. § 50-7-207(e)(1).

[11] TENN. CODE ANN. § 50-2-111. However, leased-operators or owner-operators of motor vehicles or vehicles under contracts to common carriers doing interstate business while engaged in interstate commerce are not covered

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
Workers' Compensation	Tennessee Bureau of Workers' Compensation	Statutory right to control test, considering the following seven factors: 1. right to control the conduct of the work; 2. right of termination; 3. method of payment; 4. freedom to select and hire helpers; 5. furnishing of tools and equipment; 6. self-scheduling of working hours; and 7. freedom to offer services to other entities.[12]
Workplace Safety	Tennessee Occupational and Safety and Health Administration (TOSHA)	Statutory, 20-factor I.R.S. test.[13]

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.

---

under the state wage regulations, regardless of whether a common law relationship of master and servant exists. *Id.*

[12] TENN. CODE ANN. § 50-6-102(12)(D)(i). Though no factor is decisive, the right to control the conduct of the work is a primary factor. *Continental Cas. Co. v. Theraco, Inc.*, 437 S.W.3d 841, 849 (Tenn. Ct. App. 2014) (citing *Lindsey v. Trinity Commc'ns, Inc.*, 275 S.W.3d 411, 419 (Tenn. 2009)); *see also Warner v. Potts*, 2005 WL 995236, at *1 (Tenn. Apr. 29, 2005) (emphasizing that the right to control and the right to terminate are generally considered strong evidence of an employer-employee relationship); *Galloway v. Memphis Drum Serv.*, 822 S.W.2d 584 (Tenn. 1991) (noting that in applying the seven factors, courts have repeatedly emphasized the existence of the right to control); *Bargery v. Obion Grain Co.*, 785 S.W.2d 118, 119-20 (Tenn. 1990) (discussing the control factor); *Masiers v. Arrow Transfer & Storage Co.*, 639 S.W.2d 654, 656 (Tenn. 1982) (emphasizing the rights to control and to terminate as factors with "controlling significance").

[13] TENN. CODE ANN. § 50-3-103. Note, the twenty-factor tests also applies for classifying workers under the Tennessee Drug-Free Workplace Program. TENN. CODE ANN. § 50-9-103.

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, state and local immigration laws have faced legal challenges.[15] An increasing number of states have enacted immigration-related laws, many of which mandate E-Verify usage. These state law E-Verify provisions, most of which include enforcement provisions that penalize employers through license suspension or revocation for knowingly or intentionally employing undocumented workers, have survived constitutional challenges.[16]

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

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

1.2(b)(i) *Private Employers*

Tennessee Illegal Alien Employment Act. Tennessee employers are prohibited from the knowing employment, rehire, recruitment, or referral for a fee of illegal aliens under the Tennessee Illegal Alien Employment Act.[17] *Employ* or *employment* includes any work for compensation for which an employer is required to file a Form W-2 with the federal Internal Revenue Service.[18] *Knowingly* refers to "having actual knowledge that a person is an illegal alien" or failing to perform a legal duty "to determine immigration status of an illegal alien."[19]

An employer is not in violation of the statute, however, if:

- after commencement of employment, the employer requests, receives, and records in the employee file, documentation verifying lawful employment status that is consistent with federal IRCA requirements; or

---

[14] 48 C.F.R. §§ 22.1803, 52.212-5, and 52.222-54 (contracts for commercially available off-the-shelf items and contracts with a period of performance of less than 120 days are excluded from the E-Verify requirement). For additional information, see LITTLER ON GOVERNMENT CONTRACTORS & EQUAL EMPLOYMENT OPPORTUNITY OBLIGATIONS.

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

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

[17] TENN. CODE ANN. § 50-1-103(b).

[18] TENN. CODE ANN. § 50-1-103(a)(3).

[19] TENN. CODE ANN. § 50-1-103(a)(5).

- the employer verifies the immigrant status of the person using the federal E-Verify program and receives a result showing: (1) the employee is eligible to work; (2) the employee is ineligible to work, but there is an unresolved appeal; or (3) the employee is ineligible to work and has not yet appealed, but the time for appeal has not yet expired.[20]

Tennessee Lawful Employment Act: Verification Requirements. Under the Tennessee Lawful Employment Act (TLEA), private employers with 35 or more employees must enroll in E-Verify and are required to use E-Verify to verify the work authorization status of all new employees hired on after January 1, 2023.[21]

Moreover, all other private employers with six or more employees[22] must verify the work eligibility of employees either by: (1) enrolling in and using E-Verify; or (2) requesting supporting documentation from a newly-hired employee. Acceptable supporting documents include:

- a valid Tennessee driver license or photo identification license;
- a valid driver license or photo identification license issued by another state where the issuance requirements are at least as strict as those in Tennessee;
- an official birth certificate issued by a U.S. state, jurisdiction, or territory;
- a U.S. government-issued certified birth certificate;
- a valid, unexpired U.S. passport;
- a U.S. certificate of birth abroad;
- a report of birth abroad of a U.S. citizen;
- a certificate of citizenship;
- a certificate of naturalization;
- a U.S. citizen identification card; or
- a valid alien registration documentation or other proof of current immigration registration recognized by the federal DHS that contains the individual's complete legal name and current alien admission number or alien file number.[23]

Document Retention. An employer must retain the record of an employee's E-verify results for three years after the date of hire or one year after employment is terminated, whichever is later. For a nonemployee, documentation must be kept for three years after it is received or one year after the person ceases to provide labor or services to the employer, whichever is later.[24]

---

[20] TENN. CODE ANN. § 50-1-103(c)-(d).

[21] TENN. CODE ANN. § 50-1-703 (private employers with 50 or more employees were required to use E-Verify for all new employees hired on or after January 1, 2017).

[22] TENN. CODE ANN. § 50-1-702(13).

[23] TENN. CODE ANN. § 50-1-703. Employers are also required to verify the status of nonemployees providing labor and services. TENN. CODE ANN. § 50-1-703(a)(1)(A). *Nonemployee* is defined as "any individual, other than an employee, paid directly by the employer in exchange for the individual's labor or services." TENN. CODE ANN. § 50-1-702(11).

[24] TENN. CODE ANN. § 50-1-703(a)(4).

1.2(b)(ii) *State Contractors*

An employer that enters into a contract to supply goods or services to the state or a state entity cannot knowingly allow illegal immigrants to perform work on the contract. Prior to contracting with the state or a state entity, the employer must attest in writing that it will not knowingly use the services of: (1) illegal immigrants in the performance of the contract; and (2) any subcontractor who will use the services of illegal immigrants.[25]

Specifically, each contract must include language:

- deeming the requirements regarding employment of illegal aliens a material provision of the contract, breach of which will "be grounds for monetary and other penalties, up to and including termination of the contract;"
- "establishing the authority of the state to conduct random checks of personnel records;" and
- requiring semi-annual attestations and requiring contractors to obtain such attestations from subcontractors working on the contract semi-annually.[26]

An employer that enters into a contract with an executive branch state entity must update these attestations at least semi-annually during the term of the contract. As well, contractors must obtain semi-annual attestations from subcontractors used to perform work on these contracts.[27] Contractors must maintain attestations from subcontractors and make them available to state officials performing random checks and upon request.[28]

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

Tennessee Illegal Alien Employment Act. An employer that violates the Tennessee Illegal Alien Employment Act may face suspension, revocation, or denial of a business license. For a first violation, the Commissioner of the Department of Labor and Workforce Development will suspend the business license until it is shown, by filing a sworn statement with the Commissioner, that there is no longer a violation. For subsequent violations within three years, the employer's license will be suspended for one year.[29]

Tennessee Lawful Employment Act: Verification Requirements. An employer that violates the Tennessee Lawful Employment Act may receive a warning in lieu of penalties for a first violation, if compliance is made within 45 days of the initial order and the Commissioner determines the violation was not a knowing violation. If a warning is not issued, the Commissioner will issue a final order that includes, at a minimum, the types of evidence required from the private employer in order to avoid license suspension. Under a final order, the Commissioner may also assess various civil penalties.[30]

---

[25] TENN. CODE ANN. § 12-3-309; Tenn. Exec. Order No. 41 (2006).

[26] TENN. CODE ANN. § 12-3-309; Tenn. Exec. Order No. 41, ¶ 5 (2006).

[27] TENN. CODE ANN. § 12-3-309; Tenn. Exec. Order No. 41, ¶ 5 (2006).

[28] Tenn. Exec. Order No. 41, ¶ 5(2006).

[29] TENN. CODE ANN. § 50-1-103(e)(1).

[30] TENN. CODE ANN. § 50-1-703(d)-(i).

If an employer with fifty or more employees has not enrolled in E-Verify, the Commissioner will additionally impose a penalty for knowing noncompliance and additional penalties for each day that the violation continues, beginning 45 days after the employer receives notice of a violation.[31]

In addition, an employer that fails to comply with the verification requirements is barred from receiving economic development incentives, including grants, loans, or other performance-based initiatives, from Tennessee state or local governments.[32]

State Contractors. Upon discovery that a person who contracts to supply goods or services to the state or other state entity knowingly uses illegal immigrants to perform the contract, the person will be prohibited from contracting or submitting a bid for any contract to supply goods or services to the state or other state entity for a period of one year.[33]

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").[34] 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.

---

[31] TENN. CODE ANN. § 50-1-703(f)(2)(B).

[32] TENN. CODE ANN. §§ 50-1-702, 50-1-707.

[33] TENN. CODE ANN. § 12-3-309(c); Tenn. Exec. Order No. 41 (2006).

[34] 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 42U.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*

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

Preemption of Local Laws. Moreover, Tennessee state law provides that a local government may not, "as a condition of doing business within" its jurisdictional boundaries or contracting with the local government, "prohibit an employer from requesting any information on an application for employment or during the process of hiring a new employee," except as otherwise provided under state or federal law.[35]

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

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

However, employers in particular industries are required to review the criminal records of applicants for certain jobs. Applicants for the following types of positions must submit to criminal background checks: applicants with significant access to children as a part of their job or volunteer efforts;[36] certain applicants who work for religious, charitable, scientific, athletic, or educational organizations;[37] applicants for nursing home positions that provide direct care to residents or patients;[38] applicants for home health care or hospice organizations;[39] certain applicants for positions in adult day care centers;[40] and certain applicants for positions in organizations that provide services to elderly persons or individuals with disabilities.[41]

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

Tennessee employers cannot obtain information about sealed or expunged criminal records; these records are kept confidential.

Relatedly, an individual to whom an expungement order has been granted will "not be guilty of perjury or otherwise giving a false statement by reason of the person's failure to recite or acknowledge" the expunged arrest, indictment, information, trial, or conviction in response to any inquiry made of the individual for any purpose.[42] *Expunction* means, "in contemplation of law, the conviction for the expunged

---

[35] TENN. CODE ANN. § 7-51-1802(d).

[36] TENN. CODE ANN. §§ 37-5-511, 49-5-413.

[37] TENN. CODE ANN. § 37-1-414.

[38] TENN. CODE ANN. § 68-11-256.

[39] TENN. CODE ANN. § 68-11-233.

[40] TENN. CODE ANN. § 71-2-403.

[41] TENN. CODE ANN. § 52-2-1002.

[42] TENN. CODE ANN. § 40-32-101(g)(15)(C).

offense never occurred, and the person shall not suffer any adverse effects or direct [disadvantages] by virtue of the criminal offense that was expunged."[43]

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[44] governs an employer's acquisition and use of virtually any type of information gathered by a "consumer reporting agency"[45] regarding job applicants for use in hiring decisions or regarding employees for use in decisions concerning retention, promotion, or termination. Preemployment reports created by a consumer reporting agency (such as credit reports, criminal record reports, and department of motor vehicle reports) are subject to the FCRA, along with any other consumer report used for employment purposes.

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

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

Discrimination Concerns. While federal law does not prevent employers from asking about financial information provided they follow the FCRA, as noted above, federal antidiscrimination law prohibits 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]."[46]

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

Tennessee 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.

---

[43] TENN. CODE ANN. § 40-32-101(g)(15)(D).

[44] 15 U.S.C. §§ 1681 *et seq*.

[45] 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).

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

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

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

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

Tennessee restricts an employer's ability to access an applicant's or employee's social media accounts. Specifically, employers are prohibited from:

- requesting or requiring "an employee or an applicant to disclose a password that allows access" to their personal internet account;
- compelling "an employee or an applicant to add the employer or an employment agency" to their personal internet account's contacts list;
- compelling an employee or applicant to access a personal internet account in the employer's presence "in a manner that enables the employer to observe the contents" of the individual's personal internet account; or
- taking adverse action against, failing to hire, or otherwise penalizing an employee or applicant because they failed to disclose information or refused to take any of the actions specified above in connection with their social media accounts.[47]

Adverse action means firing, threatening, or otherwise discriminating "against an employee in any manner that affects [his or her] employment, including compensation, terms, conditions, location, rights, immunities, promotions, or privileges."[48]

[47] TENN. CODE ANN. § 50-1-1003(a).

[48] TENN. CODE ANN. § 50-1-1002(1).

Exceptions. An employer may view, access, or use information about an employee or applicant that is available in the public domain.[49] Employers may also comply with a duty to screen employees or applicants, or to monitor or retain employee communications, if established under federal law, or by self-regulatory organizations.[50]

The statute also permits an employer to take action to protect its trade secret information. An employer can discipline or discharge an employee for transferring the employer's proprietary or confidential information or financial data to an employee's personal internet account without the employer's authorization.[51]

In addition, an employer can conduct an investigation or require an employee to cooperate in an investigation if:

- there is specific information on the employee's personal internet account regarding compliance with applicable laws, regulatory requirements, or prohibitions against work-related misconduct; or
- the employer has specific information about an unauthorized transfer of the employer's proprietary information, confidential information, or financial data to an employee's personal internet account.[52]

With respect to employer-provided devices, an employer is permitted to request or require that an employee disclose a username or password required to gain access to:

- an electronic communications device the employer supplies, or wholly or partly pays for; or
- an account or service the employer provides because of the employment relationship, or that is used for the employer's business purposes.[53]

Additionally, an employer can restrict or prohibit an employee's access to certain websites while using an electronic communications device the employer supplies or wholly or partly pays for, or while using an employer's network or resources, in accordance with state and federal law. Employers can also monitor, review, access, or block electronic data stored on a device or an employer's network, in accordance with state and federal law.[54]

Employers have no duty to search or monitor the activity of a personal internet account. Moreover, employers are not liable under the law for failing to request or require an employee or applicant to grant access to, allow observation of, or disclose information allowing access to or observation of the employee's or applicant's personal internet account.

[49] TENN. CODE ANN. § 50-1-1003(b)(7).

[50] TENN. CODE ANN. § 50-1-1003(b)(6).

[51] TENN. CODE ANN. § 50-1-1003(b)(2).

[52] TENN. CODE ANN. § 50-1-1003(b)(3).

[53] TENN. CODE ANN. § 50-1-1003(b)(1).

[54] TENN. CODE ANN. § 50-1-1003(b)(4)-(5).

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.[55] 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*

Tennessee employers may require applicants and employees to submit to polygraph examinations. An employer cannot take any personnel action based solely on the results, however.[56]

Moreover, an employer cannot introduce the results of a voice stress analysis performed on an employee to prove misconduct by the employee at any hearing or other employment procedure in which the employee is entitled to due process. *Voice stress analysis* "means the use of a device that has the ability to electronically analyze the responses of an individual to a specific set of questions and to record the analysis, both digitally and on a graph."[57]

Impermissible Questions. It is unlawful for a polygraph examiner to inquire into any of the following areas during an examination:

---

[55] 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.

[56] TENN. CODE ANN. § 62-27-128.

[57] TENN. CODE ANN. § 50-1-311.

- religious beliefs or affiliations;
- beliefs or opinions regarding racial matters;
- political beliefs or affiliations;
- beliefs, affiliations, or lawful activities regarding unions or labor organizations;
- sexual preferences or activities;
- any disability covered by the Americans with Disabilities Act; or
- actions or activities more than five years prior to the examination date, except for felony convictions and violations of the Tennessee Drug Control Act.

These restrictions do not apply if an employment-related polygraph examination is administered as a result of an investigation of illegal activity, and the inability to pose relevant questions in relation to the illegal activity would be detrimental to the investigation.[58]

Notification. To protect examinees' rights, certain minimum procedures must be followed. Prior to the beginning of a polygraph examination, a prospective examinee must sign and receive a copy of a notification containing the following information:

- that the examinee is consenting voluntarily to the examination, has the right to refuse to take a polygraph examination, has the right to refuse to answer any question, and may terminate the examination at any time;
- that the examinee has the right to make a written request to the examiner within thirty days of the examination to be furnished the results of the examination by paying a reasonable fee to cover the cost of the results and that, upon receipt of the written request and payment, the examiner must, within thirty days, provide the examinee a written copy of any opinions or conclusions rendered as a result of the examination;
- that the examinee or the examinee's attorney has the right to make an audio or video recording of the examination and pretest interview;
- the name of the polygraph examiner, the examiner's polygraph examiner license number issued by the board, and the examiner's business address;
- the name and address of the commissioner; and
- if the polygraph examiner is a law enforcement official or other officer of the court, that fact must be disclosed to the examinee prior to beginning the examination. The examiner must further inform the examinee that should they choose to proceed, any illegal activity disclosed during the examination may be used against the examinee in court.[59]

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

A violation of the provisions regarding impermissible questions constitutes a Class C misdemeanor.[60]

[58] TENN. CODE ANN. § 62-27-123(d)(1).

[59] TENN. CODE ANN. § 62-27-125.

[60] TENN. CODE ANN. § 62-27-123(d)(2).

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.[61] The Drug-Free Workplace Act of 1988 also requires some federal contractors and all federal grantees (but not subcontractors or subgrantees) to certify to the appropriate federal agency that they are providing a drug-free workplace.[62] 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*

Tennessee law does not mandate preemployment drug or alcohol screening by private employers.

Voluntary Participants in Drug-Free Workplace. As discussed further at **3.2(b)(ii)**, employers that elect to implement a drug-free workplace program under the Tennessee Drug-Free Workplace Act are required to conduct preemployment drug testing and are subject to certain requirements regarding testing. A covered employer must, after a conditional offer of employment, require a job applicant to submit to a drug test, and may use an applicant's refusal to test or a positive confirmed result as a basis for not hiring an applicant.[63] An employer may, but is not required to, test job applicants for alcohol after making a conditional offer of employment.[64] However, a covered employer may not discharge, discipline, refuse to hire, discriminate against, or request or require rehabilitation of an employee or job applicant on the sole basis of a positive test result that has not been verified by a confirmation test and by a medical review officer.[65] A covered employer that refuses to hire a job applicant in accordance with Tennessee's Drug-Free Workplace Act is considered to have done so for cause.[66]

Covered employers must also include notice of drug and alcohol testing on vacancy announcements for positions for which drug or alcohol testing is required.[67]

---

[61] These industries are covered by the Federal Aviation Administration (FAA); the Federal Motor Carrier Safety Administration (FMSCA); the Federal Railroad Administration (FRA); the Federal Transit Administration (FTA); and the Pipeline and Hazardous Materials Safety Administration (PHMSA). In addition, the U.S. Department of Defense, the Coast Guard, and the Nuclear Regulatory Commission, as well as other government agencies, have adopted regulations requiring mariners, employers, and contractors to maintain a drug-free workplace.

[62] 41 U.S.C. §§ 8101 *et seq*.; *see also* 48 C.F.R. §§ 23.500 *et seq*.

[63] TENN. CODE ANN. § 50-9-106(a)(1).

[64] TENN. CODE ANN. § 50-9-106(a)(1).

[65] TENN. CODE ANN. § 50-9-107(b).

[66] TENN. CODE ANN. § 50-9-108.

[67] TENN. CODE ANN. § 50-9-105(c).

2. TIME OF HIRE

2.1 Documentation to Provide at Hire

2.1(a) *Federal Guidelines on Hire Documentation*

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

Table 2. Federal Documents to Provide at Hire

Category	Notes
Benefits & Leave Documents: Affordable Care Act (ACA)	Currently, employers covered under the Fair Labor Standards Act (FLSA) must provide to each employee, at the time of hire, written notice: • informing the employee of the existence of an insurance exchange, including a description of the services provided by such exchange, and the manner in which the employee may contact the exchange to request assistance; • that if the employer-plan's share of the total allowed costs of benefits provided under the plan is less than 60% of such costs, the employee may be eligible for a premium tax credit under section 36B of the Internal Revenue Code of 1986[68] and a cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act[69] 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.[70] 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.[71]
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.[72]

[68] 26 U.S.C. § 36B.

[69] 42 U.S.C. § 18071.

[70] 29 U.S.C. § 218b.

[71] 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.

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

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	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.[73]
Benefits & Leave Documents: Family and Medical Leave Act (FMLA)	In addition to posting requirements, if an FMLA-covered employer has any eligible employees, it must provide a general notice to each employee by including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hiring.[74] 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.[75] 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.[76]
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

[73] 29 C.F.R. § 2590.606-1.

[74] 29 C.F.R. § 825.300(a).

[75] 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.

[76] 29 C.F.R. § 825.300(a).

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	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.[77] 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.[78]
Uniformed Services Employment and Reemployment Rights Act (USERRA) Documents	Employers must provide to persons covered under USERRA a notice of employee and employer rights, benefits, and obligations. Employers may meet the notice requirement by posting notice where employers customarily place notices for employees.[79]
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.[80]

2.1(b) *State Guidelines on Hire Documentation*

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

Table 3. State Documents to Provide at Hire	
Category	**Notes**
Benefits & Leave Documents	No notice requirement located.
Drug-Free Workplace Programs	Employers that implement a drug-free workplace must create and disclose their policies. One time only, prior to testing, a covered

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

[78] 26 C.F.R. § 31.3402(f)(2)-1. The IRS provides this form at https://www.irs.gov/pub/irs-pdf/fw4.pdf.

[79] 38 U.S.C. § 4334. This notice is available at https://www.dol.gov/sites/dolgov/files/VETS/legacy/files/USERRA_Private.pdf.

[80] 29 C.F.R. § 531.59.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
	employer must give all employees and applicants a written policy statement that contains: • a general statement of the employer's policy on employee drug or alcohol use, which must identify: ▪ types of drug or alcohol testing an employee or job applicant may be required to submit to, including reasonable-suspicion drug or alcohol testing or drug or alcohol testing conducted on any other basis; and ▪ actions the covered employer may take against an employee or job applicant on the basis of a positive test result; • a statement advising the employee or applicant of the existence of the law; • a general statement concerning confidentiality; • procedures for employees and applicants to confidentially report, to a medical review officer, the use of prescription or nonprescription medications, after being tested, but only if the testing process has revealed a positive result for the presence of alcohol or drug use; • consequences of refusing to submit to a drug or alcohol test; • a representative sampling of names, addresses, and telephone numbers of employee assistance programs and local rehabilitation programs; • a statement that an employee or job applicant who receives a positive confirmed test result may contest or explain the result to the medical review officer within five working days after receiving written notification of the test result; that if an employee's or job applicant's explanation or challenge is unsatisfactory to the medical review officer, the medical review officer must report a positive test result back to the covered employer; and that a person may contest the test result pursuant to rules adopted by the department of labor and workforce development; • a statement informing the employee or applicant of their responsibility to notify the laboratory of any administrative or civil action brought pursuant to this section; • a list of all drug classes for which the employer may test; • a statement regarding any applicable collective bargaining agreement or contract, and any right to appeal to the applicable court; • a statement notifying employees and job applicants of their right to consult with a medical review officer for technical information regarding prescription or nonprescription medication;[81] and

[81] TENN. CODE ANN. § 50-9-105; TENN. COMP. R. & REGS. 0800-02-12-.04.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
	• a statement complying with the requirements for notice, specifically informing employees that it is a condition of employment for them "to refrain from reporting to work or working with the presence of drugs or alcohol" in their bodies and that, "if an injured employee refuses to submit to a test for drugs or alcohol, the employee forfeits eligibility for workers' compensation medical and indemnity benefits."[82] Any notice must inform minors who are tested that the minor's parents or guardians will be notified of the results of tests conducted.[83]
Fair Employment Practices Documents	No notice requirement located.
Tax Documents	No notice requirement located.
Wage & Hour Documents	At the time of hiring, employers must inform employees of the amount of wages to be paid. This requirement does not apply to employees engaged in farm labor, for railroad companies, in domestic service, and in agriculture.[84]

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.[85] 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;

[82] TENN. CODE ANN. § 50-9-101(b).

[83] TENN. CODE ANN. § 50-9-105(f).

[84] TENN. CODE ANN. § 50-2-101.

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

5. the format of the report must be a Form W-4 or, at the option of the employer, an equivalent form; and
6. the maximum penalty a state may set for failure to comply with the state new hire law is $25 (which increases to $500 if the failure to comply is the result of a conspiracy between the employer and the employee to not supply the required report or to supply a false or incomplete report).[86]

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 4. Multistate Employer New Hire Information

Contact By Mail or Fax	Contact Online
Department of Health and Human Services Administration for Children and Families Office of Child Support Enforcement Multi-State Employer Registration Box 509	Register online by submitting a multistate employer notification form over the internet.[87] Multistate employers can receive assistance with registration as a multistate employer from the

[86] 42 U.S.C. § 653a.

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

Table 4. Multistate Employer New Hire Information	
Contact By Mail or Fax	**Contact Online**
Randallstown, MD 21133 Fax: (410) 277-9325	Multistate Help Desk by calling (410) 277-9470, 9:00 A.M. to 5:00 P.M., Eastern Time.

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

The following is a summary of the key elements of Tennessee's new hire reporting law.[88]

Who Must Be Reported. Tennessee employers must report newly-hired and rehired employees.[89] A helpful rule of thumb is that if the employee is required to fill out a Form W-4, the employer must report the employee to the New Hire Reporting program.

Report Timeframe. Employers must make the report not later than 20 business days after an employee's hiring date. If submitted magnetically or electronically, employers may report twice per month (if necessary), not less than 12 or more than 16 days apart.[90]

Information Required. Employers must report the employee's name, address, Social Security number, and date of hire. The employer must also supply its name, address, and federal tax identification number.[91]

Form & Submission of Report. New hire reporting may be made via Form W-4 or, at the option of the employer, an equivalent form containing the same data. The report may be submitted by first-class mail, fax, phone, magnetically (diskette or magnetic tape), file transfer protocol, or electronically.[92]

Location to Send Information.

Tennessee New Hire Reporting
P.O. Box 17367
Nashville, TN 37217
(888) 715-2280
(887) 505-4761 (fax)
Online reporting is available at www.tnnewhire.com.

[88] TENN. CODE ANN. §§ 36-5-1101 *et seq*.

[89] TENN. CODE ANN. § 36-5-1102.

[90] TENN. CODE ANN. § 36-5-1104.

[91] TENN. CODE ANN. § 36-5-1102.

[92] TENN. CODE ANN. § 36-5-1105.

Multistate Employers. Employers with workers employed in two or more states that transmit reports magnetically and electronically may designate one state to report to. If an employer elects to do so, it must notify the Secretary of the HHS, in writing, as to which state the employer designated for reporting purposes.[93]

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

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

Protections against trade secret misappropriation are also available to employers. Until 2016, trade secrets were the only form of intellectual property (*i.e.*, copyrights, patents, trademarks) not predominately governed by federal law. However, the Defend Trade Secrets Act of 2016 (DTSA) now provides a federal court civil remedy and original (but not exclusive) jurisdiction in federal court for claims of trade secret misappropriation.[94] 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*

Although enforceable, Tennessee courts generally disfavor covenants restricting competition by former employees.[95] These covenants are viewed as a restraint of trade, and as such, are construed strictly in

[93] TENN. CODE ANN. § 36-5-1103.

[94] 18 U.S.C. §§ 1832 *et seq.*

[95] *Hasty v. Rent-A-Driver, Inc.*, 671 S.W.2d 471, 472 (Tenn. 1984).

favor of the employee.[96] Restrictive covenants in employment contracts will be enforced if they are reasonable under the particular circumstances.[97] In analyzing the reasonableness of noncompetes, Tennessee courts consider the following factors:

- the consideration supporting the covenant;
- the danger to the employer if there is no such agreement in place;
- the economic hardship the covenant imposes on the employee;
- the public interest; and
- the time and territorial limits set forth in the agreement, as these must be no greater than necessary to protect the business interest of the employer.[98]

To enforce a noncompete agreement, the employer must demonstrate that it has a "legitimate business interest, *i.e.*, one that is properly protectable by a noncompetition covenant."[99] Because an employer may not restrain ordinary competition, it must show the existence of special facts over and above ordinary competition.[100] Tennessee courts consider the following factors in determining whether the employee would have an unfair advantage:

- whether the employer provided the employee with specialized training;
- whether the employee was given access to trade or business secrets or other confidential information; and
- whether the employee had repeated contacts with the customers such that the customers associated the employer's business with the employee.[101]

These considerations may operate individually or in tandem to give rise to a properly protectable business interest.

After it is determined that nonenforcement of a covenant will threaten a protectable interest of the employer, the court must weigh this factor against the hardship that will be caused to the employee if the covenant is enforced.[102] The burden of establishing that there is no undue hardship is generally on the

---

[96] *Vantage Tech., L.L.C. v. Cross*, 17 S.W.3d 637, 644 (Tenn. Ct. App. 2000); *Brasfield v. Anesthesia Servs., P.C.*, 1999 WL 817507 (Tenn. Ct. App. Oct. 13, 1999) (refusal to enforce noncompetition provision against a physician where the physician did not compete directly, but his new employer did compete).

[97] *Central Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28, 32 (Tenn. 1984); *Allright Auto Parks, Inc. v. Berry*, 409 S.W.2d 361, 363 (Tenn. 1966).

[98] *Murfreesboro Med. Clinic, P.A. v. Udom*, 166 S.W.3d 674, 678 (Tenn. 2005); *see also Hinson v. O'Rourke*, 2015 WL 5033908 (Tenn. Ct. App. Aug. 25, 2015).

[99] *Vantage Tech., L.L.C. v. Cross*, 17 S.W.3d 637, 643 (Tenn. Ct. App. 2000).

[100] *Hasty*, 671 S.W.2d at 473; *Flying Color of Nashville, Inc. v. Keyt*, 1991 WL 153198, at *5 (Tenn. Ct. App. Aug. 14, 1991).

[101] *Dill v. Continental Car Club, Inc.*, 2013 WL 5874713, at **12-13 (Tenn. Ct. App. Oct. 31, 2013).

[102] *Dabora, Inc. v. Kline*, 884 S.W.2d 475, 479 (Tenn. Ct. App. 1994).

employer.[103] Where an employee creates a situation of hardship by their own actions, however, there will be a limitation to the court's protection.[104]

Geographic & Time Restrictions. In determining the reasonableness of a covenant not to compete, courts also look to whether the time and territorial limitations in the covenant are reasonable.[105] The "territorial limits must be no greater than necessary to protect the business interest of the employer."[106] Generally, a reasonable area is considered to be the territory within which the employee performed services for the employer. However, Tennessee courts have also held that the territorial scope of a restrictive covenant may be reasonable even if it covers territory in which the employee at the time of the termination of the contract of employment had no business contact, if it could be reasonably anticipated at the time that the agreement was executed that such territory might be within their coverage at some period during employment.[107]

A covenant not to compete must also contain reasonable limitations as to the time during which competition is to be restrained. Reasonableness depends on the factual circumstances of each case. Tennessee courts have generally upheld restrictions ranging from two years to, in unusual cases, five years.[108]

Enforceability Following Discharge. In Tennessee, noncompete agreements remain enforceable following employee discharge. However, courts may consider bad faith depending on the discharge circumstances.[109]

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

---

[103] *Allright Auto Parks, Inc. v. Berry*, 409 S.W.2d 361, 363 (Tenn. 1966).

[104] *Dabora, Inc.*, 884 S.W.2d at 479 (where employee knew the employer would not waive her covenant and moved to take a job in competition with the employer, court refused to hold that the hardship on employee outweighed the employer's right to be free of unfair competition); *see also Vantage Tech., L.L.C.*, 17 S.W.3d at 646 (hardship on employer outweighed that of employee where, if covenant were enforced, employer would lose investment in customers, while employee would only lose "that which does not belong to him.").

[105] *Columbus Med. Servs., L.L.C. v. David Thomas & Liberty Healthcare Corp.*, 308 S.W.3d 368, 384 (Tenn. Ct. App. 2009) (*quoting Murfreesboro Med. Clinic, P.A. v. Udom*, 166 S.W.3d 674, 678 (Tenn. 2005)).

[106] *Columbus Med. Servs., L.L.C.*, 308 S.W.3d at 384 (quoting *Murfreesboro Med. Clinic, P.A.*, 166 S.W.3d at 678).

[107] *Ramsey v. Mutual Supply Co*., 427 S.W.2d 849, 853 (Tenn. Ct. App. 1968).

[108] *Matthews v. Barnes*, 293 S.W. 993, 993, 996 (Tenn. 1927); *Powell v. McDonnell Ins., Inc*., 1997 WL 589232, at **6-7 (Tenn. Ct. App. Sept. 24, 1997) (two-year restriction from competition by former salesman for insurance agency was reasonable); *Arkansas Dailies, Inc. v. Dan*, 260 S.W.2d 200, 205 (Tenn. Ct. App. 1953) (three-year covenant held reasonable).

[109] *See, e.g.*, *Central Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28, 35 (Tenn. 1984) (in evaluating reasonableness, "a discharge which is arbitrary, capricious or in bad faith clearly has a bearing on whether a court of equity should enforce a noncompetition covenant").

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.

Tennessee courts have found that where a noncompete agreement is part of the employee's original employment agreement, the employment alone is sufficient consideration.[110] This principle holds true even in cases where the employment is for an indefinite period of time and is terminable at-will by the employer.[111] Continuation of employment may also constitute adequate consideration for an at-will employee who enters a noncompete agreement after the initial offer of employment is accepted.[112] A change in terms of employment may also equate to sufficient consideration, but Tennessee courts will determine consideration on a case by case basis.[113]

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.

Tennessee permits judicial modification, or blue penciling, of an overbroad covenant not to compete.[114] This approach is especially apt where the text of the covenant itself provides for modification.[115] Tennessee courts will not modify covenants, however, if credible evidence supports a finding that the covenant is deliberately unreasonable and oppressive. This rule protects against employers drafting overly broad restrictions and expecting the worst sanction only to be modification by the court so that the covenant is enforced to the maximum extent allowed by law.[116]

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

In 2000, Tennessee adopted, with some revisions, the Uniform Trade Secrets Act. The Tennessee Trade Secrets Act (TTSA) allows employers to seek redress from employees, former employees, other individuals or other entities who improperly disclose, use or misappropriate a trade secret.[117] The TTSA preempts and

---

[110] *Ramsey*, 427 S.W.2d at 852; *see also Central Adjustment Bureau, Inc.*, 678 S.W.2d at 33 ("a covenant signed prior to, contemporaneously with or shortly after employment begins is part of the original agreement, and, … therefore, under *Ramsey*, it is supported by adequate consideration.").

[111] *Ramsey*, 427 S.W.2d at 852.

[112] *Cummings Inc. v. Dorgan*, 320 S.W.3d 316, 336 (Tenn. Ct. App. 2009); *see also Combs v. Brick Acquisition Co.*, 2013 WL 5872448, at *9 (Tenn. Ct. App. 2013) ("it is now well established in this state that continuing employment of an at-will employee can be adequate consideration for a covenant not to compete").

[113] *Central Adjustment Bureau*, 678 S.W.2d at 35 (defendants received additional benefits, including numerous salary increases, which constituted sufficient consideration).

[114] 678 S.W.2d at 36-37 (adopting "rule of reasonableness").

[115] 678 S.W.2d at 36.

[116] *Vantage Tech., L.L.C. v. Cross*, 17 S.W.3d 637, 647 (Tenn. Ct. App. 2000).

[117] TENN. CODE ANN. §§ 47-25-1701 *et seq*.

displaces conflicting or inconsistent common law in Tennessee regarding the misappropriation of trade secrets.[118]

Definition of a Trade Secret. The TTSA defines a *trade secret* as:

> [I]nformation, without regard to form, including, but not limited to, technical, nontechnical or financial data, a formula, pattern, compilation, program, device, method, technique, process, or plan that: (A) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and (B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[119]

The statutory definition serves as a starting point for employers attempting to establish that information is properly classified as a trade secret. The definition must be considered in conjunction with several other factors that Tennessee courts typically evaluate in determining whether information constitutes a trade secret. In general, these factors may include:

- the extent to which the information is known to the public;
- the extent of measures taken to guard the information's secrecy;
- the value of the information to the business and its competitors;
- the amount of money spent to develop the information; and
- the ease or difficulty with which it could be acquired by outsiders.[120]

The burden is on the party asserting that information is a trade secret to show that it meets the statutory definition.[121]

The fact that particular information may be unknown to others and/or may have been considered "secret" or "confidential" by its owner does not necessarily mean that the information will qualify as a trade secret. The information must not be readily ascertainable by others and must derive independent economic value from its secrecy.[122] Information that has become readily available through public sources, or is generally known in the industry, does not meet this test. While absolute secrecy is not required for the information to be protectable under the TTSA, the employer must establish that it took "reasonable" efforts to maintain the secrecy of the information.[123]

Misappropriation of a Trade Secret. An employer may bring a cause of action against an employee for the misappropriation of a trade secret. Tennessee law defines *misappropriation* as:

---

[118] *Hamilton-Ryker Grp., L.L.C. v. Keymon*, 2010 WL 323057, at *14 (Tenn. Ct. App. Jan. 28, 2010) (citing TENN. CODE ANN. § 47-25-1708(a)).

[119] TENN. CODE ANN. § 47-25-1702(4).

[120] *Wright Med. Tech., Inc. v. Grisoni*, 135 S.W.3d 561, 589 (Tenn. Ct. App. 2001).

[121] *Hauck Mfg. Co. v. Astec Indus., Inc.*, 376 F. Supp. 2d 808, 816 (E.D. Tenn. 2005).

[122] 376 F. Supp. 2d at 814.

[123] *Hamilton-Ryker Grp., L.L.C. v. Keymon*, 2010 WL 323057, at *14 (Tenn. Ct. App. Jan. 28, 2010).

- 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
- disclosure or use of a trade secret of another without express or implied consent by a person who:
  - used improper means to acquire knowledge of the trade secret; or
  - at the time of disclosure or use, knew or had reason to know that that person's knowledge of the trade secret was:
    - derived from or through a person who had utilized improper means to acquire it;
    - acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
    - 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 or her] position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.[124]

The TTSA defines *improper means* to include "theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy or limit use, or espionage through electronic or other means."[125] An action for misappropriation must be brought within three years after the misappropriation is discovered or, by the exercise of reasonable diligence, should have been discovered.[126]

The TTSA provides various remedies to parties in a misappropriation of trade secrets action. Under the TTSA, a court may enjoin actual or threatened misappropriation of trade secrets. Although an injunction will generally terminate when the trade secret ceases to exist, in some circumstances, a court may order that an injunction continue for an additional reasonable period of time. The continuation of an injunction may be predicated upon a need to eliminate the commercial advantage that otherwise would be derived from the misappropriation, deterrence of willful and malicious misappropriation, or where the trade secret ceases to exist due to the fault of the enjoined party or others by improper means.[127]

In addition to or in lieu of injunctive relief, a prevailing prosecuting party is entitled to recover damages that can include both the actual loss caused by misappropriation as well as the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss.[128] Damages, however, may be limited to the extent that the "defendant can show a material and prejudicial change of position prior to acquiring knowledge" or "reason to know of misappropriation" that renders a monetary recovery inequitable.[129] If the court determines that willful and malicious misappropriation exists, the court may award exemplary damages.[130] The TTSA also provides for an award of reasonable attorneys' fees to the

[124] TENN. CODE ANN. § 47-25-1702(2).

[125] TENN. CODE ANN. § 47-25-1702(1).

[126] TENN. CODE ANN. § 47-25-1707.

[127] TENN. CODE ANN. § 47-25-1703(a).

[128] TENN. CODE ANN. § 47-25-1704(a).

[129] TENN. CODE ANN. § 47-25-1704(a).

[130] TENN. CODE ANN. § 47-25-1704(b).

prevailing party when: (1) a claim of misappropriation is made in bad faith; (2) a motion to terminate an injunction is made or resisted in bad faith; or (3) willful and malicious misappropriation exists.[131]

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

Tennessee has no statutory guidelines addressing employee inventions and ideas.

3. DURING EMPLOYMENT

3.1 Posting, Notice & Record-Keeping Requirements

3.1(a) *Posting & Notification Requirements*

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

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

Table 5. Federal Posting & Notice Requirements

Poster or Notice	Notes
Employee Polygraph Protection Act (EPPA)	Employers must post and keep posted on their premises a notice explaining the EPPA.[132]
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.[133]
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.[134]
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.[135]

[131] TENN. CODE ANN. § 47-25-1705(1); *see also Wyndham Vacation Resorts, Inc. v. Wesley Fin. Grp., L.L.C.*, 2013 WL 785938 (M.D. Tenn. Feb. 28, 2013).

[132] 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.

[133] 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.

[134] 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.

[135] 29 C.F.R. § 825.300. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/fmla.htm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
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.[136]
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.[137]
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.[138]
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.[139]
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.[140] The second page includes reference to government contractors.

[136] 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.

[137] 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.

[138] 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.

[139] 20 C.F.R. app. § 1002. This poster is available at http://www.dol.gov/vets/programs/userra/poster.htm.

[140] 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.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
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.[141]
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.[142]
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.[143]
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.[144]
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.[145]
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

[141] 41 C.F.R. §§ 60-300.44, 60-741.44.

[142] 29 C.F.R. § 5.5(a)(l)(i). This poster is available at https://www.dol.gov/whd/regs/compliance/posters/davis.htm.

[143] 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.

[144] 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.

[145] 29 C.F.R. § 525.14. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/disab.htm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	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.[146]
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.[147]
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.[148] **Pay Period or Monthly Notice.** A contractor must inform an employee in writing of the amount of accrued paid sick leave no less than once each pay period or each month, whichever is shorter. Additionally, this information must be provided when employment ends and when an employee's accrued but unused paid sick leave is reinstated. Providing these notifications via a pay stub meets the compliance requirements of the executive order. **Pay Stub / Electronic.** A contractor's existing procedure for informing employees of available leave, such as notification accompanying each paycheck or an online system an employee can check at any time, may be used to satisfy or partially satisfy these requirements if it is written (including electronically, if the contractor customarily corresponds with or makes information available to its employees by electronic means).[149]
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

[146] 29 C.F.R. § 471.2. This poster is available at https://www.dol.gov/olms/regs/compliance/EO13496.htm.

[147] 48 C.F.R. §§ 3.1000 *et seq*. This poster is available at https://forms.oig.hhs.gov/hotlineoperations/posteren.aspx.

[148] 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.

[149] 29 C.F.R. § 13.5.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	nondiscrimination provision to their employees by incorporating it into their existing handbooks or manuals.[150]
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.[151]

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

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

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Child Labor Law	All employers that employ minors must post and maintain notice, in a conspicuous place, summarizing the restrictions on employment and hours of work applicable to minors.[152]
Drug-Free Workplace Programs	Workplace notices are required for employers that participate in the Tennessee Drug-Free Workplace Program. Notice of drug and alcohol testing must be included on vacancy announcements.[153] Notice of the

[150] 41 C.F.R. § 60-1.35(c). This poster is available at https://www.dol.gov/agencies/ofccp/posters.

[151] 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.

[152] TENN. CODE ANN. § 50-5-111. This poster is available at https://www.tn.gov/workforce/general-resources/major-publications0/major-publications-redirect/posters-redirect/required-posters.html. It is available in English at https://www.tn.gov/content/dam/tn/workforce/documents/majorpublications/requiredposers/Wage_Poster.pdf and in Spanish at https://www.tn.gov/content/dam/tn/workforce/documents/majorpublications/requiredposers/WageRegPoster_spanish.pdf.

[153] TENN. CODE ANN. § 50-9-105; TENN. COMP. R. & REGS. 0800-02-12-.04. This poster is available at https://www.tn.gov/content/dam/tn/workforce/documents/majorpublications/requiredposers/DrugFreeWP_poster.pdf.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
	drug and alcohol testing policy must be posted in appropriate and conspicuous locations as well.[154]
Fair Employment Practices	All employers must post notice informing employees that discrimination is prohibited in employment on the basis of race, color, creed, religion, sex, age, disability, or national original. This notice must be posted conspicuously, in accessible areas frequented by employees and applicants, and near each worksite.[155]
Fair Employment Practices: Sexual Harassment Rules	The Department of Labor and Workforce Development, along with the state human rights commission, is required to prepare state materials explaining the sexual harassment rules of the state human rights commission and to mail these materials to employers. Upon receipt, employers must share these rules, via poster, pamphlet, or brochure materials.[156]
Human Trafficking (Optional)	This poster concerning the Tennessee Human Trafficking Resource Center, and pertinent hotlines, is recommended but not required.[157]
Restroom Signage	Requires an entity open to the general public to post a notice at each public restroom and each building entrance of the business's policy of allowing a member of either biological sex to use any public restroom within the building or facility. Signage of the notice must be posted in a manner that is complaint with the standard signage for restrooms under the Americans with Disabilities Act: (1) be at least eight inches (8'') wide and six inches (6'') tall; (2) the top one-third (1/3) of the sign must have a background color of red and state "NOTICE" in yellow text, centered in that portion of the sign; (3) the bottom two-thirds (2/3) of

[154] TENN. CODE ANN. § 50-9-105; TENN. COMP. R. & REGS. 0800-02-12-.04. Employers with drug testing policies must create their own forms to satisfy this notice requirement.

[155] TENN. COMP. R. & REGS. 1500-01-02-.01. This poster is available at https://www.tn.gov/content/dam/tn/workforce/documents/majorpublications/requiredposers/Website_-_Employment_poster_-_2014_-_FINAL.pdf. The notice includes the necessary information in both English and Spanish.

[156] TENN. CODE ANN. § 4-3-1416.

[157] This poster is available at https://www.tn.gov/workforce/general-resources/major-publications0/major-publications-redirect/posters-redirect/required-posters.html. It is available in English at https://www.tn.gov/content/dam/tn/workforce/documents/majorpublications/requiredposers/tbi_poster_english.pdf. It is also available in Bulgarian https://www.tn.gov/content/dam/tn/workforce/documents/majorpublications/requiredposers/tbi_poster_bulgarian.pdf, French https://www.tn.gov/content/dam/tn/workforce/documents/majorpublications/requiredposers/tbi_poster_french.pdf, and Russian https://www.tn.gov/content/dam/tn/workforce/documents/majorpublications/requiredposers/tbi_poster_russian.pdf.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
	the sign must contain in boldface, block letters the following statement centered on that portion of the sign: THIS FACILITY MAINTAINS A POLICY OF ALLOWING THE USE OF RESTROOMS BY EITHER BIOLOGICAL SEX, REGARDLESS OF THE DESIGNATION ON THE RESTROOM; (4) except as provided in subdivision (b)(2), have a background color of white with type in black; and (5) be located on a door to which the sign must be affixed or have its leading edge located not more than one foot (1') from the outside edge of the frame of a door to which the sign must be affixed. [158]
Right to Work	This poster informs employees about the restrictions of Tennessee's right-to-work law. It may be physically posted or physically disseminated if there is no appropriate place to post.[159]
Unemployment Compensation	All employers subject to the unemployment law must post and maintain, in locations readily accessible to employees, a notice informing employees about benefits eligibility and how to file a claim.[160] If an employer is not required to provide unemployment compensation insurance coverage to its employees, it must disclose this information, in writing, to each present and prospective employee.[161]
Wages, Hours & Payroll: Meal Break Waiver Policy	Employers with employees who are "principally employed in the service of food or beverages to customers" may adopt a meal break waiver policy under certain conditions. If an employer adopts such a policy, it must be posted in at least one conspicuous place on the premises.[162]
Wages, Hours & Payroll: Payday Notices	All employers must establish regular paydays and must post and maintain notices informing employees about the designated paydays. Notice must be posted in at least two conspicuous places where employees can see the posters as they come and go to work.[163]

[158] TENN. CODE ANN. § 68-120-120 .

[159] TENN. CODE ANN. § 50-1-206. This poster is available at https://www.tn.gov/content/dam/tn/workforce/documents/majorpublications/requiredposers/Right-to-Work-Poster.pdf.

[160] TENN. CODE ANN. § 50-7-304; TENN. COMP. R. & REGS. 0800-10-03.09. This poster is available in English at https://www.tn.gov/content/dam/tn/workforce/documents/majorpublications/requiredposers/UI_Poster_for_Employees.pdf and in Spanish at https://www.tn.gov/content/dam/tn/workforce/documents/majorpublications/requiredposers/uiposter_spanish.pdf.

[161] TENN. CODE ANN. § 50-7-106; TENN. COMP. R. & REGS. 0800-10-03.09.

[162] TENN. CODE ANN. § 50-2-103(h). Employers must create their own forms to satisfy this notice requirement and must include certain information on the notice. *See* TENN. CODE ANN. § 50-2-103(h)(C).

[163] TENN. CODE ANN. § 50-2-103. Employers must create their own forms to satisfy this notice requirement.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Workers' Compensation	All employers must post and maintain conspicuous notice informing employees about workers' compensation coverage and injury reporting.[164]
Workplace Safety: No Smoking Signs	Smoking is prohibited in enclosed workplaces, including in company vehicles.[165] "No Smoking" signs, or signs with the associated international symbol, must be clearly and conspicuously posted at all entrances of places of employment where smoking is prohibited.[166]
Workplace Safety: Safety and Health Poster	All employers must post a required notice under Tennessee's Occupational Safety and Health Act informing employees of their rights, among other things, to a safe workplace, to notice of workplace hazards and hazardous chemicals, and to file complaints.[167]
Workplace Safety: Workplace Chemical List	All employers engaged in business where chemicals are either used or stored for use or distribution must compile and maintain accurate workplace chemical lists, with detailed information about the employer as well as the workplace operation, the product identifier on the appropriate safety data sheet, and the work area where the hazardous chemical is typically used, stored, or generated. This information must be posted in the pertinent workplace. New hires and newly-assigned employees must be informed of the chemical lists before being required to work.[168]

3.1(b) *Record-Keeping Requirements*

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

Table 7 summarizes the federal record-keeping requirements.

[164] TENN. CODE ANN. § 50-6-407. This poster is available in English at https://www.tn.gov/content/dam/tn/workforce/documents/majorpublications/requiredposers/Final_Posting_Notice_revised.pdf and in Spanish at https://www.tn.gov/content/dam/tn/workforce/documents/majorpublications/requiredposers/WC_Certificate_sp.pdf.

[165] TENN. CODE ANN. § 39-17-1803.

[166] TENN. CODE ANN. § 39-17-1805.

[167] TENN. CODE ANN. § 50-3-105; *see* TENN. COMP. R. & REGS. 0800-1-9.11(3). This poster is available in English at https://www.tn.gov/content/dam/tn/workforce/documents/majorpublications/requiredposers/TOSHA_Poster_Legal_Size.pdf and in Spanish at https://www.tn.gov/content/dam/tn/workforce/documents/majorpublications/requiredposers/tosha_poster_spanish.pdf.

[168] TENN. COMP. R. & REGS. 0800-1-9.11(3).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Age Discrimination in Employment Act (ADEA): Payroll Records	*Covered employers must maintain the following payroll or other records for each employee:* • employee's name, address, and date of birth; • occupation; • rate of pay; and • compensation earned each week.[169]	At least 3 years from the date of entry.
Age Discrimination in Employment Act (ADEA): Personnel Records	*Employers that maintain the following personnel records in the course of business are required by the ADEA to keep them for the specified period of time:* • job applications, resumes, or other forms of employment inquiry, including records pertaining to the refusal to hire any individual; • promotion, demotion, transfer, selection for training, recall, or discharge of any employee; • job orders submitted by the employer to an employment agency or labor organization for recruitment of personnel for job openings; • test papers completed by applicants which disclose the results of any employment test considered by the employer; • results of any physical examination considered by the employer in connection with a personnel action; and • any advertisements or notices relating to job openings, promotions, training programs, or opportunities to work overtime.[170]	At least 1 year from the date of the personnel action to which any records relate.
Age Discrimination in Employment (ADEA): Benefit Plan Documents	*Employer must keep on file any:* • employee benefit plans, such as pension and insurance plans; and • copies of any seniority systems and merit systems in writing.[171]	For the full period the plan or system is in effect, and for at least 1 year after its termination.
Title VII & the Americans with Disabilities Act	*Employers must preserve any personnel or employment record made, including:* • requests for reasonable accommodation; • application forms submitted by applicants;	At least 1 year from the date the records were made, or

[169] 29 U.S.C. § 626; 29 C.F.R. § 1627.3(a).

[170] 29 C.F.R. § 1627.3(b).

[171] 29 C.F.R. § 1627.3(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
(ADA): Personnel Records	• other records having to do with hiring, promotion, demotion, transfer, lay-off, or termination; • rates of pay or other terms of compensation; and • selection for training or apprenticeship.[172]	from the date of the personnel action involved, whichever is later.
Title VII & the Americans with Disabilities Act (ADA): Complaints of Discrimination	*When a charge of discrimination has been filed or an action brought against the employer, it must:* • make and keep such records relevant to the determination of whether unlawful employment practices have been or are being committed, including personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person; and • retain application forms or test papers completed by unsuccessful applicants or candidates for the position.[173]	Until final disposition of the charge or action (*i.e.*, until the statutory period for bringing an action has expired or, if an action has been brought, the date the litigation is terminated).
Title VII & the Americans with Disabilities Act (ADA): Other	An employer must keep and maintain its Employer Information Report (EEO-1).[174]	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	At least 3 years following the date on which the polygraph examination was conducted.

[172] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[173] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[174] 29 C.F.R. § 1602.7.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	under investigation and the basis for testing the particular employee; and • 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.[175]	
Employee Retirement Income Security Act (ERISA)	Employers that sponsor an ERISA-qualified plan must maintain records that provide in sufficient detail the information from which any plan description, report, or certified information filed under ERISA can be verified, explained, or checked for accuracy and completeness. This includes vouchers, worksheets, receipts, and applicable resolutions.[176]	At least 6 years after documents are filed or would have been filed but for an exemption.
Equal Pay Act	Covered employers must maintain the records required to be kept by employers under the Fair Labor Standards Act (29 C.F.R. part 516).[177]	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.[178]	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;	3 years from the last day of entry.

[175] 29 U.S.C. §§ 2001 *et seq.*; 29 C.F.R. § 801.30.

[176] 29 U.S.C. § 1027.

[177] 29 C.F.R. § 1620.32(a).

[178] 29 C.F.R. § 1620.32(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• date of birth, if under 19; • sex and occupation in which employed; • time of day and day of week on which the employee's workweek begins; • regular hourly rate of pay for any workweek in which overtime compensation is due; • basis on which wages are paid (pay interval); • amount and nature of each payment excluded from the employee's regular rate; • hours worked each workday and total hours worked each workweek; • total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation; • total premium pay for overtime hours; • total additions to or deductions from wages paid each pay period, including employee purchase orders or wage assignments; • total wages paid each pay period; • date of payment and the pay period covered by the payment; • records of retroactive payment of wages, including the amount of such payment to each employee, the period covered by the payment, and the date of the payment; and • for employees working on a fixed schedule, the schedule of daily and weekly hours the employee normally works (instead of hours worked each day and each workweek).[179] 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);	

[179] 29 C.F.R. §§ 516.2, 516.5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• amount by which the wages of each tipped employee have been deemed to be increased by tips as determined by the employer (not in excess of the difference between $2.13 and the applicable federal minimum wage); • 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.[180]	
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.[181]	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);	At least 3 years from the last effective date.

[180] 29 C.F.R. § 516.28.

[181] 29 C.F.R. §§ 516.2, 516.3. Presumably the regulation's reference to "prerequisites" is an error and should refer to "perquisites."

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• certain plans and trusts under FLSA section 7(e); • certificates and notices listed or named in the FLSA; and • sales and purchase records.[182]	
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.[183]	At least 2 years from the date of last entry.
Family and Medical Leave Act (FMLA)	*Covered employers must make, keep, and maintain records pertaining to their compliance with the FMLA, including:* • basic payroll and identifying employee data, including name, address, and occupation; • rate or basis of pay and terms of compensation; • daily and weekly hours per pay period; • additions to or deductions from wages and total compensation paid; • dates FMLA leave is taken by FMLA-eligible employees (leave must be designated in records as FMLA leave, and leave so designated may not include leave required under state law or an employer plan not covered by FMLA); • if FMLA leave is taken in increments of less than one full day, the hours of the leave; • copies of employee notices of leave furnished to the employer under the FMLA, if in writing; • copies of all general and specific notices given to employees in accordance with the FMLA; • any documents that describe employee benefits or employer policies and practices regarding the taking of paid and unpaid leave; • 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.	At least 3 years.

[182] 29 C.F.R. § 516.5.

[183] 29 C.F.R. § 516.6.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	Covered employers with no eligible employees must only maintain the following records: • basic payroll and identifying employee data, including name, address, and occupation; • rate or basis of pay and terms of compensation; • daily and weekly hours worked per pay period; • additions to or deductions from wages; and • total compensation paid. *Covered employers in a joint employment situation must keep all the records required in the first series with respect to any primary employees, and must keep the records required by the second series with respect to any secondary employees.* *Also, if an FMLA-eligible employee is not subject to the FLSA record-keeping requirements for minimum wage and overtime purposes (i.e., not covered by, or exempt from FLSA) an employer does not need to keep a record of actual hours worked, provided that:* • FMLA eligibility is presumed for any employee employed at least 12 months; and • with respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written, maintained record. *Medical records also must be retained.* Specifically, records and documents relating to certifications, re-certifications, or medical histories of employees or employees' family members, created for purposes of FMLA, must be maintained as confidential medical records in separate files/records from the usual personnel files. If the ADA is also applicable, such records must be maintained in conformance with ADA-confidentially requirements (subject to exceptions). If the Genetic Information Nondiscrimination Act of 2008 (GINA) is applicable, records and documents created for purposes of FMLA containing family medical history or genetic information as defined in	

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	GINA must be maintained in accordance with the confidentiality requirements of Title II of GINA.[184]	
Federal Insurance Contributions Act (FICA)	*Employers must keep FICA records, including:* • copies of any return, schedule, or other document relating to the tax; • records of all remuneration (cash or otherwise) paid to employees for employment services. The records must show with respect to each employee receiving such remuneration: ▪ name, address, and account number of the employee and additional information when the employee does not provide a Social Security card; ▪ total amount and date of each payment of remuneration (including any sum withheld as tax or for any other reason) and the period of services covered by such payment; ▪ amount of each such remuneration payment that constitutes wages subject to tax; ▪ amount of employee tax, or any amount equivalent to employee tax, collected with respect to such payment, and, if collected at a time other than the time such payment was made, the date collected; and ▪ if the total remuneration payment and the amount thereof which is taxable are not equal, the reason for this; • the details of each adjustment or settlement of taxes under FICA; and • records of all remuneration in the form of tips received by employees, employee statements of tips under section 6053(a) (unless otherwise maintained), and copies of employer statements furnished to employees under section 6053(b).[185]	At least 4 years after the date the tax is due or paid, whichever is later.
Immigration	Employers must retain all completed Form I-9s.[186]	3 years after the date of hire or 1 year following the termination

[184] 29 U.S.C. § 2616; 29 C.F.R. § 825.500.

[185] 26 C.F.R. §§ 31.6001-1, 31.6001-2.

[186] 8 C.F.R. § 274a.2.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
		of employment, whichever is later.
Income Tax: Accounting Records	*Any taxpayer required to file an income tax return must maintain accounting records that will enable the filing of tax returns correctly stating taxable income each year, including:* • regular books of account or records, including inventories, sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown by such person in any return of such tax or information.[187]	Required to be maintained for "so long as the contents [of the records] may become material in the administration of any internal revenue law;" this could be as long as 15 years in some cases.
Income Tax: Employee Payment Records	*Employers are required to maintain records reflecting all remuneration paid to each employee, including:* • employee's name, address, and account number; • total amount and date of each payment; • the period of services covered by the payment; • the amount of remuneration that constitutes wages subject to withholding; • the amount of tax collected and, if collected at a time other than the time the payment was made, the date collected; • an explanation for any discrepancy between total remuneration and taxable income; • the fair market value and date of each payment of noncash remuneration for services performed as a retail commissioned salesperson; and • other supporting documents relating to each employee's individual tax status.[188]	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.[189]	As long as it is in effect and at least 4 years thereafter.

[187] 26 U.S.C. § 3402; 26 C.F.R. § 1.6001-1.

[188] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

[189] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Unemployment Insurance	*Employers are required to maintain all relevant records under the Federal Unemployment Tax Act, including:* • total amount of remuneration paid to employees during the calendar year for services performed; • amount of such remuneration which constitutes wages subject to taxation; • amount of contributions paid into state unemployment funds, showing separately the payments made and not deducted from the remuneration of its employees, and payments made and deducted or to be deducted from employee remuneration; • information required to be shown on the tax return and the extent to which the employer is liable for the tax; • an explanation for any discrepancy between total remuneration paid and the amount subject to tax; and • the dates in each calendar quarter on which each employee performed services not in the course of the employer's trade or business, and the amount of the cash remuneration paid for those services.[190]	At least 4 years after the later of the date the tax is due or paid for the period covered by the return.
Workplace Safety / the Fed-OSH Act: Exposure Records	*Employers must preserve and retain employee exposure records, including:* • environmental monitoring or measuring of a toxic substance or harmful physical agent, including personal, area, grab, wipe, or other form of sampling, as well as related collection and analytical methodologies, calculations, and other background data relevant to an interpretation of the results obtained; • biological monitoring results which directly assess the absorption of a toxic substances or harmful physical agent by body specimens; and • Material Safety Data Sheets (MSDSs), or in the absence of these documents, a chemical inventory or other record reveling the identity of a toxic substances or 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,	At least 30 years.

[190] 26 C.F.R. § 31.6001-4.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	collection methodology, analytic methods used, and a summary of other background data is maintained for 30 years; • MSDSs need not be retained for any specified time so long as some record of the identity of the substance, where it was used and when it was used is retained for at least 30 years; and • biological monitoring results designated as exposure records by a specific Fed-OSH Act standard should be retained as required by the specific standard.[191]	
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.[192]	Duration of employment plus 30 years.
Workplace Safety: Analyses Using Medical	*Employers must preserve and retain analyses using medical and exposure records*, including any compilation of data, or other study based on information collected from individual	At least 30 years.

[191] 29 C.F.R. § 1910.1020(d).

[192] 29 C.F.R. § 1910.1020(d).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
and Exposure Records	employee exposure or medical records, or information collected from health insurance claim records, provided that the analysis has been provided to the employer or no further work is being done on the analysis.[193]	
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.[194]	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.[195]	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	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

[193] 29 C.F.R. § 1910.1020(d).

[194] 29 C.F.R. §§ 1904.33, 1904.44.

[195] 41 C.F.R. § 60-1.12(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	databases, records identifying job seekers contacted regarding their interest in a particular position, regardless of whether the individual qualifies as an internet applicant under 41 C.F.R. § 60–1.3, tests and test results, and interview notes; ▪ 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.[196]	have a contract of at least $150,000, the minimum retention period is one year from the date of making the record or the personnel action, whichever occurs later.
Equal Employment Opportunity: Complaints of Discrimination	*Where a complaint of discrimination has been filed, an enforcement action commenced, or a compliance review initiated, employers must maintain:* • personnel or employment records relating to the aggrieved person and to all other employees holding 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.[197]	Until final disposition of the complaint, compliance review or action.

[196] 41 C.F.R. §§ 60-1.12, 60-300.80, and 60-741.80.

[197] 41 C.F.R. §§ 60-1.12, 60-741.80.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Minimum Wage Under Executive Orders Nos. 13658 (contracts entered into on or after January 1, 2015), 14026 (contracts entered into on or after January 30, 2022)	*Covered contractors and subcontractors performing work must maintain for each worker:* • name, address, and Social Security number; • occupation(s) or classification(s); • rate or rates of wages paid; • number of daily and weekly hours worked; • any deductions made; and • total wages paid. These records must be available for inspection and transcription by authorized representatives of the Wage and Hour Division (WHD) of the U.S. Department of Labor. The contractor must also permit authorized representatives of the WHD to conduct interviews with workers at the worksite during normal working hours.[198]	3 years.
Paid Sick Leave Under Executive Order No. 13706	*Contractors and subcontractors performing work subject to Executive Order No. 13706 must keep the following records:* • employee's name, address, and Social Security number; • employee's occupation(s) or classification(s); • rate(s) of wages paid (including all pay and benefits provided); • number of daily and weekly hours worked; • any deductions made; • total wages paid (including all pay and benefits provided) each pay period; • a copy of notifications to employees of the amount of accrued paid sick leave; • a copy of employees' requests to use paid sick leave (if in writing) or (if not in writing) any other records reflecting such employee requests; • dates and amounts of paid sick leave used by employees (unless a contractor's paid time off policy 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	During the course of the covered contract as well as after the end of the contract.

[198] 29 C.F.R. § 23.260.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	to provide, including copies of any certification or documentation provided by an employee; • 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.[199]	
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.[200]	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;	At least 3 years from the completion of the work records

[199] 29 C.F.R. § 13.25.

[200] 29 C.F.R. § 5.5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• fringe benefits; • total daily and weekly compensation; • the number of daily and weekly hours worked; • any deductions, rebates, or refunds from daily or weekly compensation; • list of wages and benefits for employees not included in the wage determination for the contract; • any list of the predecessor contractor's employees which was furnished to the contractor by regulation; and • a copy of the contract.[201]	containing the information.
Walsh-Healey Act	*Walsh-Healey Act supply contractors must keep the following records:* • wage and hour records for covered employees showing wage rate, amount paid in each pay period, hours worked each day and week; • the period in which each employee was engaged on a government contract and the contract number; • name, address, sex, and occupation; • date of birth of each employee under 19 years of age; and • a certificate of age for employees under 19 years of age.[202]	At least 3 years from the last date of entry.

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

Table 8 summarizes the state record-keeping requirements.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Drug-Free Workplace Programs	Employers participating in the Drug-Free Workplace Program must retain records documenting the completion of substance abuse education and awareness.[203]	None specified.

[201] 29 C.F.R. § 4.6.

[202] 41 C.F.R. § 50-201.501.

[203] TENN. COMP. R. & REGS. 0800-2-12-.13.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Employment Verification	*Employers must retain certain documents obtained during required employment verification procedures. Such records include:* • all results generated by the E-Verify program during the work authorization status check; and • documentation received in support of the authorization process (*i.e.*, copies of driver's licenses, birth certifications, etc.).[204]	Records for *employees* must be kept for 3 years after hire, or 1 year after termination, whichever is later. Records for *nonemployees* must be kept 3 years after receipt by the employer, or 1 year after services are no longer provided, whichever is later.
Fair Employment Practices: Complaints of Discrimination	*Where a complaint of discrimination has been filed, an employer must retain all personnel records relevant to the complainant and to "all other employees holding positions similar to that held or sought by the complainant." Such records include but are not limited to:* • application forms or test papers, including those completed by an unsuccessful applicant or by all other candidates for the same position as that for which the complainant applied and was rejected; • records concerning hiring, promotion, demotion, transfer, layoff, or termination; • rates of pay and other terms of compensation; • selection for training or apprenticeship; and • records relevant to a determination of whether discriminatory practices have been or are being committed.[205]	Where a complaint of discrimination has been filed, records must be retained until final disposition.

[204] TENN. CODE ANN. § 50-1-703(a)(4).

[205] TENN. CODE ANN. § 4-21-308(b); TENN. COMP. R. & REGS. 1500-01-01-.02.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Fair Employment Practices: Personnel Records	*All personnel records made by an employer must be retained, including but not limited to:* • application forms; • records concerning hiring, promotion, demotion, transfer, layoff, or termination; • rates of pay and other terms of compensation; and • selection for training or apprenticeship.[206]	6 months from the date of making of the record, or from the termination of employee.
Income Tax	All individuals and entities must keep and preserve suitable records from which tax liability may be determined.[207]	None specified.
Public Works Contracts: Highway Construction	Any person or entity that enters into a state contract for a highway construction project must maintain payroll records.[208]	1 year following completion of the state construction project.
Unemployment Compensation	*Each employing unit must keep and maintain payroll records showing:* • time period covered by the payroll; • place of employment within the state;[209] and • scheduled hours per day or week.[210] *Records must also show, for each worker and for each pay period:* • name and Social Security number; • number of hours for which the individual was paid (except workers on a salary or fixed stipend); and • individual wages for employment.[211] *Each employing unit with workers in covered employment must keep further records as follows:*	Not less than 7 years.

[206] TENN. CODE ANN. § 4-21-308; TENN. COMP. R. & REGS. 1500-01-01-.02(4).

[207] TENN. CODE ANN. § 67-1-113.

[208] TENN. CODE ANN. § 12-4-41.

[209] If the employee works in a city with 10,000 people or more, that city is recorded as the place of employment. If the employee does not work in such a city, the county where work is performed must be recorded. If the worker performs work in more than one city or county, the place of employment should be the base of operations if in Tennessee or, if no base of operations, the city in Tennessee where the worker received direction or control or, if no such place in the state, then the city or county where the worker has residence in Tennessee. TENN. COMP. R. & REGS. 0800-10-03-.10(5).

[210] TENN. COMP. R. & REGS. 0800-10-03-.10(4)(a).

[211] TENN. COMP. R. & REGS. 0800-10-03-.10(4)(b).

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• date of hire, rehire, or return to work after temporary layoff; • date of termination by layoff, quit, discharge, or death; • scheduled hours (except for workers without a fixed schedule of hours); • full-time weekly wage (except for workers paid on a variable pay basis); • worker's money wages in each pay period and total wages for all pay periods showing separately: money wages, the cash value of all other remuneration, and the total cash and noncash remuneration; and • any special payments for services other than those rendered exclusively in a given month, such as bonuses, gifts, prizes, etc. showing separately money payments, other remunerations, the nature of all payments, and total payments.[212] *Relatedly, payroll records must be maintained in a form that enables the state to identify workers who may be eligible for partial unemployment benefits. Specifically, the records must show:* • wages earned by weeks; • whether any week of partial unemployment claimed by each worker is in fact a well of less than full-time work; and • time lost, if any, due to unavailability for work by each worker who may be eligible for partial benefits.[213]	
Wages, Hours & Payroll	Employers must maintain, and make available for inspection, wage and payroll records pertinent to a written wage complaint.[214]	None specified.
Workers' Compensation	Where an employee is offered a treating panel of physicians and selects a provider, the employer must give a copy of the completed selection form to the employee and must maintain a copy in the employer's records as well.[215]	None specified.

[212] TENN. CODE ANN. § 50-7-701; TENN. COMP. R. & REGS. 0800-10-03-.10(6).

[213] TENN. COMP. R. & REGS. 0800-09-01-.06.

[214] TENN. CODE ANN. § 50-2-103(j).

[215] TENN. CODE ANN. § 50-6-204(a)(3)(D)(i).

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Workplace Safety: Illness and Injury Records	*Where required,*[216] *employers must keep and maintain records of any fatality, injury, or illness that is:* • work-related; • a new case; and • meets one or more of the general recording criteria described in the regulations (*i.e.*, needle stick and sharps injury cases, tuberculosis cases, hearing loss cases, medical removal cases, and musculoskeletal disorder cases). The regulations provide guidance for employers evaluating whether a report is necessary.[217] *Such records may be kept using:* • OSHA 300, Log of Work-Related Injuries and Illnesses; • OSHA 300-A, Summary of Work-Related Injuries and Illnesses; • OSHA 301, Injury and Illness Incident Report; and • privacy case list (if one exists).[218]	5 years following the end of the calendar year that the records cover.
Workplace Safety: Workplace Training Records	All employers (manufacturing and nonmanufacturing) must comply with the Fed-OSH Act hazard communications requirements and must provide training to employees concerning hazardous chemicals in their workplace. Refresher training must be provided annually, unless an exemption is granted.[219] *All employers must maintain records of the training conducted. Records must include:* • identification (by name, Social Security number, clock number, or other method) of the employee receiving training; • dates of employee training sessions; and	Period of employment plus 5 years.

[216] According to the regulations, employers with 10 or fewer employers are partially exempt from these record-keeping requirements. Employers have such duties if instructed in writing by the Tennessee Occupational Safety and Health Administration (TOSHA) or the Bureau of Labor Statistics. Employers that question the applicability of these requirements should consult the regulations for coverage details. TENN. COMP. R. & REGS. 0800-01-03-.02.

[217] TENN. COMP. R. & REGS. 0800-01-03-.03; *see* TENN. CODE ANN. § 50-3-701.

[218] TENN. COMP. R. & REGS. 0800-01-03-.04.

[219] TENN. COMP. R. & REGS. 0800-01-09-.07; *see also* TENN. CODE ANN. § 50-3-2001(1)(A)-(B).

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• a brief description of the training given (*e.g.*, symptoms of carbon monoxide poisoning).[220]	
Workplace Safety: Workplace Chemical Lists	*Manufacturing employers, as well as certain nonmanufacturing employers, must compile and maintain an accurate workplace chemical list (WCL) for each hazardous chemical known to be present in the workplace.*[221] *Each WCL must include:* • employer name and mailing address; • workplace location (if not mailing address); • employer's primary Standard Industrial Classification Code; • employer's federal employer identification number; • brief description of the workplace operation; • product identifier used on the material safety data sheets (MSDS) and/or the container label; and • the work area or workplace in which the hazardous chemically is normally used, stored, or generated (a separate WCL may be compiled for separate and distinct work areas or workplaces within an establishment).[222] If the employer generating a WCL ceases to operate a business in Tennessee, copies of all WCLs must be sent to the Commissioner, Attention: Division of Occupational Safety and Health, within ninety (90) days following cessation of business.[223]	30 years.

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.

[220] TENN. COMP. R. & REGS. 0800-01-09-.07(4).

[221] The workplace chemical list requirements apply to nonmanufacturing employers that use or store hazardous chemicals in the workplace in excess of 55gallons, if a liquid state, or in excess of 500lbs., if a solid state. Additional measurements are provided for gaseous chemicals. Employers that question the applicability of these requirements should consult the regulations for coverage details. TENN. COMP. R. & REGS. 0800-1-9-.11(2)(c).

[222] TENN. COMP. R. & REGS. 0800-1-9-.11(1).

[223] TENN. COMP. R. & REGS. 0800-1-9-.12(3).

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

Tennessee 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*

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

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

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

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

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

The Tennessee Supreme Court has upheld a private employer's right to implement random drug and alcohol testing and to terminate employees for testing positive or refusing to submit to a test.[224]

As noted in **1.3(e)(ii)**, the Tennessee Drug-Free Workplace Act is not mandatory but creates several statutory incentives for employers to implement a drug-free workplace program.[225] Employers that implement a certified drug-free workplace program are entitled to a discount on workers' compensation insurance,[226] to the authority to terminate an employee who tests positive for drugs or alcohol,[227] and to a rebuttable presumption in a defense to a workers' compensation claim.[228]

To qualify for the incentives available under the Drug-Free Workplace Act, employers must provide all employees and applicants at least 60 days' prior written notice of the employer's policy on drug and alcohol use.[229] The notice must include a list of all drugs for which the employer may test and all bases for testing, such as random selection and reasonable suspicion. The notice must also list all employment actions the employer may take against the employee should the employee refuse a test or receive a positive test result. The notice must outline the procedure for contesting or explaining a positive test result to the medical review officer. Once an employer becomes a participant in the program, it must submit paperwork on an annual basis to remain certified and protected by the statute.

A covered employer that establishes a drug-free workplace must conduct the following types of drug tests:

---

[224] *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714 (Tenn. 1997).

[225] TENN. CODE ANN. §§ 50-9-101 to 50-9-112.

[226] TENN. CODE ANN. § 50-6-418.

[227] TENN. CODE ANN. § 50-9-101(b).

[228] TENN. CODE ANN. § 50-6-110(c)(1).

[229] TENN. CODE ANN. § 50-9-105.

- **Job Applicant Drug Testing.** A covered employer must, after a conditional offer of employment, require job applicants to submit to a drug test and may use an applicant's refusal to test or a positive confirmed result as a basis for not hiring an applicant. Limited testing of applicants, only if it is based on a reasonable classification basis, is permissible in accordance with Division of Workers' Compensation rules.[230]
- **Reasonable Suspicion Drug Testing.** An employer that requires an employee to submit to a test based on reasonable suspicion must promptly detail in writing the basis for the decision to test the employee. The employee is entitled to a copy of this document, if requested. The employer must keep the original document confidential and must retain the document for at least one year.[231]
- **Routine Fitness-for-Duty Drug Testing.** A covered employer must require an employee to submit to a drug test if the test is part of a routinely scheduled employee fitness-for-duty medical examination or a test that is scheduled routinely for all members of an employment classification or group.[232]
- **Follow-Up Drug Testing.** A covered employer must require any employee who enters an employee assistance program for drug-related problems or a drug rehabilitation program in the course of their employment to submit to a drug test as a follow-up to such program. If the employee voluntarily entered the program, the covered employer has the option not to require follow-up testing. If such testing is required, it must be conducted at least once a year for a two-year period after completion of the program. Advance notice of a follow-up testing date must not be given to the employee to be tested.[233]
- **Postaccident Testing.** After an accident that results in an injury, a covered employer *may* require the employee to submit to a drug test in accordance with Tennessee's drug-free workplace law.[234]

A covered employer may not discharge, discipline, or refuse to hire an employee or job applicant on the basis of a positive test result that has not been verified by a confirmation test and by a medical review officer. A covered employer that discharges or disciplines an employee or refuses to hire a job applicant in accordance with Tennessee's drug-free workplace law is considered to have done so for cause.[235]

All specimen collection and testing for drugs must be performed in accordance with the procedures provided for by the U.S. Department of Transportation rules for workplace drug and alcohol testing.[236]

Tennessee's drug-free workplace law does not preclude an employer from conducting any lawful testing of employees for drugs and alcohol. In other words, not all employers elect to implement a policy that is certified as compliant with the Drug-Free Workplace Act and those employers may still institute lawful testing. Tennessee employers may implement their own prohibited substance policy and, so long as that

[230] TENN. CODE ANN. § 50-9-106(a)(1).

[231] TENN. CODE ANN. § 50-9-106(a)(2).

[232] TENN. CODE ANN. § 50-9-106(a)(3).

[233] TENN. CODE ANN. § 50-9-106(a)(4).

[234] TENN. CODE ANN. § 50-9-106(a)(5).

[235] TENN. CODE ANN. § 50-9-108.

[236] TENN. CODE ANN. § 50-9-110.

policy is nondiscriminatory and complies with federal law, may rely on that policy for disciplinary actions and, if necessary, termination of employment.

3.2(c) *Marijuana Laws*

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

Under federal law, it is illegal to possess or use marijuana.[237]

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

Tennessee permits the use of a form of medical marijuana under very limited circumstances that do not impact an employer's ability to maintain a drug-free workplace. The state medical marijuana law contains no employment-related statutory provisions.

3.2(d) *Data Security Breach*

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

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

- An employer providing identity protection services to an employee whose personal information may have been compromised due to a data security breach is not required to include the value of the identity protection services in the employee's gross income and wages.
- An individual whose personal information may have been compromised in a data breach is not required to include in their gross income the value of the identity protection services.
- 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.[238]

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.[239]

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

Under Tennessee law, when a covered entity discovers or is notified of a breach in its security system where unencrypted personal information was or is reasonably believed to have been acquired by an

[237] 21 U.S.C. §§ 811-12, 841 *et seq*.

[238] 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.

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

unauthorized person, notice is required.[240] A *security breach* is the acquisition of either unencrypted computerized data or encrypted computerized data and the encryption key by an unauthorized person that materially compromises the security, confidentiality, or integrity of personal information of a resident of Tennessee maintained by any covered entity. A security breach does not include the good faith acquisition of personal information by an employee or agent of a covered entity for the purposes of the covered entity if the personal information is not used or subject to further unauthorized disclosure..[241]

Covered Entities & Information. A covered entity is any person or business that conducts business in Tennessee that owns or licenses computerized data that includes personal information.[242] However, the statute does not apply to any person subject to and compliant with Title V of the Gramm-Leach-Bliley Act.

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

- Social Security number;
- driver's license number; or
- account number, or credit or debit card number, in combination with any required security code or password that would permit access to the account.[243]

Personal information does not include information that is lawfully available from public federal, state, or local government records, encrypted information, or information that has been redacted or otherwise made unusable.

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

- written notice;
- electronic notice, if it is consistent with the federal e-sign act; or
- substitute notice, if:
  - the covered entity demonstrates that:
    - the cost of providing notice would exceed $250,000;
    - the affected class of persons to be notified exceeds 500,000; or
    - the covered entity does not have sufficient contact information.[244]

Substitute notice must consist of all of the following:

- electronic mail notice, when the covered entity has an electronic mail address for the affected resident;

[240] TENN. CODE ANN. § 47-18-2107.

[241] TENN. CODE ANN. § 47-18-2107(a)(1).

[242] TENN. CODE ANN. § 47-18-2107.

[243] TENN. CODE ANN. § 47-18-2107(a)(3)(A).

[244] TENN. CODE ANN. § 47-18-2107(e).

- conspicuous posting of the notice on the website of the covered entity, if the covered entity maintains a website; and
- notification by statewide media.[245]

A covered entity that maintains and complies with a notification procedure as part of an information security policy for the treatment of personal information is considered compliant with the data security breach statute. The covered entity's policy must afford the same or greater protection to the affected individuals as the statute.[246]

Timing of Notice. Notice must be given immediately, but no later than 45 days from the discovery or notification of the breach.[247] However, notification may be delayed if:

- A law enforcement agency determines the notification will impede a criminal investigation.
- A covered entity needs time to determine the scope of the breach.
- A covered entity needs time to restore the reasonable integrity of the data system.[248]

Additional Provisions. If more than 1,000 persons at a single time will be notified, then the covered entity must also notify without unreasonable delay all nationwide consumer reporting agencies of the timing, distribution, and content of the notices.[249]

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.[250] 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.[251]

---

[245] TENN. CODE ANN. § 47-18-2107(e).

[246] TENN. CODE ANN. § 47-18-2107(f).

[247] TENN. CODE ANN. § 47-18-2107(b), (c).

[248] TENN. CODE ANN. § 47-18-2107(d).

[249] TENN. CODE ANN. § 47-18-2107(g).

[250] 29 U.S.C. § 218(a).

[251] 29 U.S.C. § 206.

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.[252]

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.[253]

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

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

Tennessee does not have a state-specific minimum wage provision. Tennessee employers covered by the FLSA must pay their employees according to federal minimum wage laws.

3.3(c) *State Guidelines on Overtime Obligations*

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

3.4 Meal & Rest Period Requirements

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

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

Federal law contains no generally applicable meal period requirements for adults. Under the FLSA, *bona fide* meal periods (which do not include coffee breaks or time for snacks and which ordinarily last 30 minutes or more) are not considered "hours worked" and can be unpaid.[255] 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.[256]

---

[252] 29 U.S.C. §§ 203, 206.

[253] 29 U.S.C. § 3(m)(2)(B).

[254] 29 U.S.C. § 207.

[255] 29 C.F.R. § 785.19.

[256] 29 C.F.R. § 785.18.

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.[257] 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.[258] 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.[259] Exemptions apply for smaller employers and air carriers.[260]

The Pregnant Workers Fairness Act (PWFA), enacted in 2022, also impacts an employer's lactation accommodation obligations. The PWFA requires employers of 15 or more employees to make reasonable accommodations for a qualified employee's known limitations related to pregnancy, childbirth, or related medical conditions.[261] Lactation is considered a related medical condition.[262] 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.[263] For more information on these topics, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

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

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

Meal Periods. Tennessee employers must provide each employee with a 30-minute unpaid break period if the employee is scheduled to work six hours consecutively, unless the employee works in an environment that provides for ample opportunity to rest or take an appropriate break.[264] Employers cannot schedule the break during or before the first hour of scheduled work activity. Factors to be considered in determining whether an employee fits within the exception include whether:

- shorter rest breaks are given during the six-hour shift;

---

[257] 29 U.S.C. § 218d.

[258] 29 U.S.C. § 218d(b)(2).

[259] 29 U.S.C. § 218d(a).

[260] 29 U.S.C. § 218d(c), (d).

[261] 42 U.S.C. § 2000gg–1.

[262] 29 C.F.R. § 1636.3.

[263] 29 C.F.R. § 1636.3.

[264] TENN. CODE ANN. § 50-2-103.

- an employee has an opportunity to eat;
- employees are free to leave the employer's premises;
- there is a locker room or lounge maintained for the employee's comfort;
- employees "are required to be engaged in the performance of any substantial duties for the employer during breaks that may be given during the six-hour shift;" and
- the break time is spent predominantly for the employer's benefit or the employee's benefit.

Notably, the state attorney general has opined that an employer does *not* comply with the meal/rest period statute's requirements by providing employees two 20-minute unpaid breaks that they may use however they wish and during which they are not required to perform an duties for the employer's benefit.[265]

Meal Period Waiver. At the employer's discretion, an employee principally employed in food and beverage service to customers and who receives tips and reports the tips to the employer, may waive their right to a 30-minute unpaid meal break. To waive the meal break, an employee must submit a waiver request to the employer in writing on a form established by the employer. For the waiver to be effective:

- the employee must submit the request knowingly and voluntarily; and
- the employer and employee must both consent to the waiver.[266]

An employer that intends to initiate employee waiver agreements must establish a reasonable policy that permits employees to waive the meal break subject to the demands of the employees' work environment. The policy must be in writing and posted in at least one conspicuous place in the workplace. The policy must include, but not be limited to, the following:

- a waiver form that contains a statement that the employee acknowledges the employee's right under state law to receive an unpaid 30-minutes meal break during a six-hour work period and that the employee is knowingly and voluntarily waiving this right;
- the length of time the waiver will be in effect; and
- procedures for rescinding the waiver agreement.[267]

An employer or employee may rescind a waiver agreement after providing notice to the other party; notice must be provided at least seven calendar days prior to the date that the waiver will no longer be in effect.

An employer cannot coerce an employee into waiving a meal break.[268]

---

[265] TENN. CODE ANN. § 50-2-103; State of Tenn., Office of Att'y Gen., *Opinion No. 08-187* (Dec. 16, 2008), *available at* https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2008/op08-187.pdf; *see also Yates v. Hertz Corp.*, 285 F. Supp. 2d 1104 (M.D. Tenn. 2003) (employee fired for attempting to take a break could bring a claim for retaliatory discharge).

[266] TENN. CODE ANN. § 50-2-103(h).

[267] TENN. CODE ANN. § 50-2-103(h).

[268] TENN. CODE ANN. § 50-2-103.

Rest Periods. There are no generally applicable rest period requirements for adults in Tennessee other than the meal break provisions. Employers covered by the FLSA should consult the federal provisions.

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

Minors must have a 30-minute unpaid break or meal period if scheduled to work for six consecutive hours. This break cannot be scheduled during or before the first hour of scheduled work activity.[269]

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

An employer that violates the state meal period provisions commits a Class B misdemeanor. The punishment is a fine between $100 and $500. Additionally, employers, partnerships, or corporations that willfully violate these provisions will be subject to a civil penalty between $500 and $1,000. Each and every infraction is a separate and distinct offense.[270]

The meal and rest period statute does not provide a private right of action for violations. Enforcement powers are limited to the state labor department.[271]

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

In general, Tennessee law provides that an individual has a right to breast feed their child in any public or private location where the individual and the child are otherwise authorized to be present.[272] Specifically applicable to the workplace, Tennessee requires employers to make a reasonable effort to provide a room or other location close to the work area, other than a toilet stall, where an employee can express milk. Employers must provide reasonable unpaid break time each day to an employee who needs to express breast milk for her infant child. The break time must, if possible, run concurrently with break time already provided.[273]

In addition, the Tennessee Pregnant Workers Fairness Act requires employers of 15 or more employees to provide reasonable accommodations to an applicant or employee due to medical needs arising from pregnancy, childbirth, or related medical conditions. *Reasonable accommodation* includes providing a private place, other than a bathroom stall, for the purpose of expressing milk. However, the Act does not require an employer to construct a permanent, dedicated space for expressing milk.[274]

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

---

[269] TENN. CODE ANN. § 50-5-115.

[270] TENN. CODE ANN. § 50-2-103.

[271] *Johnson v. Koch Foods, Inc.*, 670 F. Supp. 2d 657 (E.D. Tenn. 2009).

[272] TENN. CODE ANN. § 68-58-101.

[273] TENN. CODE ANN. § 50-1-305.

[274] TENN. CODE ANN. §§ 50-10-102, 50-10-103.

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

training, or travel time—is or is not "work." In addition, the Portal-to-Portal Act of 1947 excluded certain preliminary and postliminary activities from "work time."[276]

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

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

Under Tennessee law, "work" is to be interpreted in the same manner as the United States Supreme Court interprets the term for purposes of the federal Fair Labor Standards Act (FLSA) and the federal Portal-to-Portal Act of 1947. Additionally, under Tennessee law, "work" does not include time spent: (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities; (2) activities that are preliminary to or take place after the principal activity; or (3) activities that require insubstantial or insignificant periods of time beyond the employee's scheduled working hours.[277]

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.[278] 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.[279] For more information on the FLSA's child labor restrictions, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

---

[276] *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").

[277] TENN. CODE ANN. § 50-2-115.

[278] 29 C.F.R. §§ 570.36, 570.50.

[279] 29 C.F.R. § 570.6.

3.6(b) *State Guidelines on Child Labor*

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

General Restrictions. As set forth in Table 9 below, Tennessee generally prohibits employers from hiring minors to work in hazardous occupations.

Table 9. State Restrictions on Type of Employment by Age

Age Range	Restrictions
Under Age 18	*Minors under age 18 may not be employed in connection with the following hazardous occupations:* • occupations in or about plants or establishments manufacturing or storing explosives or articles containing explosive components; • motor vehicle driving occupations; • coal and other mining occupations; • logging occupations; occupations at saw, lath, shingle or cooperage-stock mills; • occupations involving operation of elevators, or power-driven hoisting apparatus; • occupations involving slaughtering, meat packing, processing, or rendering; • occupations involved in the operation of hazardous power-driven machines; • occupations involving exposure to radioactive substances and to ionizing radiations; • brick, tile, or kindred product manufacturing; • wrecking, demolition, or ship-breaking; • roofing or excavation; • occupations that the labor commissioner declares to be hazardous or injurious to the life, health, safety, and welfare of minors; and • occupations involving youth peddling.[280]
Ages 16 & 17	Minors aged 16 or 17 may be employed in any occupation that does not interfere with the minor's health or well-being and that is not otherwise prohibited as set forth above.[281]
Ages 15 & Under	Minors aged 14 or 15 may be employed in any occupation that does not interfere with the minor's schooling, health or well-being and that is not otherwise prohibited as set forth above.[282] Minors under age 14 may not be employed, subject to the limited exceptions set forth in **3.6(b)(iii)**.[283]

[280] TENN. CODE ANN. § 50-5-106.

[281] TENN. CODE ANN. § 50-5-105.

[282] TENN. CODE ANN. § 50-5-104.

[283] TENN. CODE ANN. § 50-5-103.

Restrictions on Selling or Serving Alcohol. No person under age 18 may dispense, serve, or sell alcoholic or malt beverages in establishments holding a state liquor license.[284] Further, no person age 15 or under may work, in any occupation, at any place of employment where the average monthly gross receipts from the sale of intoxicating beverages exceed 25% of the total gross receipts of the place of employment. Nor may any person age 15 or under work in any place of employment where the minor will be permitted to take orders for or serve intoxicating beverages, regardless of the amount of intoxicating beverages sold in the place of employment.[285] If a minor is 16 or 17, the minor may be employed in an establishment where the average monthly gross receipts from the sale of intoxicating beverages exceed 25% of the total gross receipts of the establishment if the minor is not permitted to take orders for or serve intoxicating beverages.[286]

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

In Tennessee, minors aged 16 and 17 cannot work:

- during hours when they are required to attend classes; or
- between 10:00 P.M. and 6:00 A.M. (Sunday through Thursday evenings preceding school day without a notarized statement of consent).

However, with a signed and notarized statement of consent by the minor's parents or guardians, minors may be employed between 10:00 P.M. and midnight on Sunday through Thursday evenings preceding a school day. They cannot be employed between such hours or such evenings on more than three occasions during any week.

Special rules apply to home-schooled minors and those enrolled at church-related schools. Moreover, various exemptions exist, *e.g.*, married minors, minors with a high school degree or its equivalent, and minors who are parents (see **3.6(b)(iii)**).[287]

When school is in session, minors aged 14 or 15 can work no more than three hours per day or 18 hours per week and no later than 7:00 P.M. When school is not in session, minors aged 14 or 15 can work no more than eight hours a day or 40 hours per week and no later than 9:00 P.M.[288]

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

The Tennessee Child Labor Act does not apply to the following:

- a child employed by their parents in a nonhazardous occupation (*i.e.*, those occupations not listed in **3.6(b)(i)**);
- a child employed in errand and delivery work by foot, bicycle, or public transportation;
- a high school graduate or a child who has the equivalent of a high school diploma (but only if a copy of the minor's high school diploma or its equivalent is retained by the employer in the employer's personnel records);

---

284 TENN. COMP. R. & REGS. 0100-11-.03.

285 TENN. CODE ANN. § 50-5-106.

286 TENN. CODE ANN. § 50-5-106, as amended by H.B. 1212 (Tenn. 2023).

287 TENN. CODE ANN. §§ 50-5-105, 50-5-107.

288 TENN. CODE ANN. § 50-5-106.

- a minor who is or has been lawfully married or is a parent (but only if a copy of either the minor's marriage license or the birth certificate of the minor's child is retained by the employer in the employer's personnel records);
- a minor who is an enrollee in a public employment program that is funded by the federal government (but only if the employer maintains a written statement from the appropriate federal agency in the employee's personnel records);
- a minor who is age 16 or 17 and not enrolled in school (but only if the employer has on file in the employer's personnel records a written statement signed by the director of schools stating that the particular minor is not enrolled in school); and
- a minor who is age 16 or 17 and is excused from compulsory school attendance under state law (but only if the employer has on file in the employer's personnel records a written statement signed by the director of schools stating that the particular minor has been so excused).[289]

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

While Tennessee does not require an employment certificate or work permit, employers must obtain proof of age of all employees under age 18.[290] Employers must keep a copy of evidence of the minor's age.[291]

In addition, if a minor is subject to one of the exceptions to the child labor laws noted in **3.6(b)(iii)**, an employer may need to keep a written statement detailing the reason for the exception in its personnel records. Exemptions to the child labor restrictions are also available. The minor and the minor's parents or guardian may submit an exemption request in writing to the Tennessee Department of Labor and Workforce Development, Labor Standards Division. To grant the request, the department must find that an exemption is in the best interest of the minor involved and would present no danger to their life, health, safety, or schooling.[292]

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

Any person who employs a child less than 14 years of age commits a Class D felony, which is punishable by at least two years in prison and a fine of $5,000. Other violations of the Child Labor Act are Class A misdemeanors. The Tennessee Department of Labor and Workforce Development can also levy a civil penalty up to $1,000 for each violation and, upon notification of a violation, the department considers each day of a violation a separate punishable offense.[293]

[289] TENN. CODE ANN. § 50-5-107.

[290] TENN. CODE ANN. § 50-5-109.

[291] TENN. CODE ANN. § 50-5-111.

[292] TENN. CODE ANN. § 50-5-108.

[293] TENN. CODE ANN. § 50-5-112.

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).[294]

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.[295]

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.[296]

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.[297] 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.[298]

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

---

[294] 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").

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

[296] 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.

[297] 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/.

[298] 12 C.F.R. § 1005.2(b)(3)(i)(A).

must be disclosed in close proximity to the short-form disclosure. Employees must receive the short-form disclosure and either receive or have access to the long-form disclosure before the account is activated. All disclosures must be provided in writing. Importantly, within the short-form disclosure, employers must inform employees in writing and before the card is activated that they need not receive wages by payroll card. This disclosure must be very specific. It must provide a clear fee disclosure and include the following statement or an equivalent: "You do not have to accept this payroll card. Ask your employer about other ways to receive your wages." Alternatively, a financial institution or employer may provide a statement that the consumer has several options to receive wages or salary, followed by a list of the options available to the consumer, and directing the consumer to tell the employer which option the customer chooses using the following language or similar: "You have several options to receive your wages: [list of options]; or this payroll card. Tell your employer which option you choose." This statement must be located above the information about fees. A short-form disclosure covering a payroll card account also must contain a statement regarding state-required information or other fee discounts or waivers.[299] 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.[300]

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.[301]

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.[302]

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.

---

[299] 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.

[300] 12 C.F.R. § 1005.18.

[301] *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.

[302] 29 C.F.R. § 778.106; *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30b04, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf.

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

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

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

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

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

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

The FLSA does not have a general expense reimbursement obligation. Nonetheless, it prohibits employers from circumventing minimum wage and overtime laws by passing onto employees the cost of items that are primarily for the benefit or convenience of the employer, if doing so reduces an employee's wages below the highest applicable minimum wage rate or cuts into overtime premium pay.[303] 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.[304] Accordingly, among other items, an employer may be required to reimburse an employee for expenses related to work uniforms,[305] tools and equipment,[306] and business transportation and travel.[307] 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.[308]

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;[309]

[303] *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).

[304] 29 C.F.R. §§ 531.35, 531.36, and 531.37.

[305] 29 U.S.C. § 203(m); 29C.F.R. §§ 531.3, 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c12.

[306] 29 U.S.C. § 203(m); 29C.F.R. §§ 531.3, 531.35; U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA 2001-7 (Feb. 16, 2001).

[307] 29 C.F.R. § 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c04.

[308] 29 C.F.R. § 778.217.

[309] 29 C.F.R. § 531.38.

- amounts ordered by a court to pay an employee's creditor, trustee, or other third party, under garnishment, wage attachment, trustee process, or bankruptcy proceedings (the employer or anyone acting on its behalf cannot profit from the transaction);[310]
- 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);[311]
- with an employee's authorization for:
  - the purchase of U.S. savings stamps or U.S. savings bonds;
  - union dues paid pursuant to a valid and lawful collective bargaining agreement;
  - payments to the employee's store accounts with merchants wholly independent of the employer;
  - insurance premiums, if paid to independent insurance companies where the employer is under no obligation to supply the insurance and derives, directly or indirectly, no benefit or profit from it; or
  - voluntary contributions to churches and charitable, fraternal, athletic, and social organizations, or societies from which the employer receives no profit or benefit, directly or indirectly;[312]
- 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;[313] 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.[314]

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.[315]

---

[310] 29 C.F.R. § 531.39. The amount subject to withholding is governed by the federal Consumer Credit Protection Act. 15U.S.C. §§ 1671 *et seq*.

[311] 29 C.F.R. § 531.40.

[312] 29 C.F.R. § 531.40.

[313] 29 U.S.C. § 203. However, the cost cannot be treated as wages if prohibited under a collective bargaining agreement.

[314] 29 C.F.R. § 825.213.

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

An employer may also be able to deduct for wage overpayments even if the deduction cuts into the employee's FLSA minimum wage or overtime pay. The deduction can be made in the next pay period or several pay periods later. An employer cannot, however, charge an administrative fee or charge interest that brings the payment below the minimum wage.[316] 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.[317]

Deductions During Non-Overtime v. Overtime Workweeks. Whether an employee receives overtime during a given workweek affects an employer's ability to take deductions from the employee's wages. During non-overtime workweeks, an employer may make qualifying deductions (*i.e.*, the cost is reasonable and there is no employer profit) for "board, lodging, or other facilities" even if the deductions would reduce an employee's pay below the federal minimum wage. Deductions for articles that do not qualify as "board, lodging, or other facilities" (*e.g.*, tools, equipment, cash register shortages) can be made in non-overtime workweeks if, after the deduction, the employee is paid at least the federal minimum wage.[318]

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.[319]

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.[320]

3.7(b) *State Guidelines on Wage Payment*

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

Authorized Instruments. Wages may be paid in U.S. currency or by cash, check, bank draft, direct deposit into an institution of the employee's choice, or by payroll debit card. Paychecks must be payable upon presentation at some bank or other established business, without discount, exchange, or cost of collection.[321]

Direct Deposit. Mandatory direct deposit is permitted in Tennessee. Wages can be paid by electronic automated fund transfer in U.S. currency. The state labor department takes the position that an employer

---

316 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.

317 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.

318 29 C.F.R. § 531.36.

319 29 C.F.R. § 531.37.

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

321 TENN. CODE ANN. § 50-2-103.

can change the method of payment to direct deposit, but the employee must be able to choose the financial institution. Note, however, that the state labor department has informally advised that, if direct deposit is mandated and an employee cannot obtain a checking account, an alternative payment method must be provided.[322]

Payroll Debit Card. Employers may pay employees with prepaid debit cards as long as the employer discloses in writing the fees associated with prepaid debit cards and provides the employee with the option for payment by direct deposit.[323] If an employer pays its employees with prepaid debit cards, the employee must have the ability to make at least one withdrawal or transfer from the debit card per pay period for any amount on the card without incurring fees or costs.[324]

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

Tennessee's Wage Regulation Act requires an employer with five or more employees to establish and maintain regular paydays. All wages or compensation of employees in private employment are due and payable not less frequently than once per month, though employers may pay wages more frequently.[325] If wages are paid monthly, all wages or compensation earned and unpaid before the first day of any month are due and payable no later than the fifth day of the next month. If wages are paid in two or more pay periods per month, wages and compensation are due and payable as follows: Employers must pay their employees no later than the 20th day of the month for work completed prior to the first day of the month. Employers must pay employees on the 5th of the month for work performed but unpaid prior to the 16th of the previous month.[326]

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

Upon discharge, an employer must pay all wages or compensation due an employee on the next regular payday following the date of separation or 21 days thereafter, whichever occurs last.[327] If an employee voluntarily leaves employment, an employer must pay all wages or compensation due an employee on the next regular payday following the date of separation or 21 days thereafter, whichever occurs last.[328] Tennessee employers must include in an employee's final paycheck any vacation pay or unused compensatory time that is owed to the employee by virtue of company policy or labor agreement.[329]

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

Other than a requirement that employers post notice of designated paydays in at least two conspicuous places,[330] Tennessee has no express requirements related to wage statements, notice of wage payments,

---

[322] TENN. CODE ANN. § 50-2-103; Communication with Christine Tugman, Admin. Assistant I, Tennessee Dep't of Labor & Workforce Dev. (June 13, 2014).

[323] TENN. CODE ANN. § 50-2-103(e).

[324] TENN. CODE ANN. § 50-2-103(e).

[325] TENN. CODE ANN. § 50-2-103(a), (c); Tennessee Dep't of Labor and Workforce Dev., *Wages, Fringe Benefits, Paychecks & Breaks*, *available at* https://www.tn.gov/workforce/employees/labor-laws/labor-laws-redirect/wages-breaks.html (addressing payday regulations).

[326] TENN. CODE ANN. § 50-2-103(a)(2), (3).

[327] TENN. CODE ANN. § 50-2-103.

[328] TENN. CODE ANN. § 50-2-103.

[329] TENN. CODE ANN. § 50-2-103.

[330] TENN. CODE ANN. § 50-2-103.

or to record keeping with respect to wage payments. In the absence of an applicable state law, an employer would be subject only to the relevant federal law. Although federal law does require employers to provide W-2 forms once a year, the law does not generally require statements with each wage payment.

3.7(b)(v) *Wage Transparency*

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

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

Changing Regular Paydays. There are no general notice requirements with respect to changing regular paydays, although an employer must update the required workplace posting regarding paydays as discussed in **3.6(b)(iv)**. It is recommended, however, that employees receive advance written notice before a change occurs.

Changing Pay Rate. In Tennessee, it is unlawful for workers to be employed, or permitted or suffered to work, without first being informed about the amount of wages they will be paid. Per the state labor department, a pay decrease cannot occur unless employers tell employees about the change before any work is performed.[331]

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

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

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

Requirements for Deductions. Tennessee's Wage Regulation Act establishes the time and manner in which employers must pay their employees. Employers are not permitted to offset or deduct unilaterally from an employee's wages without a written agreement except where required by law, as in the case of payroll taxes and garnishments.

Permissible Deductions. An employer that offers health insurance to employees can deduct the employee portion of health insurance premiums if the participating employee requests.[332] Employers may also offset an employee's wages for a specific dollar amount that the employer loaned or advanced the employee only if:

1. the employer had an agreement with the employee to loan the money prior to the date the wages are due;
2. the employee signs a written agreement allowing the employer to deduct the money owed from the employee's wages;
3. the employer notifies the employee in writing 14 days prior to the payment of wages due and owing; and

---

[331] TENN. CODE ANN. § 50-2-101; Tennessee Dep't of Labor and Workforce Dev., *Wages, Fringe Benefits, Paychecks & Breaks*, *available at* https://www.tn.gov/workforce/employees/labor-laws/labor-laws-redirect/wages-breaks.html (addressing unauthorized paycheck deductions).

[332] TENN. CODE ANN. § 50-1-308.

4. the employee has not paid the amount owed.[333]

Prohibited Deductions. An employer cannot deduct for any of the following amounts without the employee's consent:

- cost of uniforms or equipment;
- company loans; or
- money shortages.[334]

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

Tennessee employers must file an answer with the court within 10 days after being served with a garnishment notice for an employee.[335] Within a day of being served with the garnishment, the employer must determine whether it controls any of the employee's money or property and, if so, provide a copy of the garnishment to the employee via first-class mail to the employee's last known address.[336] If an employer fails to answer the garnishment, the court may enter a conditional judgment against the employer for the entire amount of the debt and require the employer to appear and show cause why a final judgment should not be entered.[337] If the employer fails to appear and show cause, the conditional judgment will be final, and the employer will be responsible for the employee's entire debt and costs.

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

Because Tennessee does not have minimum wage or overtime requirements, FLSA-covered employees alleging minimum wage or overtime violations must comply with federal provisions regarding wage disputes.

The Labor Standards Division of the Tennessee Department of Labor and Workforce Development enforces Tennessee's Wage Regulation Act. Employees alleging a violation of the state's wage payment laws must file a complaint within three years of the alleged violation.[338] **Effective July 1, 2024**, Tennessee has a three-year statute of limitations for wage-related actions sounding in breach of contract, unjust enrichment and quantum merit.[339]

An employer's failure to pay wages in accordance with the Wage Regulation Act is a Class B misdemeanor, punishable by a fine of not less than $100 and no more than $500.[340] A willful violation is subject to a civil

---

[333] TENN. CODE ANN. § 50-2-110.

[334] Tennessee Dep't of Labor and Workforce Dev., *Wages, Fringe Benefits, Paychecks & Breaks*, *available at* https://www.tn.gov/workforce/employees/labor-laws/labor-laws-redirect/wages-breaks.html (addressing unauthorized paycheck deductions).

[335] TENN. CODE ANN. §§ 26-2-101 to 26-2-410.

[336] TENN. CODE ANN. § 26-2-406.

[337] TENN. CODE ANN. § 26-2-209.

[338] TENN. CODE ANN. § 28-3-105. Tennessee wage payment laws do not contain a statute of limitations. The general limitations statute provides a three-year limitations period for "[c]ivil actions based upon the alleged violation of any federal or state statute creating monetary liability for personal services rendered, or liquidated damages or other recovery therefor, when no other time of limitation is fixed by the statute creating such liability." TENN. CODE ANN. § 28-3-105(3).

[339] TENN. CODE ANN. § 28-3-105(4).

[340] TENN. CODE ANN. § 50-2-103.

penalty of not less than $500 and no more than $1,000, and each and every infraction constitutes a separate and distinct offense.[341] If the violation was unintentional, there shall be a warning, in lieu of a penalty, on the first offense. It is also a Class C misdemeanor for an employer to misrepresent the amount of compensation that an employee is to receive upon hire.[342]

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).[343] 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.[344] 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.[345]

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

Employers in Tennessee are not required to provide their employees with paid vacations or to establish written vacation policies.[346] Vacation benefits are a matter of agreement between employer and employee. 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. It is important to draft clear, precise, and complete policies and procedures regarding these benefits, as they can become contractual obligations and subject the employer to liability if withheld or reduced without notice. Because vacation and similar paid time off is a matter of contract or employer policy in Tennessee, an employer may cap vacation accrual[347] or impose a "use-it-or-lose-it" provision.[348]

Employers may require employees to forfeit unused accrued vacation time upon termination of employment. If an employer's policy has not provided for forfeiture upon termination, the employer must include in an employee's final paycheck any vacation pay or unused compensatory time that is owed to

---

[341] TENN. CODE ANN. § 50-2-103.

[342] TENN. CODE ANN. § 50-2-104.

[343] 29 U.S.C. § 1002.

[344] 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.

[345] 490 U.S. 107, 119(1989).

[346] TENN. CODE ANN. § 50-2-103(a)(3).

[347] *See Jackson v. Jackson, Johnson & Murphey, P.C.*, 2003 WL 23099682 (Tenn. Ct. App. Dec. 31, 2003) (employer successfully argued the employment manual—drafted by the plaintiff—limited the amount of vacation and leave time that carried over from year to year).

[348] *See, e.g.*, *Vraney v. Medical Specialty Clinic, P.C.*, 2013 WL 4806902 (Tenn. Ct. App. Sept. 9, 2013).

the employee by virtue of company policy or labor agreement.[349] The circumstances under which a court may determine that a vacation pay policy or an employment contract creates a binding obligation to deem unused vacation pay "owed" to the employee upon termination will vary upon the facts of the case.[350]

3.8(b) *Holidays & Days of Rest*

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

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

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

Tennessee 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. However, an employer must provide time off on Veterans Day under certain circumstances.[351]

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.[352] 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).[353] However, under COBRA, only an employee and the employee's spouse

---

[349] TENN. CODE ANN. § 50-2-103.

[350] State of Tenn., Office of Att'y Gen., *Opinion No. 06-169* (Nov. 13, 2006), *available at* https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2006/op06-169.pdf; *see also* Tennessee Dep't of Labor and Workforce Dev., *Wages, Fringe Benefits, Paychecks & Breaks*, *available at* https://www.tn.gov/workforce/employees/labor-laws/labor-laws-redirect/wages-breaks.html (addressing fringe benefits). *See also, e.g.*, *Michelhaugh v. Consol. Nuclear Sec., L.L.C.*, 2020 WL 4668095 (Tenn. Ct. App. Aug. 11, 2020) (vacation awarded on December 31, 2014 for next calendar year was advanced rather than accrued or earned).

[351] TENN. CODE ANN. § 15-1-105.

[352] 29 U.S.C. § 1144.

[353] 29 U.S.C. § 1161.

and dependent children are considered "qualified beneficiaries."[354] 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*

Tennessee 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:

- for the birth or placement of a child for adoption or foster care;[355]
- to care for an immediate family member (spouse, child, or parent) with a serious health condition;[356]
- to take medical leave when the employee is unable to work because of a serious health condition;[357]
- 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.[358] 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.[359] For information on the FMLA, see **LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES**.

---

[354] 29 U.S.C. § 1167(3).

[355] 29 C.F.R. §§ 825.102, 825.112, 825.113, 825.120, and 826.121.

[356] 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).

[357] 29 C.F.R. §§ 825.112, 825.113.

[358] 29 U.S.C. § 2611(4); 29 C.F.R. §§ 825.104 to 825.109.

[359] 29 U.S.C. § 2611(2); 29 C.F.R. §§ 825.110 to 825.111.

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

Tennessee 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.[360] 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*

Tennessee law does not include any provisions requiring employers to provide paid sick leave to employees. Moreover, state law prohibits municipalities within the state from enacting paid sick leave ordinances.[361]

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.[362] 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.

---

[360] 80 Fed. Reg. 54,697-54,700 (Sept. 10, 2015).

[361] TENN. CODE ANN. §§ 7-51-1801, 7-51-1802.

[362] 42 U.S.C. § 2000e(k); *see also* 29 C.F.R. § 1604.10.

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.[363] 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.[364] An employee may also be allowed to take leave beyond the maximum FMLA leave if the additional leave would be considered a reasonable accommodation.

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

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

Under Tennessee law, employees are entitled to a leave of absence for up to four months for pregnancy, adoption, childbirth, and nursing of an infant.[365] To be eligible for the leave, employees must have completed at least one year of full-time employment at a work site that employs at least 100 employees.[366]

Leave may be paid or unpaid, although the employer need not pay the cost of any benefits during the leave unless it does so for all employees on a leave of absence.[367]

Employees must give at least three months' advance notice of: (1) the anticipated date the leave will begin; (2) length of the leave; and (3) intent to return to full-time employment after the leave concludes. Employees who provide such notice must be restored to the same or a similar position upon return from leave. Failure to provide three months' advance notice because a medical emergency necessitated the leave to begin sooner than anticipated will not disqualify an employee from rights and benefits regarding this leave.[368]

An employer will not be held liable for failure to reinstate the employee if the employee's position is so unique that the employer cannot, after reasonable efforts, fill the position temporarily or the employer

---

[363] 29 C.F.R. § 825.202.

[364] 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.

[365] TENN. CODE ANN. § 4-21-408.

[366] TENN. CODE ANN. § 4-21-408.

[367] TENN. CODE ANN. § 4-21-408.

[368] TENN. CODE ANN. § 4-21-408.

learns that the employee has pursued other employment during the leave. The employer must notify the employee when a determination is made not to reinstate for these reasons.[369]

An employer must include in its employee handbook a statement of an employee's rights and obligations under this law.[370]

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*

In Tennessee, eligible employees are entitled to up to four months of leave upon the placement of a child for adoption as discussed in 3.9(c)(ii). Leave for employees requesting leave for adoption begins when the employee receives custody of the child.[371]

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*

Under Tennessee law, there is no statutory requirement to provide school activities leave for private-sector employees. That being said, the Tennessee Parental Educational Participation Act urges private employers to develop programs to permit employees with children in school to take time off to volunteer in their children's educational and teaching process.[372]

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*

Tennessee 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.

---

[369] TENN. CODE ANN. § 4-21-408.

[370] TENN. CODE ANN. § 4-21-408.

[371] TENN. CODE ANN. § 4-21-408.

[372] TENN. CODE ANN. § 49-6-7001(b)(6).

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

Tennessee law entitles an employee who is an eligible voter—who does not have three hours before or after work to vote—to take time off to vote. The time off must be paid. An employer may neither take deductions from an employee's pay, nor penalize employees for taking time off. An employee must apply for time off to vote before 12:00 P.M. the day before the election.[373]

In addition, an employee who is appointed by the county election commission to prepare and maintain voting machines, and who has full-time employment other than that of a voting machine technician, must be provided time off for the days required to perform their technician duties. The time off may be unpaid. However, an employer cannot require an employee to use vacation or other leave time for the days the employee performs technician duties. Voting machine technicians are not required to provide notice to employers.[374]

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*

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

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

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

The Jury System Improvements Act prohibits employers from terminating or disciplining "permanent" employees due to their jury service in federal court.[375] 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.[376] 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. Tennessee law requires employers to provide time off to employees in order to respond to a jury summons. An employer may not discharge or discriminate against any employee who

---

[373] TENN. CODE ANN. § 2-1-106.

[374] TENN. CODE ANN. § 2-9-103.

[375] 28 U.S.C. § 1875.

[376] *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).

takes jury duty leave so long as the employee provides the required notice to the employer.[377] After receiving a jury duty summons, an employee must, within one working day, provide the summons to their employer in order to be excused from employment on required days of appearance. The employee must be excused for the entire day on any day that jury service exceeds three hours.[378]

Notwithstanding the excused absences for jury duty, an employee is entitled to their usual compensation received from employment. If an employer employs fewer than five people on a regular basis or if the juror has been employed by an employer on a temporary basis for less than six months, the employer is not required to compensate the juror during the period of jury service. The employer has the discretion to deduct the amount of the fee or compensation the employee receives for serving as a juror. Employers are required to compensate employees for travel time to and from jury duty as well as for the time spent on jury service.[379]

If the employee is working a night shift or is working hours preceding those in which court is normally held, the employee must also be excused from employment for the shift immediately preceding the first day of service. After the first day of service in which the employee's responsibility for jury duty exceeds three hours during a day, the employee must be excused from the next scheduled work period occurring within 24 hours of that day of jury service.[380]

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*

Tennessee 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

[377] TENN. CODE ANN. § 22-4-106(d)(1).

[378] TENN. CODE ANN. § 22-4-106(a)(1).

[379] TENN. CODE ANN. § 22-4-106(b).

[380] TENN. CODE ANN. § 22-4-106(a)(2).

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.[381]

FMLA. Under the FMLA, eligible employees may take leave for: (1) any "qualifying exigency" arising from the foreign deployment of the employee's spouse, son, daughter, or parent with the armed forces; or (2) to care for a next of kin servicemember with a serious injury or illness (referred to as "military caregiver leave").

1. **Qualifying Exigency Leave.** An eligible employee may take up to 12 weeks of unpaid leave in a single 12-month period if the employee's spouse, child, or parent is an active duty member of one of the U.S. armed forces' reserve components or National Guard, or is a reservist or member of the National Guard who faces recall to active duty if a qualifying exigency exists.[382] 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.[383] Notably, leave is only available for covered relatives of military members called to active *federal* service by the president and is not available for those in the armed forces recalled to state service by the governor of the member's respective state.
2. **Military Caregiver Leave.** An eligible employee may take up to 26 weeks of unpaid leave in a single 12-month period to care for a "covered servicemember" with a serious injury or illness if the employee is the servicemember's spouse, child, parent, or next of kin.

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

Military Service Leave. Employees who are members of the Tennessee state guard or civil air patrol are entitled to unpaid leave when ordered to duty, including emergency duty, or for training purposes.[384] Such leave cannot result in a loss of time, pay, regular leave, vacation, or impairment of efficiency rating. Leave also cannot result in loss of supplemental pay, position, or any other job-related benefit.[385]

Active members of the Tennessee state forces and the civil air patrol are also entitled equivalent protections regarding the right to reemployment afforded under USERRA to service members called to

---

[381] 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)).

[382] 29 C.F.R. § 825.126(a).

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

[384] TENN. CODE ANN. § 8-33-110.

[385] TENN. CODE ANN. § 8-33-110.

federal active service. To be eligible for leave of absence protections, a covered individual must satisfy the following conditions:

- a person with a period of service of 30 days or less must report for work to the person's employer not later than the first full regularly scheduled work period following a period of eight hours after the person has completed their period of service and has been safely transported to their residence, unless reporting for work within that time period is not reasonably practicable through no fault of their own, in which case they must report for work as soon as reasonably practicable;
- a person with a period of service of more than 30 days but not more than 180 days must submit an application for reemployment with their employer within 14 days after completion of their period of service, unless doing so is not reasonably practicable through no fault of their own, in which case they must submit an application for reemployment as soon as reasonably practicable; and
- a person with a period of service greater than 180 days must submit an application for reemployment with their employer within 90 days after completion of the period of service.

Persons in active uniformed service must, unless impossible or unreasonable under the circumstances, provide advance notice to their employer of the orders calling the person to active state duty.[386]

Other Military-Related Protections: Spousal Unemployment. Military spouses are eligible to receive unemployment compensation if they leave their jobs due to a spouse's military transfer. An employer's experience rating will not be adversely affected.[387]

3.9(l) *Other Leaves*

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

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

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

Volunteer Emergency Responders. Tennessee law provides for voluntary emergency responder leave. An employer may not terminate an employee who is a volunteer firefighter or a volunteer rescue squad worker and is late or absent from work in order to respond to an emergency. The employee need not be paid for such a leave of absence.[388]

An employee must make a reasonable effort to notify the employer of the emergency. Upon request, the employee must provide a written statement from a supervisor certifying that the employee missed work due to responding to an emergency.[389]

386 TENN. CODE ANN. § 8-33-110.

387 TENN. CODE ANN. § 50-7-303(a)(1)(B).

388 TENN. CODE ANN. §§ 50-1-307, 50-1-309(a)(1).

389 TENN. CODE ANN. §§ 50-1-307(c), 50-1-309(b).

An employee who worked more than four hours the prior day or night as a volunteer firefighter may be permitted to take off the next scheduled work period within 12 hours following the emergency as a vacation or sick day without loss of pay.[390]

Additionally, an employee may be permitted to leave work in order to respond to fire calls during the employee's regular hours without loss of pay, vacation time, sick leave, or earned overtime accumulation.[391] If the employee is not entitled to vacation or sick leave, then the employee may be permitted to take the time off from work without pay.[392]

Veterans. Tennessee requires all employers to allow their veteran employees November 11, Veterans Day, as a non-paid holiday under certain circumstances. Independent contractors are not considered employees. Veterans include former members of the U.S. armed forces or former or current members of a reserve or Tennessee national guard unit that have been called into active service.

Veterans wishing to have the holiday off work:

- must provide the employer with at least one-month's written notice;
- must provide the employer with proof of veteran status, such as DD Form 214 or other comparable discharge document from the armed forces; and
- the absence, alone or in combination with other veteran absences will not impact public health or safety or cause the employer significant economic or operational disruption.[393]

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.[394] Employers are also required to comply with all applicable occupational safety and health standards.[395] 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

[390] TENN. CODE ANN. § 50-1-309(a)(1).

[391] TENN. CODE ANN. §§ 50-1-307, 50-1-309(a)(1).

[392] TENN. CODE ANN. § 50-1-309(a)(2).

[393] TENN. CODE ANN. § 15-1-105.

[394] 29 U.S.C. § 654(a)(1). An *employer* is defined as "a person engaged in a business affecting commerce that has employees." 29 U.S.C. § 652(5). The definition of employer does not include federal or state agencies (except for the U.S. House of Representatives and Senate). Under some state plans, however, state agencies may be subject to the state safety and health plan.

[395] 29 U.S.C. § 654(a)(2).

enforcement of state standards that are at least as effective in providing workplace protection as are comparable standards under the federal law.[396] 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*

Tennessee, under agreement with Fed-OSHA, operates its own state occupational safety and health program in accordance with section 18 of the Fed-OSH Act.[397] Thus, Tennessee is a so-called "state plan" jurisdiction, with its own detailed rules for occupational safety and health that parallel, but are separate from, Fed-OSHA standards. The Tennessee Occupational Safety and Health Administration (TOSHA) enforces the safety and health laws in Tennessee.[398] TOSHA regulations generally track their federal counterparts. In Tennessee, TOSHA conducts investigations enforcing TOSHA and the fed-OSH Act.

Workplace Investigations. An inspection by TOSHA may arise a number of ways. The most common triggers for a TOSHA investigation are:

- a written complaint, usually by an employee;
- when an accident with injuries occurs;
- when a referral of hazards is made by a reliable source;
- when a company is randomly selected; or
- when a follow-up inspection is performed to ensure that a prior citation has been corrected.

Employers generally have little to no notice of a TOSHA inspection. The TOSHA compliance officers arrive at the employer's worksite, present their credentials, and perform an opening conference with the employer and the designated employee representative. During the opening conference, information will be provided on employer and employee rights, and information about the company's safety and health program will be discussed. The TOSHA officer will then perform a walk-through inspection of the facility, which could consist of interviewing management and employees, air and noise readings, air flow and distance measurements, reviews of the material safety data sheets (MSDS), and reviews of programs. A closing conference will then be held.

If a violation is found during the inspection, the TOSHA officer will discuss the violation with the employer, resolutions to correct the problem, and the date by which any corrections need to be made. Particular hazards can also be found during the course of the inspection that could require another evaluation by an occupational safety specialist or an industrial hygienist. It is possible that some hazards will be referred to another compliance officer for a subsequent investigation; however, the follow-up examination will be considered a continuation of the original inspection.

Citations. If a citation is issued, it will be within 180 days of the inspection and it will set forth the seriousness of the violations, penalties, and the abatement dates for each violation. The citation, or a copy of it, must be posted at or near the place each violation occurred to let employees know about hazards to which they may be exposed. The citation must remain posted for three working days or until the violation

[396] 29 U.S.C. § 667(c)(2).

[397] 29 U.S.C. § 667.

[398] TENN. CODE ANN. §§ 50-3-101 *et seq*.

is corrected, whichever is longer. Even if the employer contests the citation, it must comply with these posting requirements.

Employers have a few options if they wish to contest a citation. First, the employer can make a written request to discuss the citation at an informal conference, which must be held within 20 calendar days of the date the citation was issued. The employer can use the informal conference as an opportunity to: (1) question the citation regarding violation, penalty, and abatement dates; (2) obtain a more complete understanding of the specific standards that apply; (3) discuss ways to correct the violations; and (4) obtain answers to any other related questions it may have.

Second, the employer can contest the citation within 20 days after receipt. The written notice of contest must clearly state what is being contested (*i.e.*, the violation, penalty, and/or abatement date). The administrator will then forward the case to the Tennessee Occupational Safety and Health Review Commission, a three-member independent agency appointed by the governor. The review commission will schedule and hold a hearing. The review commission may uphold, modify, or eliminate any item of the citation that the employer has challenged.

Penalties must be paid within 30 calendar days after the citation and Notification of Penalty has been issued. If the employer contests the citation or penalty in good faith, it does not pay for those items contested until a final decision is made. In addition, the employer must resolve whatever issues are underlying the citation by the required date. TOSHA's Consultation Resources Program provides "abatement" assistance and advice at no direct cost to employers that request it. However, this service is only available if the compliance citations are not contested.

If an employer receives a citation, a follow-up inspection may be conducted to verify that the employer: (1) posted the citation as required; (2) corrected the violations as required in the citation; and (3) adequately protected employees during multi-step or lengthy abatement periods.

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*

Tennessee law prohibits drivers from operating a motor vehicle while using a hand-held mobile telephone or a hand-held personal digital assistant to transmit or read a written message.[399] A driver does not transmit or read a written message if the driver reads, selects, or enters a telephone number or name in a hand-held mobile telephone or a personal digital assistant for the purpose of making or receiving a telephone call.[400]

Tennessee also prohibits all drivers from talking on a cell phone while driving, unless in hands-free mode.[401]

[399] TENN. CODE ANN. § 55-8-199(b).

[400] TENN. CODE ANN. § 55-8-199(b).

[401] TENN. CODE ANN. § 55-8-199.

Tennessee's prohibition on hand-held devices while driving applies to employees driving for work purposes and could expose an employer to liability. Employers therefore should be cognizant of, and encourage compliance with, the restriction.

3.10(c) *Firearms in the Workplace*

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

Federal law does not address firearms in the workplace.

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

Firearms in the Workplace. An individual, corporation or business entity is authorized to prohibit the possession of weapons by employees on premises owned, operated or managed by the individual, corporation or business entity. The employer must post notice of the prohibition to all affected employees.[402]

An individual, corporation, or business entity is also authorized to:

- prohibit the possession of weapons by any person who is at a meeting conducted by, or on property owned, operated, or managed or under the control of the entity; or
- restrict the possession of weapons by any person who is at a meeting conducted by, or on property owned, operated, or managed or under the control of the entity by allowing a handgun to be carried in a concealed manner only by persons authorized to carry a handgun pursuant to § 39-17-1351.[403]

If an entity does not prohibit firearms on its premises, the owner or manager is immune from civil liability from any claim based on their failure to adopt a policy that prohibits firearms. This immunity does not extend to situations where the owner or manager's conduct or failure to act results from gross negligence or willful or wanton misconduct.[404]

Firearms in Company Parking Lots. As mentioned, employers may prohibit the possession of weapons by any person, including one who has a handgun permit on company property. However, Tennessee law allows an individual with a valid handgun carry permit to transport and store a firearm or ammunition in their motor vehicle in a public or private parking area if:

- the vehicle is permitted to park in the location; and
- the firearm or ammunition is stored in the vehicle in a place hidden from "ordinary observation" when the person is in the vehicle, or if the individual is not in the vehicle, the firearm or ammunition is locked in the vehicle's trunk, glove box, or interior, or in a container "securely affixed" to the vehicle.

A permit holder transporting and/or storing a firearm or ammunition does not violate the statute if the firearm or ammunition is observed by another person or security device during the ordinary course of the permit holder securing the firearm or ammunition from observation in or on a motor vehicle.

---

402 TENN. CODE ANN. § 39-17-1315(b).

403 TENN. CODE ANN. § 39-17-1359(a)(1).

404 TENN. CODE ANN. § 39-17-1325.

For purposes of the statute, *motor vehicle* is defined as any motor vehicle which is in the lawful possession of the permit holder. The definition does not include any motor vehicle which is owned or leased by a governmental or business entity that is provided to an employee for use during the course of employment, if the entity has adopted a written policy prohibiting firearms or ammunition not required for employment within the entity's motor vehicles.

Additionally, an employer will not be liable for damages, injuries, or death resulting from or arising out of another's actions involving a firearm or ammunition legally transported or stored under the law, unless it commits an offense involving the use of a stored firearm or ammunition, or intentionally solicits or procures conduct that violates the law which causes damages, injuries, or death. Furthermore, an employer is not liable if an individual's legally transported and stored firearm or ammunition is stolen.[405]

The presence of a firearm or ammunition within an employer's parking area in accordance with state law does not by itself constitute a failure by the employer to provide a safe workplace. Further, an employer is prohibited from discharging or taking adverse employment action against an employee based solely on the employee's transportation or storage of a firearm or ammunition in their vehicle in a workplace parking area. For purposes of this law, *employee* means a person who performs services for an employer for valuable consideration and who possesses a valid handgun carry permit.[406]

Signage Requirements. Employers that prohibit possession of weapons on the premises must display notice in prominent locations, including all entrances primarily used by persons entering the property, building, or portion of the property or building where weapon possession is prohibited. The notice shall be plainly visible to the average person entering the building, property, or portion of the building or property. The notice must be in English, but a duplicate notice may also be posted in any language used by patrons, customers, or persons who frequent the place where weapon possession is prohibited.[407]

A sign must be used as the method of posting and must include certain specific details:

- To prohibit possession of weapons, including concealed weapons: A sign prohibiting possession must include the phrase "NO FIREARMS ALLOWED," and the phrase must measure at least 1" high and 8" wide. The sign must also include the phrase "As authorized by T.C.A. § 39-17-1359." The sign must also include a pictorial representation of the phrase "NO FIREARMS ALLOWED" with a circle with a diagonal line through the circle and an image of a firearm inside the circle under the diagonal line. The entire pictorial representation must be at least 4" high and 4" wide. The diagonal line must be at a forty-five degree angle from the upper left to the lower right side of the circle.
- To restrict possession of weapons but allow valid, permitted concealed carry: A sign restricting possession must include the phrase "CONCEALED FIREARMS ONLY," and the phrase must measure at least 1" high and 8" wide. The sign must also include the phrase "As authorized by T.C.A. §§ 39-17-1351 and 39-17- 1359." The sign must also include a pictorial representation of the phrase "CONCEALED FIREARMS ONLY" with a circle with a diagonal line through the circle and an image of a firearm and an image of an eyeball inside the circle. The

[405] TENN. CODE ANN. §§ 39-17-1313, 39-17-1315(b), and 39-17-1359(a).

[406] TENN. CODE ANN. § 50-1-312.

[407] TENN. CODE ANN. § 39-17-1359.

entire pictorial representation must be at least 4" high and 4" wide. The diagonal line must be at a forty five degree angle from the upper left to the lower right side of the circle.[408]

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*

The Tennessee Non-Smoker Protection Act prohibits smoking in enclosed places of employment, including in company vehicles; however, private businesses with three or fewer employees may establish smoking areas if certain conditions are met.[409]

"No Smoking" signs must be posted at every entrance to the workplace. The prohibition on smoking must be communicated to all existing employees and to all prospective employees upon their application for employment.[410] Employers must notify employees of the smoking policy by a written policy, handout, or statement distributed to all employees, or by posting a notice in an area that employees frequent.[411]

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*

Tennessee law does not address suitable seating requirements for employees.

3.10(f) *Workplace Violence Protection Orders*

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

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

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

Under the Workplace Violence Act, all Tennessee employers and employees can seek a temporary restraining order and an injunction if they have suffered "unlawful violence or a credible threat of violence" at the workplace.[412] The law identifies potentially unlawful conduct as a series of acts "evidencing a continuity of purpose," such as following or stalking an employee to or from the workplace; entering an employee's workplace; following an employee during work hours; and calling or

---

[408] TENN. CODE ANN. § 39-17-1359(b).

[409] TENN. CODE ANN. §§ 39-17-1803(a), 39-17-1804(6); *see also* TENN. CODE ANN. §§ 39-17-1601 *et seq*. (setting forth the Children's Act for Clean Indoor Air, which prohibits smoking in certain facilities that typically serve children).

[410] TENN. CODE ANN. § 39-17-1803(b).

[411] TENN. COMP. R. & REGS. 008-06-01-.04.

[412] TENN. CODE ANN. §§ 20-14-101 *et seq*.

corresponding with an employee.[413] A *credible threat of violence* is a knowing and willful statement or course of conduct that would cause a reasonable person to believe that the person is under threat of death or serious bodily injury.[414]

To obtain a temporary restraining order, the petitioner must show that a "reasonable investigation" was conducted and offer "reasonable proof" that great or irreparable harm will result if the court denies the injunction. Unless modified or terminated by the court, the temporary restraining order cannot be in effect for more than 15 days.[415] Within 30 days of the petition, the court must hold a hearing and issue the injunction if there is clear and convincing evidence that the respondent engaged in unlawful violence or made a credible threat of violence. Any injunction issued by the court cannot exceed three years unless the court grants the petitioner's timely request to renew the injunction.[416] Local law enforcement officials must also receive a copy of the court's temporary restraining order or injunction and notice of any modifications or terminations.[417]

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");[418] (2) the Americans with Disabilities Act (ADA);[419] (3) the Age Discrimination in Employment Act (ADEA);[420] (4) the Equal Pay Act;[421] (5) the Genetic Information Nondiscrimination Act of 2009 (GINA);[422] (6) the Civil Rights Acts of 1866 and 1871;[423] and (7) the Civil Rights Act of 1991. As a result of these laws, federal law prohibits discrimination in employment on the basis of:

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

[413] TENN. CODE ANN. § 20-14-101(1).

[414] TENN. CODE ANN. § 20-14-101(2).

[415] TENN. CODE ANN. § 20-14-104.

[416] TENN. CODE ANN. § 20-14-105.

[417] TENN. CODE ANN. § 20-14-107.

[418] 42 U.S.C. §§ 2000e *et seq.* Title VII applies to employers with 15 or more employees. 42 U.S.C. § 2000e(b).

[419] 42 U.S.C. §§ 12101 *et seq.* The ADA applies to employers with 15 or more employees. 42 U.S.C. § 12111(5).

[420] 29 U.S.C. §§ 621 *et seq*. The ADEA applies to employers with 20 or more employees. 29 U.S.C. § 630.

[421] 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.

[422] 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)).

[423] 42 U.S.C. §§ 1981, 1983.

- sex (includes pregnancy, childbirth, or related medical conditions, and pursuant to the U.S. Supreme Court's decision in *Bostock v. Clayton County, Georgia*, includes sexual orientation and gender identity);[424]
- 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.[425] 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.[426]

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

The Tennessee Human Rights Act (THRA) is intended to prohibit discrimination and harassment in a manner consistent with federal antidiscrimination law.[427] The THRA prohibits discrimination against any employee or applicant with respect to hiring, discharge, compensation, or other terms and conditions or privileges of employment on the basis of:

- race, (the definition of race includes hair texture and protective hairstyles. Protective hairstyles includes but is not limited to braids, locs, and twists);[428]
- creed;
- color;
- religion;
- sex (including pregnancy);
- age; or
- national origin (including ancestry).[429]

[424] 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.

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

[426] 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.

[427] TENN. CODE ANN. §§ 4-21-101(a)(1) *et seq*.

[428] TENN. CODE ANN. § 4-21-102.

[429] TENN. CODE ANN. § 4-21-101(a)(3).

Tennessee courts have traditionally relied upon federal jurisprudence to decide claims under the THRA.[430] Thus, for example, Tennessee courts apply the same burden-shifting analysis to claims under the THRA as is applied to claims under Title VII and the ADEA.[431]

The THRA applies to all employers employing eight or more persons within Tennessee or "any person acting as an agent of an employer, directly or indirectly."[432] Religious corporations, associations, educational institutions, or societies are not subject to the THRA with respect to the employment of individuals of a particular religion to perform work connected with carrying out its activities.[433]

The THRA generally applies to employees irrespective of "full-time" or "part-time" designation. Similar to the federal ADEA, the age discrimination protections of the THRA are limited to employees who are at least 40 years old.[434]

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

The THRA provides aggrieved employees two ways to pursue a claim of discrimination: (1) filing a charge with the Tennessee Human Rights Commission (THRC); and (2) filing a lawsuit for discrimination in state court.[435] Filing a charge with the THRC is not an administrative prerequisite to filing suit under the THRA; thus, an employee is not required to exhaust administrative remedies prior to filing suit.[436] An aggrieved employee must file an administrative charge with the THRC within 185 days from the date of the discriminatory act.[437] The statute of limitations for filing a THRA claim in state court is one year after the alleged discriminatory act ceases.[438] Filing an administrative charge with the THRC does not "toll" the limitations period for a lawsuit in state court.

The statute of limitations begins to run on the date the employer notifies the employee of the adverse employment action, not the date the action occurs. Tennessee also follows the continuing violation doctrine, which allows an employee to recover for a series of related discriminatory acts that occurred both inside and outside the one-year statute of limitations. Under the continuing violation doctrine, the statute of limitations begins on the date the alleged discriminatory acts cease.[439]

The THRA authorizes recovery of back pay, front pay, damages for "humiliation and embarrassment," and attorneys' fees. Unlike federal antidiscrimination statutes, the THRA prohibits the recovery of punitive damages for employment discrimination, except for claims of "malicious harassment."[440]

---

[430] TENN. CODE ANN. § 4-21-101(a)(1); *Frye v. St. Thomas Health Servs.*, 227 S.W.3d 595, 602 (Tenn. Ct. App. 2007) (citing *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 31 (Tenn. 1996)).

[431] TENN. CODE ANN. § 4-21-311(e); *see also Johnson v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 502 F. App'x 523, 542-43 (6th Cir. 2012).

[432] TENN. CODE ANN. § 4-21-102(5).

[433] TENN. CODE ANN. §§ 4-21-102, 4-21-405.

[434] TENN. CODE ANN. § 4-21-101(b).

[435] TENN. CODE ANN. §§ 4-21-302 to 4-21-307, 4-21-311.

[436] TENN. CODE ANN. §§ 4-21-302 to 4-21-307, 4-21-311.

[437] TENN. CODE ANN. § 4-21-302(c).

[438] TENN. CODE ANN. § 4-21-311(d).

[439] TENN. CODE ANN. § 4-21-311(d).

[440] TENN. CODE ANN. § 4-21-306.

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

Disability Discrimination. Tennessee law prohibits discrimination in employment on the basis of disability through the Tennessee Disability Act (TDA).[441] The TDA incorporates a definition of "disability" that mirrors the original definition of the federal Americans with Disabilities Act (ADA)[442] and prohibits discrimination "in the hiring, firing, and other terms and conditions of employment."[443] Claims under the TDA are generally comparable to federal claims under the ADA.[444]

However, the TDA differs from the ADA in two significant respects. First, the causation standard is higher for the TDA, applying a "based solely upon" standard.[445] Second, the TDA contains no obligation on the part of the employer to provide a reasonable accommodation.[446] The TDA specifically states that an employee is not protected if the employee's disability "to some degree prevents [the employee] from performing duties required" by the job.[447] Accordingly, if an employee's disability limits the employee's ability to perform the functions of a position, the employer has no legal duty under the TDA to accommodate the employee. Tennessee employers subject to the federal ADA nonetheless must comply with the ADA's reasonable accommodation requirements.

An aggrieved employee may file a complaint under the TDA with the Tennessee Human Rights Commission.[448] The TDA mirrors the THRA's procedural process and available remedies as described in **3.11(a)(iii)**.

Use of Agricultural Product. Tennessee law prohibits an employer from discharging or terminating an employee solely for participating or engaging in the use of an agricultural product that is not regulated by the alcoholic beverage commission and is not otherwise proscribed by law, if:

- the employee engaged in such use in a manner that complies with all applicable employer policies regarding such use during times at which the employee is working; and
- the employee engages in the use of the product or in the activity during times when the employee is not working.[449]

National Guard Membership. Tennessee employers may not refuse to employ an individual solely because they are a member of the Tennessee national guard, nor may an employer terminate an individual's employment because they are on leave to attend a required drill or field training.[450]

Natural Immunity Discrimination. Tennessee has enacted a law prohibiting a private business from adopting or enforcing a rule, policy, procedure, or practice that: (1) fails to recognize natural immunity as

---

441 TENN. CODE ANN. §§ 8-50-103 *et seq*.

442 TENN. CODE ANN. § 4-21-102(3).

443 TENN. CODE ANN. § 8-50-103.

444 *Burress v. City of Franklin*, 809 F. Supp. 2d 795, 817 (M.D. Tenn. 2011).

445 TENN. CODE ANN. § 8-50-103(b).

446 TENN. CODE ANN. § 8-50-103(b); *Anderson v. Ajax Turner Co.*, 1999 WL 976517, at *3 (Tenn. Ct. App. Oct. 28, 1999); *Pruett v. Wal-Mart Stores, Inc.*, 1997 WL 729260, at *12 (Tenn. Ct. App. Nov. 25, 1997).

447 TENN. CODE ANN. § 8-50-103(b).

448 TENN. CODE ANN. § 8-50-103(c).

449 TENN. CODE ANN. § 50-1-304(d).

450 TENN. CODE ANN. § 58-1-604.

providing a level of immune protection is at least as protective as COVID-19 vaccine; or (2) treats individuals with natural immunity differently than those who have received the COVID-19 vaccine.[451]

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."[452] 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.[453]

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

Tennessee law prohibits employers from discriminating between employees in the same establishment on the basis of sex by paying any employee salary or wage rates less than the rates the employer pays to any employee of the opposite sex for comparable work on jobs the performance of which require comparable skill, effort and responsibility, and that are performed under similar working conditions.[454] The statute does not prohibit wage differentials based on a seniority system, a merit system, a system that measures earnings by quality or quantity of production, or any other reasonable differential that is based on a factor other than sex. An employer paying a wage differential in violation of the statute cannot reduce the wage rate of any employee in order to comply.

An employee alleging a violation may file a civil action within two years of the alleged violation.[455]

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

---

[451] TENN. CODE ANN. §§ 14-1-101; 14-2-101.

[452] 29 U.S.C. § 206(d)(1).

[453] 42 U.S.C. § 2000e-5.

[454] TENN. CODE ANN. § 50-2-202.

[455] TENN. CODE ANN. §§ 50-2-204, 50-2-205.

determining the extent to which an employer is required to accommodate an employee's pregnancy, childbirth, or related medical conditions.

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

- fail or refuse to make reasonable accommodations for the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on its business operations;
- require a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process;
- deny employment opportunities to a qualified employee, if the denial is based on the employer's need to make reasonable accommodations for the qualified employee;
- require a qualified employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided; or
- take adverse action related to the terms, conditions, or privileges of employment against a qualified employee because the employee requested or used a reasonable accommodation.[456]

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).[457]

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.[458] 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

[456] 42 U.S.C. § 2000gg-1. The regulations provide definitions of *pregnancy*, *childbirth*, and *related medical conditions*. 29 C.F.R. § 1636.3.

[457] 29 C.F.R. § 1636.3.

[458] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1636.3.

an effective reasonable accommodation.[459] An employee is not required to accept an accommodation. However, if the employee rejects a reasonable accommodation, and, as a result of that rejection, cannot perform (or apply to perform) an essential function of the position, the employee will not be considered "qualified."[460]

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.[461]

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.[462]

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.

---

[459] 29 C.F.R. § 1636.3.

[460] 29 C.F.R. § 1636.4.

[461] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1630.2(p).

[462] 29 C.F.R. § 1636.3.

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

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

In addition to the pregnancy leave protections discussed in **3.9(c)(ii)**, Tennessee law also requires certain private sector employers to provide reasonable accommodations to pregnant employees. The Pregnant Workers Fairness Act requires employers of 15 or more employees to make reasonable accommodations for the medical needs of an applicant or an employee arising from pregnancy, childbirth, or related medical conditions, unless providing accommodation would impose an undue hardship on the employer's business operations. *Undue hardship* means an action requiring significant difficulty or expense.[463]

Reasonable accommodation includes:

- making existing facilities used by employees readily accessible and usable;
- providing more frequent, longer, or flexible breaks;
- providing a private place, other than a bathroom stall, for the purpose of expressing milk;
- modifying food or drink policy;
- providing modified seating or allowing the employee to sit more frequently if the job requires standing;
- providing assistance with manual labor and limits on lifting;
- authorizing a temporary transfer to a vacant position;
- providing job restructuring or light duty, if available;
- acquiring or modifying of equipment, devices, or an employee's work station;
- modifying work schedules; and
- allowing flexible scheduling for prenatal visits.[464]

However, the Act does not require an employer to take the following actions, unless the employer does or would do so for another employee or a class of employees that need a reasonable accommodation:

- hire new employees that the employer would not have otherwise hired;
- discharge an employee, transfer another employee with more seniority, or promote another employee who is not qualified to perform the new job;
- create a new position, including a light duty position for the employee, unless a light duty position would be provided for another equivalent employee;
- compensate an employee for more frequent or longer break periods, unless the employee uses a break period that would otherwise be compensated; or

[463] TENN. CODE ANN. §§ 50-10-102, 50-10-103.

[464] TENN. CODE ANN. § 50-10-102.

- construct a permanent, dedicated space for expressing milk.[465]

An employer may, if required of other employees with medical conditions, request that an employee with a medical need relating to pregnancy, childbirth, or related medical conditions provide certification from a healthcare professional if the employee is requesting a reasonable accommodation related to temporary transfer to a vacant position, job restructuring, light duty, or accommodations that require time away from work. During the time period in which an employee is making good faith efforts to obtain certification, an employer must begin engaging in a good faith interactive process with the employee to determine if a reasonable accommodation can be provided absent undue hardship. The Act prohibits an employer from requiring an employee to take leave under a leave law or policy adopted by the employer, if another reasonable accommodation can be provided.[466]

The Act also prohibits an employer from taking adverse action against an employee in the terms, conditions, or privileges of employment for requesting or using a reasonable accommodation to the known limitations for medical needs arising from pregnancy, childbirth, or related medical conditions, including but not limited to counting an absence related to pregnancy under no fault attendance policies.[467] An applicant or employee alleging a violation of the Act may bring a civil action in the chancery court or circuit court within one year from the date of termination of employment or the date of the adverse employment action. An employee is not required to pursue an administrative action or remedy prior to filing suit.[468]

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.[469] Multiple decisions of the U.S. Supreme Court[470] 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.[471] 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.

---

[465] TENN. CODE ANN. § 50-10-103.

[466] TENN. CODE ANN. § 50-10-103.

[467] TENN. CODE ANN. § 50-10-103.

[468] TENN. CODE ANN. § 50-10-104.

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

[470] *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).

[471] 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.

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

There are no antiharassment training and education requirements mandated for private employers in Tennessee. However, the Healthy Workplace Act provides immunity from liability to an employer in connection with a suit against the employer for any employee's abusive conduct that results in negligent or intentional infliction of mental anguish, if the employer has adopted an abusive conduct prevention policy.[472] The policy must:

- assist employers in recognizing and responding to abusive conduct in the workplace; and
- prevent retaliation against any employee who has reported abusive conduct in the workplace.[473]

An employer may adopt the state's model policy, or may create its own policy that meets the statutory requirements for an abusive conduct prevention policy.[474]

3.12 Miscellaneous Provisions

3.12(a) *Whistleblower Claims*

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

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

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

The Tennessee Public Protection Act (TPPA) is the state whistleblower statute for employees terminated "for refusing to participate in, or refusing to remain silent about, illegal activities."[475] The TPPA defines *illegal activities* as "activities that are in violation of the criminal or civil code of this state or the United States or any regulation intended to protect the public health, safety or welfare." It does not include federal laws prohibiting employment discrimination or the Tennessee Disability Act.[476] To establish a violation of the TPPA, an individual must prove four elements:[477]

1. the individual was an employee;
2. the individual was terminated;

---

[472] TENN. CODE ANN. §§ 50-1-502 - 50-1-504.

[473] TENN. CODE ANN. §§ 50-1-503 - 50-1-504.

[474] TENN. CODE ANN. § 50-1-504.

[475] TENN. CODE ANN. § 50-1-304(b).

[476] TENN. CODE ANN. § 50-1-304(a)(3).

[477] *Franklin v. Swift Transp. Co., Inc.*, 210 S.W.3d 521, 528 (Tenn. Ct. App. 2006).

3. the individual either blew the whistle on illegal activity in furtherance of a clear public policy or refused to participate in illegal activity; and
4. the individual's action or inaction was the sole cause for the individual's termination.

Notably, demotions are not actionable under the TPPA. Thus, to prevail on a whistleblower claim, the employee must have been discharged or terminated. If the employee satisfies the four elements in support of the employee's claim, the burden then shifts to the employer to demonstrate a legitimate, non-pretextual reason for the termination.

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)[478] and the Railway Labor Act (RLA)[479] are the two main federal laws governing employer relations with unions in the private sector. The NLRA regulates labor relations for virtually all private-sector employers and employees, other than rail and air carriers and certain enterprises owned or controlled by such carriers, which are covered by the RLA. The NLRA's main purpose is to: (1) protect employees' right to engage in or refrain from *concerted activity* (*i.e.*, group activities attempting to improve working conditions) through representation by labor unions; and (2) regulate the collective bargaining process by which employers and unions negotiate the terms and conditions of union members' employment. The National Labor Relations Board (NLRB or "Board") enforces the NLRA and is responsible for conducting union elections and enforcing the NLRA's prohibitions against "unfair" conduct by employers and unions (referred to as *unfair labor practices*). For more information on union organizing and collective bargaining rights under the NLRA, see LITTLER ON UNION ORGANIZING and LITTLER ON COLLECTIVE BARGAINING.

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

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

Tennessee is a right-to-work state. Accordingly, employers cannot deny or attempt to deny employment because of a person's membership in, affiliation with, resignation from, or refusal to join or affiliate with any labor union or employee organization of any kind.[480] Tennessee law also prohibits employers from denying employment because a person paid or failed to pay dues, fees, assessments, or other charges to any labor union or employee organization of any kind.[481] Finally, employers cannot enter into an agreement with a union or employee organization that prohibits employees from withdrawing from a union or employee organization prior to the agreement's expiration.[482] Violation of Tennessee's right-to-

[478] 29 U.S.C. §§ 151 to 169.

[479] 45 U.S.C. §§ 151 *et seq*.

[480] TENN. CODE ANN. § 50-1-201.

[481] TENN. CODE ANN. § 50-1-203.

[482] TENN. CODE ANN. § 50-1-204.

work law is a Class A misdemeanor, and each day the employer is in violation is considered a separate and distinct offense.[483]

Additionally, Tennessee voters approved an amendment to the state's constitution establishing a right to work for individuals regardless of status of affiliation with any labor union or employee organization. Any person, corporation, association, the state of Tennessee, or its political subdivision are prohibited from denying or attempting to deny employment to any individual because of that individual's membership in, affiliation with, resignation from, or refusal to join or affiliate with any labor union or employee organization.[484]

4. END OF EMPLOYMENT

4.1 Plant Closings & Mass Layoffs

4.1(a) *Federal WARN Act*

The federal Worker Adjustment and Retraining Notification (WARN) Act requires a covered employer to give 60 days' notice prior to: (1) a *plant closing* involving the termination of 50 or more employees at a single site of employment due to the closure of the site or one or more operating units within the site; or (2) a *mass layoff* involving either 50 or more employees, provided those affected constitute 33% of those working at the single site of employment, or at least 500 employees (regardless of the percentage of the workforce they constitute).[485] 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.[486] 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*

Tennessee has enacted a mini-WARN Act that applies to Tennessee employers having at least 50 but not more than 99 full-time employees.[487] The state act adheres to all aspects of federal WARN except that it applies to employers with 50 or more employees.[488] The state law requires a covered employer to notify affected employees of a reduction in operations, which includes:

- the closure of a workplace (or portion thereof) where the number of employees working in the workplace is permanently or indefinitely reduced by 50 or more during any three-month period;

---

[483] TENN. CODE ANN. § 50-1-205.

[484] TENN. CONST. amend. XI.

[485] 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.

[486] 20 C.F.R. §§ 639.4, 639.6.

[487] TENN. CODE ANN. § 50-1-601(1).

[488] *See* Tennessee Dep't of Labor and Workforce Dev., *WARN Notices*, *available at* https://www.tn.gov/workforce/employers/staffing-redirect/layoffs---unemployment/warn-notices.html.

- the modernization of a workplace (or portion thereof) where the number of employees working in the workplace is permanently or indefinitely reduced by 50 or more during any three-month period;
- the relocation of a workplace (or portion thereof) to another site located more than 50 miles from the workplace, where the number of employees working in the workplace is permanently or indefinitely reduced by 50 or more during a three-month period; or
- the implementation or application of any management policy within the workplace, where the number of employees working in the workplace is permanently or indefinitely reduced by 50 or more during any three-month period.[489]

Workplace means "a factory, plant, office or other facility where employees produce goods or provide services."[490]

The required notice must be issued at least 60 days prior to the reduction in operations.[491] Upon notifying affected employees of a reduction in operations, an employer must also notify the Commissioner of Labor and Workforce Development regarding the circumstances of the reduction in operations and the number of employees affected.[492] Notice need not be provided if the reduction in operations results solely from a labor dispute, occurs at a construction site or other temporary workplace, or results from seasonal factors as determined by the labor commission's rules.[493]

4.1(c) *State Mass Layoff Notification Requirements*

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

Nonetheless, as indicated at **0**, unemployment notice is required for all separating employees. That requirement may be waived, by prior agreement with the Department of Labor and Workforce Development, if the employer submits "verification of the date of separation and the reason" for it through an electronic method, a mass separation notice, or a mail-in claim.[494]

4.1(d) *State Worksite Separation*

Tennessee law allows a former employee 24 hours to leave the premises from the date employment ends. If a separated employee fails to do so within that timeframe, they can be found to have committed a class C misdemeanor.[495]

---

[489] TENN. CODE ANN. § 50-1-601(2).

[490] TENN. CODE ANN. § 50-1-601(3).

[491] *See* Tennessee Dep't of Labor & Workforce Dev., *WARN Notices*, *available at* https://www.tn.gov/workforce/employers/staffing-redirect/layoffs---unemployment/warn-notices.html.

[492] TENN. CODE ANN. § 50-1-602(a).

[493] TENN. CODE ANN. § 50-1-603.

[494] TENN. COMP. R. & REGS. 0800-09-01-.02.

[495] TENN. CODE ANN. § 50-1-303.

4.2 Documentation to Provide When Employment Ends

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

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

Table 10. Federal Documents to Provide at End of Employment	
Category	**Notes**
Health Benefits: Consolidated Omnibus Budget Reconciliation Act (COBRA)	Under COBRA, the administrator of a covered group health plan must provide written notice to each covered employee and spouse of the covered employee (if any) of the right to continuation coverage provided under the plan.[496] The notice must be provided not later than the earlier of: • the date that is 90 days after the date on which the individual's coverage under the plan commences or, if later, the date that is 90 days after the date on which the plan first becomes subject to the continuation coverage requirements; or • the first date on which the administrator is required to furnish the covered employee, spouse, or dependent child of such employee notice of a qualified beneficiary's right to elect continuation coverage.
Retirement Benefits	The Internal Revenue Service requires the administrator of a retirement plan to provide notice to terminating employees within certain time frames that describe their retirement benefits and the procedures necessary to obtain them.[497]

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

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

Table 11. State Documents to Provide at End of Employment	
Category	**Notes**
Health Benefits: Mini-COBRA, etc.	Tennessee state law requires employers of fewer than 20 employees to provide posttermination continued coverage for up to three months. The law does not require such employers to provide notification of continued coverage to an employee upon termination.[498]
Unemployment Notice	**Generally.** Whenever a worker is separated from employment for an indefinite period, or for an expected duration of seven days or more, an employer must provide the worker a Separation Notice. The notice must

[496] 29 C.F.R. § 2590.606-1.

[497] I.R.S., *Retirement Topics – Notices*, *available at*: https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-notices.

[498] TENN. CODE ANN. § 56-7-2312.

Table 11. State Documents to Provide at End of Employment	
Category	**Notes**
	be furnished within 24 hours after the worker's separation from employment. An employer must use the notice supplied by the state labor department (Form LB-0489) and must complete the information required on the form.[499] Unless requested by the state unemployment department, an employer is not required to furnish a notice to any worker separated from employment for lack of work if the worker has been continuously employed for less than one week. The notice requirement may be waived, by prior agreement with the Department of Labor and Workforce Development, if the employer submits "verification of the date of separation and the reason" for it through an electronic method, a mass separation notice, or a mail-in claim.[500] **Multistate Workers.** Tennessee does not require that employees be again notified as to the jurisdiction under whose unemployment compensation law services have been covered.[501] It is recommended, however, that employers consider providing notice of the jurisdiction where services will be covered for unemployment purposes. Employers should also follow that state's general notice requirement, if applicable.

4.3 Providing References for Former Employees

4.3(a) *Federal Guidelines on References*

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

4.3(b) *State Guidelines on References*

Tennessee employers are not required to provide information on current or former employees. Upon request by a prospective employer or current or former employee, any employer that provides truthful, fair, and unbiased information about a current or former employee's job performance or employment is presumed to be acting in good faith and is granted a qualified immunity for the disclosure and the consequences of such disclosure.[502] The presumption of good faith, however, is rebuttable by showing the information disclosed was knowingly false, deliberately misleading, disclosed for a malicious purpose,

[499] The notice is available at https://www.tn.gov/content/dam/tn/workforce/documents/Forms/LB-0489.pdf.

[500] TENN. COMP. R. & REGS. 0800-09-01-.02.

[501] *See* TENN. CODE ANN. § 50-7-706 (Reciprocal Arrangements and Cooperation); *see also* TENN. COMP. R. & REGS. 0800-09-01-.20 (Interstate Claims and Procedure).

[502] TENN. CODE ANN. § 50-1-105.

disclosed in reckless disregard for its falsity or defamatory nature, or constitutes a violation of the current or former employee's civil rights.[503]

[503] TENN. CODE ANN. § 50-1-105.