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STATE

Littler on

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

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

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

DISCLAIMER

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

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1.1(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 Vermont, as elsewhere, an individual who provides services to another for payment generally is considered either an independent contractor or an employee. For the most part, the distinction between an independent contractor and an employee is dependent on the applicable state law (see Table 1). The Vermont Employee Misclassification Task Force combats misclassification of workers and ensures enforcement of all related laws and regulations.[5]

The Vermont Department of Labor (VDOL) has entered into a partnership with the U.S. Department of Labor (DOL), Wage and Hour Division, and the Employee Benefits Security Administration (EBSA) to work cooperatively through information sharing, joint enforcement efforts, and coordinated outreach and education efforts in order to reduce instances of misclassification of employees as independent contractors.[6]

Table 1. State Tests for Classifying Workers

Purpose of Determining Employee Status	State Agency	Test to Apply
Fair Employment Practices Laws	Vermont Human Rights Commission	"Right to control" test.[7]

[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] VT. STAT. ANN. tit. 3, § 2222d.

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

[7] *Fernot v. Crafts Inn, Inc.*, 895 F. Supp. 668, 681 (D. Vt. 1995) (in examining whether an alleged harasser was an employee or independent contractor for purposes of the Vermont Fair Employment Practices Act (VFEPA), the court applied the "right to control" test and held that the "most important factor to consider in determining whether a worker is an employee or independent contractor is the extent of control which, by agreement, the employer may exercise over the details of the work") (citing *Verrill v. Dewey*, 299 A.2d 182 (Vt. 1972)).

Table 1. State Tests for Classifying Workers		
Income Taxes	Vermont Agency of Administration, Department of Taxes	According to the Vermont Department of Taxes, the ABC test.[8]
Unemployment Insurance	VDOL, Unemployment Insurance	Statutory test, adopting the ABC test.[9] An individual is presumed to be an employee unless: 1. the individual is "free from control or direction over the performance of such services, both under his or her contract of service and in fact;"[10] 2. the service is either outside the usual course of business or "performed outside of all the places of business of the enterprise for which such service is performed;"[11] and 3. the individual is "customarily engaged in an independently established trade, occupation, profession, or business."[12]

[8] Agency of Admin., Dep't of Taxes, *Hiring Employees or Independent Contractors or Both, available at* https://tax.vermont.gov/business/hire-employees; *see also* VT. STAT. ANN. tit. 32, § 5841(a) (Vermont's income tax law defers to federal tax law).

[9] VT. STAT. ANN. tit. 21, § 1301(6)(B); *see also* Vermont Dep't of Labor, Unemployment Ins., *Who is an Employee v. Independent Contractor?*, *available at* (providing guidance about how the Department of Labor applies the ABC test and noting that the IRS 20-factor test is different and less inclusive than the "ABC" test; thus, "[i]t's possible that under Vermont law an individual may be considered an employee but under the IRS an individual contractor.").

[10] *Fleece on Earth v. Department of Emp't & Training*, 923 A.2d 594, 598-99 (Vt. 2007) (noting that part A of the test examines the degree of control and direction over the services performed, which is liberally construed and "broader than the common law master-servant relation, and … draws into its sweep workers who might be independent contractors under the common law") (citations omitted). Other factors relevant to part A of the test include: "the degree of oversight and supervision that a purported employer exercises; whether the purported employer or worker supplies tools and materials; the understanding and intentions of the parties; whether a purported worker may accept or decline work from the purported employer or others without suffering adverse consequence; and whether the purported employer requires the worker to complete specific training." *Great Northern Constr., Inc. v. Department of Labor*, 161 A.3d 1207, 1214 (Vt. 2016) (citations omitted).

[11] With respect to part B, Vermont courts "do not construe outside the usual course of business or outside of all places of business to mean simply the home office or headquarters of the company. The places of business include these but also as well the business territory within which it operated." *Vermont Inst. of Cmty. Involvement v. Department of Emp't Sec.*, 436 A.2d 765 (Vt. 1981) (citations omitted). The factors relevant to part B of the test include: "whether the worker's business is a 'key component' of the putative employer's business, how the purported employer defines its own business, which of the parties supplies equipment and materials, and whether the service the worker provides is necessary to the business of the putative employer or is merely incidental." *Great Northern Constr., Inc.*, 161 A.3d 1216 (citations omitted).

[12] With respect to part C, individuals are not required "to be engaged full-time in their independent business or trade." *Fleece on Earth*, 923 A.2d at 601. However, workers must be "independently established providing the same or similar services as they provide for the employer." *Fleece on Earth*, 923 A.2d at 601-02. Evidence that a

Table 1. State Tests for Classifying Workers		
		All three parts of the test must be met in order for a worker to be classified as an independent contractor.[13]
Wage & Hour Laws	VDOL, Wage & Hour	Statutory test, adopting the ABC test. *Employee* "means a person who has entered into the employment of an employer, where the employer is unable to show that: (A) the individual has been and will continue to be free from control or direction over the performance of such services, both under the contract of service and in fact; and (B) the service is either outside all the usual course of business for which such service is performed, or outside all the places of business of the enterprise for which such service is performed; and (C) the individual is customarily engaged in an independently established trade, occupation, profession, or business."[14] There is no case law explaining the test for independent contractor status in this context.

worker owns their own equipment and performs work for other companies and individuals in the past would satisfy part C. *Fleece on Earth*, 923 A.2d at 602. In *Bradford's Trucking, Inc. v. Department of Labor*, the Vermont Supreme Court observed that the third prong of the test:

> requires that [the] employer show that the business in question was established, independently of the employer or the rendering of the personal service forming the basis of the claim; that the individual was engaged in the independent business at the time of rendering the service; that the individual was customarily or regularly so engaged; and that the business was established, meaning one that is permanent, fixed, stable and lasting.

125 A.3d 135, 138 (Vt. 2015) (quotation omitted).

[13] Vermont Dep't of Labor, Unemployment Ins., *Who is an Employee v. Independent Contractor?*, *available at* https://labor.vermont.gov/document/who-employee-vs-independent-contractor; *see also Fleece on Earth*, 923 A.2d at 597.

[14] VT. STAT. ANN. tit. 21, § 341(a) (defining *employee* in the wage payment law).

Table 1. State Tests for Classifying Workers		
Workers' Compensation	VDOL, Workers' Compensation	"Right to control" test[15] and, if that test does not distinguish between an employee and independent contractor,[16] the "nature of the business" test.[17] *Worker / employee* is defined in the workers' compensation law as "an individual who has entered into the employment of, or works under contract of service or apprenticeship with, an employer."[18] Additionally, under the workers' compensation law, a sole proprietor or partner owner in an unincorporated business will not be considered a "worker" or "employee" provided:

[15] *Hathaway v. Tucker*, 14 A.3d 968, 976 (Vt. 2010). Under the right to control test, "a worker is an employee if the party for whom work is being done may prescribe not only what the result shall be, but also may direct the means and methods by which the other shall do the work." 14 A.3d at 976 (quotation omitted). Courts are not bound by the label parties attach to their relationship; although "the intent of the parties is a relevant consideration, [it] is hardly determinative." *Hathaway*, 14 A.3d at 977; *see also Falconer v. Cameron*, 561 A.2d 1357, 1359 (Vt. 1989) (concerning an argument that a lease agreement mandated that an individual be viewed as independent contractor, the Court of Appeals stated "[w]e can think of no more pointed an example of attempting to contract out of one's legal obligations as an employer").

[16] The "nature of the business" test focuses more on the definition of *employer* under the workers' compensation law and the statutory employer relationship under the law, as well as case law interpreting the same, "than on the extent of control the alleged employer had over the employee." *In re Chatham Woods Holdings, L.L.C.*, 955 A.2d 1183, 1189 (Vt. 2008). "[T]he purpose of this test is to impose workers' compensation liability on business owners who hire independent contractors to carry out some phase of their business." 955 A.2d at 1189. The nature of the business test "asks whether the work contracted for by the owner or proprietor with the independent contractor is a part of, or process in, the trade, business or occupation of the owner or proprietor." *Macum v. State Agency of Human Servs.*, 38 A.3d 1177, 1180 (Vt. 2012) ("Shared commonality of interest with associated businesses is insufficient to render a proprietor a statutory employer of the associate's employees."). Moreover, when applying the business nature test, "due consideration must be given to the *customary practice* of the owner or proprietor carrying out his usual business." *In re Chatham Woods Holdings, L.L.C.*, 955 A.2d at 1189 (emphasis added) (further explaining that a company's obligations do not change if it expands or alters the nature of its business).

[17] Vermont Dep't of Labor, Workers' Comp., *Misclassification: Who is an Employee vs. an Independent Contractor?*, *available at* https://labor.vermont.gov/document/who-employee-vs-independent-contractor. The Vermont Department of Labor provides a nonexhaustive list of 13 questions to help determine if an employment relationship exists under the right to control test and notes that "[i]f the totality of responses to these questions leads to the conclusion that an employer 'controls' its worker, then the analysis concludes and the employee must be insured for workers' compensation purposes;" if the results go in the alternate direction, then two additional questions must be asked: (1) is the work performed the "type that normally could be carried out by an employee in the usual course of business?" and (2) are "the activities being performed by the workers an integral part of the employer's regular business?" and if the response to both is yes, then the individual will be considered an employee. Vermont Dep't of Labor, Workers' Comp., *Misclassification: Who is an Employee vs. an Independent Contractor?*

[18] VT. STAT. ANN. tit. 21, § 601(14).

Table 1. State Tests for Classifying Workers		
		"(i) The individual performs work that is distinct and separate from that of the person with whom the individual contracts. (ii) The individual controls the means and manner of the work performed. (iii) The individual holds him or herself out as in business for him or herself. (iv) The individual holds him or herself out for work for the general public and does not perform work exclusively for or with another person. (v) The individual is not treated as an employee for purposes of income or employment taxation with regard to the work performed. (vi) The services are performed pursuant to a written agreement or contract between the individual and another person, and the written agreement or contract explicitly states that the individual is not considered to be an employee under this chapter, is working independently, has no employees, and has not contracted with other independent contractors. The written contract or agreement shall also include information regarding the right of the individual to purchase workers' compensation insurance coverage and the individual's election not to purchase that coverage. However, if the individual who is party to the agreement or contract under this subdivision is found to have employees, those employees may file a claim for benefits under this chapter against either or both parties to the agreement."[19]
Workplace Safety	Vermont Occupational Safety and Health Administration (VOSHA)	There are no statutory definitions or case law identifying a test for independent contractor status in this context.[20]

[19] VT. STAT. ANN. tit. 21, § 601(14)(F).

[20] Under Vermont's workplace safety law, *employee* is defined as "any person engaged in service to an employer for wages, salary or other compensation, *excluding an independent contractor*." VT. STAT. ANN. tit. 21, § 203(6) (emphasis added). However, the term *independent contractor* is not expressly defined.

1.2 Employment Eligibility & Verification Requirements

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

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

Although IRCA requires employers to review specified documents establishing an individual's eligibility to work, it provides no way for employers to verify the documentation's legitimacy. Accordingly, the federal government established the "E-Verify" program to allow employers to verify work authorization using a computerized registry. Employers that choose to participate in the program must enter into a Memorandum of Understanding with the Department of Homeland Security (DHS) which, among other things, specifically prohibits employers from using the program as a screening device. Participation in E-Verify is generally voluntary, except for federal contractors with prime federal contracts valued above the simplified acquisition threshold for work in the United States, and for subcontractors under those prime contracts where the subcontract value exceeds $3,500.[21]

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.[22] 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.[23]

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*

Vermont employers are prohibited from knowingly employing, recruiting, soliciting, or referring for employment an illegal alien.[24] However, an alien may be employed if the employer determines that the

[21] 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.

[22] *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).

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

[24] VT. STAT. ANN. tit. 21, § 444a(b).

alien is authorized to work pursuant to federal immigration regulations.[25] The term *alien* means any person who is not a U.S. citizen.[26]

Vermont does not require employers to use E-Verify or another electronic verification method.

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

Employers that violate the provisions regarding employment of illegal aliens are subject to criminal penalties.[27]

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

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

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

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

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[25] VT. STAT. ANN. tit. 21, § 444a(b), (c).

[26] VT. STAT. ANN. tit. 21, § 444a(a)(1).

[27] VT. STAT. ANN. tit. 21, § 444a(d).

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

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

Vermont employers are prohibited from requesting criminal history record information on initial employee application forms. Thereafter, an employer may inquire about a prospective employee's criminal history record during an interview or once the prospective employee has been deemed otherwise qualified for the position.[29] *Criminal history record* means all information documenting an individual's contact with the criminal justice system, including data on identification, arrest or citation, arraignment, judicial disposition, custody, and supervision.[30]

Exceptions. An employer may inquire about criminal convictions on an initial employee application form only if the following conditions are met:

- the prospective employee is applying for a position for which any federal or state law or regulation creates a mandatory or presumptive disqualification based on a conviction for one or more types of criminal offenses or a federal or state law or regulation creates an obligation on the part of the employer to not hire individuals who have been convicted of certain criminal offenses); and
- the questions on the application form are limited to the types of criminal offenses creating the disqualification or obligation.[31]

If an employer inquires about a prospective employee's criminal history record information, the prospective employee, if still eligible for the position under applicable federal or state law, must be afforded an opportunity to explain the information and the circumstances regarding any convictions, including any post-conviction rehabilitation.[32]

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

Vermont's state "ban-the-box" law covers both arrest and conviction records (see **1.3(a)(ii)**).

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

A person whose criminal history record is expunged or sealed is treated as if the person had never been arrested, convicted, or sentenced for the offense. In any application for employment, a person may not be required to answer questions about a previous criminal history record with respect to arrests or convictions that have been expunged or sealed.[33] An applicant's response to an inquiry from any person regarding an expunged or record may be that no criminal record exists.[34]

Juvenile Records. A child who was adjudicated delinquent and whose records have been sealed may reply to any related inquiries by stating that no records exist.[35]

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[29] VT. STAT. ANN. tit. 21, § 495j(a).

[30] VT. STAT. ANN. tit. 21, § 495j(e)(1).

[31] VT. STAT. ANN. tit. 21, § 495j(b)(1).

[32] VT. STAT. ANN. tit. 21, § 495j(c).

[33] VT. STAT. ANN. tit. 13, §§ 7606, 7607.

[34] VT. STAT. ANN. tit. 13, §§ 7606, 7607.

[35] VT. STAT. ANN. tit. 33, § 5119(e)(1).

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

An employer that violates Vermont's "ban-the-box" law is subject to a penalty of up to $100 for each violation.[36]

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[37] governs an employer's acquisition and use of virtually any type of information gathered by a "consumer reporting agency"[38] 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]."[39]

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[36] VT. STAT. ANN. tit. 21, § 495j(d).

[37] 15 U.S.C. §§ 1681 *et seq*.

[38] 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).

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

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

Under Vermont's mini-FCRA, an employer cannot obtain a credit report unless the individual consents, and the report is only used for purposes to which the individual consented.[40] A *credit report* is any written, oral, or other communication of any information by a credit reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living. It includes an investigative credit report. An *investigative credit report* means a report in which information on an individual's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, associates, or acquaintances who may have information on the individual. The term does not include reports of factual information on an individual's credit record obtained directly from a creditor or from a credit reporting agency.[41]

Fair Employment Practices. Under Vermont's fair employment practices law, an employer cannot: (1) fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment because of the individual's credit report or credit history; or (2) inquire about an applicant's or employee's credit report or credit history.[42] *Credit history* means information obtained from a third party, whether or not contained in a credit report that reflects or pertains to an individual's prior or current borrowing or repaying behavior or the individual's financial condition and ability to meet financial obligations.[43]

In addition, an employer cannot discharge or in any other manner discriminate against an employee or applicant:

- who has filed a complaint of unlawful employment practices in violation of the law;
- who has cooperated with the state attorney general or a state's attorney in an investigation of such practices;
- who is about to lodge a complaint or cooperate in an investigation; or
- whom the employer believes may lodge a complaint or cooperate in an investigation.[44]

Exceptions. An employer is exempt from the restrictions imposed by the fair employment practices law if one or more of the following conditions are met:

- the information is required by state or federal law or regulation;
- the position of employment involves access to confidential financial information;[45]

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[40] VT. STAT. ANN. tit. 9, § 2480e(a).

[41] VT. STAT. ANN. tit. 9, § 2480a(2), (5).

[42] VT. STAT. ANN. tit. 21, § 495i(b).

[43] VT. STAT. ANN. tit. 21, § 495i(a)(2).

[44] VT. STAT. ANN. tit. 21, § 495i(e).

[45] *Confidential financial information* "means sensitive financial information of commercial value that a customer or client of the employer gives explicit authorization for the employer to obtain, process, and store and that the employer entrusts only to managers or employees as a necessary function of their job duties." VT. STAT. ANN. tit. 21, § 495i(a)(1).

- the employer is a financial institution[46] or a credit union;[47]
- the position is a law enforcement officer,[48] emergency medical personnel,[49] or a firefighter;[50]
- the position requires a financial fiduciary responsibility to the employer or its client, including the authority to issue payments, collect debts, transfer money, or enter into contracts;
- the employer can demonstrate that the information is a valid and reliable predictor of employee performance in the specific position; or
- the position involves access to an employer's payroll information.[51]

However, exempt employers cannot use an employee's or applicant's credit report or history as the sole factor in decisions regarding employment, compensation, or a term, condition, or privilege of employment.[52]

If an exempt employer seeks to obtain or act upon an employee's or applicant's credit report or credit history that contains information about the employee's or applicant's credit score, credit account balances, payment history, savings or checking account balances, or savings or checking account numbers, the employer must:

- obtain the employee's or applicant's written consent each time the employer seeks to obtain the employee's or applicant's credit report;
- disclose in writing to the employee or applicant the employer's reasons for accessing the credit report, and if an adverse employment action is taken based upon the credit report, disclose the reasons for the action in writing (the employee or applicant has the right to contest the accuracy of the credit report or credit history);
- ensure that none of the costs associated with obtaining an employee's or an applicant's credit report or credit history are passed on to the employee or applicant; and
- ensure that the information in the employee's or applicant's credit report or credit history is kept confidential and, if employment is terminated or the applicant is not hired, provide the employee or applicant with the credit report or have the credit report destroyed in a secure manner which ensures the confidentiality of the information in the report.[53]

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

An individual asserting a violation of Vermont's mini-FCRA may bring a civil action for damages, injunctive relief, punitive damages in the case of a willful violation, and reasonable costs and attorneys' fees.[54] The attorney general may also conduct civil investigations of violations of the mini-FCRA, and may bring civil

[46] VT. STAT. ANN. tit. 8, § 11101(32).

[47] VT. STAT. ANN. tit. 8, § 30101(5).

[48] VT. STAT. ANN. tit. 20, § 2358.

[49] VT. STAT. ANN. tit. 24, § 2651(6).

[50] VT. STAT. ANN. tit. 20, § 3151(3).

[51] VT. STAT. ANN. tit. 21, § 495i(c)(1).

[52] VT. STAT. ANN. tit. 21, § 495i(c)(2).

[53] VT. STAT. ANN. tit. 21, § 495i(d).

[54] VT. STAT. ANN. tit. 9, § 2480f.

actions with respect to alleged violations.[55] Moreover, a violation of the mini-FCRA is also considered a violation of Vermont's consumer protection law.[56]

Employers that violate the fair employment practices provisions may be fined. An individual aggrieved under the law also may bring a civil action seeking compensatory and punitive damages or equitable relief, including restraint of prohibited acts, restitution, reinstatement, costs, reasonable attorneys' fees, and other appropriate relief.[57]

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

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

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

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

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

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

A Vermont employer cannot require, request, or coerce an employee or applicant to do any of the following:

- disclose a username, password, or other means of authentication, or turn over an unlocked personal electronic device for the purpose of accessing the employee's or applicant's social media account;
- access a social media account in the presence of the employer (often referred to as "shoulder surfing");
- divulge or present any content from their social media account;

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[55] VT. STAT. ANN. tit. 9, § 2480f.

[56] VT. STAT. ANN. tit. 9, § 2480f(a).

[57] VT. STAT. ANN. tit. 21, § 495b.

- add anyone, including the employer, to the list of contacts associated with a social media account; or
- change the account or privacy settings of their social media account to increase third-party access to its contents.[58]

Moreover, an employee may not agree to waive their rights under this law, and any such agreement is invalid.[59]

An employer is prohibited from discharging or in any other manner retaliating against an employee who exercises their rights under the law. Additionally, it is an unlawful practice under Vermont's fair employment law for an employer, employment agency, or labor organization to discharge or in any other manner discriminate against any employee because the employee: (1) has opposed any act or practice that is prohibited under the social media law; (2) has lodged a complaint or has testified, assisted, or participated in any manner with the Attorney General, a State's Attorney, the Department of Labor, or the Human Rights Commission in an investigation of prohibited acts or practices; (3) is known by the employer to be about to lodge a complaint, testify, assist, or participate in any manner in an investigation of prohibited acts or practices; or (4) is believed by the employer to taken any of these actions.[60]

A s*ocial media account* is an account with an electronic medium or service through which users create, share, and interact with content, including videos, still photographs, blogs, video blogs, podcasts, instant or text messages, email, online services or accounts, or internet website profiles or locations.[61]

Exceptions. The social media law does not prevent an employer from complying with the requirements of federal or state law. An employer may request that an employee share *specifically identified content* for the purposes of investigating an allegation of the unauthorized transfer or disclosure of an employer's proprietary or confidential information or financial data. *Specifically identified content* means data, information, or other content stored in a social media account that is identified with sufficient particularity to distinguish the individual piece of content being sought from any other data, information, or content stored in the account. However, this content does not include a username, password, or other means of authentication for the purpose of accessing an employee's or applicant's social media account.[62]

In regards to workplace investigations, an employer may request that an employee share specifically identified content for the purposes of: complying with the employer's legal and regulatory obligations; investigating an allegation of the unauthorized transfer or disclosure of an employer's proprietary or confidential information or financial data through an employee's or applicant's social media account; or investigating an allegation of unlawful harassment, threats of violence in the workplace, or discriminatory or disparaging content concerning another employee.[63]

[58] VT. STAT. ANN. tit. 21, § 495l.

[59] VT. STAT. ANN. tit. 21, § 495l.

[60] VT. STAT. ANN. tit. 21, §§ 495(a)(8), 495l.

[61] VT. STAT. ANN. tit. 21, § 495l.

[62] VT. STAT. ANN. tit. 21, § 495l.

[63] VT. STAT. ANN. tit. 21, § 495l.

Law enforcement agencies may request or require access to an employee's or applicant's social media account as part of a screening or fitness determination during the hiring process or employment, or as part of an investigation of an employee's misconduct, violation of policy, or violation of law.[64]

Rules of Employer-Provided Devices & Online Accounts. The statutory definition of social media account does not include an account provided by an employer or intended to be used primarily on behalf of an employer. Moreover, an employer may request or require that an employee provide a username or password that is necessary to access an employer-issued electronic device.[65]

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

An employer that violates the social media law is subject to civil penalties and investigation costs. In addition, the Vermont Superior Court may order restitution of wages or other benefits on behalf of an employee and may order reinstatement and other appropriate relief on behalf of an employee. An individual aggrieved under the law may bring a civil action seeking compensatory and punitive damages or equitable relief, including restraint of prohibited acts, restitution, reinstatement, costs, reasonable attorneys' fees, and other appropriate relief.[66]

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.[67] 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.

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[64] VT. STAT. ANN. tit. 21, § 495l.

[65] VT. STAT. ANN. tit. 21, § 495l.

[66] VT. STAT. ANN. tit. 21, §§ 495b, 495l.

[67] 29 U.S.C. §§ 2001 to 2009; *see also* U.S. Dep't of Labor, *Other Workplace Standards: Lie Detector Tests*, *available at* https://webapps.dol.gov/elaws/elg/eppa.htm.

For 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*

Vermont employers or employment agencies cannot, as a condition of employment, promotion, or change in status of employment, or as an express or implied condition of a benefit or privilege of employment, do any of the following:

- request or require that an employee or applicant take or submit to a polygraph examination;
- administer, cause to be administered, threaten to administer, or attempt to administer a polygraph examination to an employee or applicant; or
- request or require that an employee or applicant give an express or implied waiver of a practice prohibited under the law.[68]

Additionally, employers cannot refuse to hire, promote, or change the status of employment of an applicant because the applicant refuses or declines a polygraph examination.[69]

Polygraph examination is "any procedure which involves the use of instrumentation or a mechanical device to enable or assist the detection of deception, the verification of the truthfulness or the rendering of a diagnostic opinion regarding either of these, and includes a lie detector or similar test."[70]

Antiretaliation Provisions. Employees cannot be discharged, disciplined, or discriminated against in any manner for filing a complaint or testifying in any proceeding or action involving violations of the polygraph law.[71]

Exceptions. Employers whose business includes the manufacture or the wholesale or retail sale of regulated drugs[72] can require an applicant to take or submit to a polygraph examination. However, only employees who come in contact with such regulated drugs may be required to take a polygraph examination.[73]

In addition, employers whose primary business is the wholesale or retail sale of precious metals or gems and jewelry or items made from precious metals or gems can require an applicant to take or submit to a polygraph examination.[74]

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[68] VT. STAT. ANN. tit. 21, § 494a.

[69] VT. STAT. ANN. tit. 21, § 494a(b).

[70] VT. STAT. ANN. tit. 21, § 494(6).

[71] VT. STAT. ANN. tit. 21, § 494d.

[72] *See* VT. STAT. ANN. tit. 18, § 4201 (defining regulated drugs).

[73] VT. STAT. ANN. tit. 21, § 494b(3).

[74] VT. STAT. ANN. tit. 21, § 494b(2).

Employers authorized or required under federal law or regulations to administer polygraph examinations also can require an applicant to take or submit to a polygraph examination, or administer or cause to be administered, a polygraph examination to an applicant.[75]

Prohibited Inquiries. An examinee cannot be asked the following questions during a polygraph examination: (1) about their political, religious, or labor union affiliations; (2) about their sexual practices, social habits, or marital relationship, unless these questions are clearly related to job performance; or (3) that are unrelated to job performance.[76]

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

Violations can be punished by a fine, imprisonment, or both.[77] An employee discriminated against in violation of the law is entitled to lost wages and benefits, and restoration to the employee's previous position.[78]

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.[79] 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.[80] 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.

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[75] VT. STAT. ANN. tit. 21, § 494b(4).

[76] VT. STAT. ANN. tit. 21, § 494c(b).

[77] VT. STAT. ANN. tit. 21, § 494e.

[78] VT. STAT. ANN. tit. 21, § 494d.

[79] 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.

[80] 41 U.S.C. §§ 8101 *et seq*.; *see also* 48 C.F.R. §§ 23.500 *et seq*.

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

Vermont has a drug testing law that covers private and public employers.[81] While employers are not required to conduct drug and alcohol testing of applicants or employees, those that voluntarily choose to test must do so in accordance with the state's drug testing law.[82]

Drug Testing of Applicants. An employer may require that an applicant for employment submit to a drug test only if all of the following conditions are met:

- the applicant has received a conditional offer of employment conditioned on a negative test result;
- the applicant has received written notice of the drug testing procedure and list of drugs to be tested, as well as a statement that the therapeutic levels of medically prescribed drugs tested will not be reported; and
- the test is administered in accordance with the drug testing law.[83]

The notice requirement cannot be waived by the applicant.[84]

Drug Testing of Employees. Generally, employers are prohibited from requesting or requiring that employees submit to a drug test as a condition of employment, promotion, change of status of employment, or benefit of employment.[85] Further, employers may not have a company-wide random drug-testing policy, unless it is required by federal law or regulation.[86] Employers, however, may require an employee to submit to a drug test if the following conditions are met:

- the employer has probable cause to believe the employee is using or is under the influence of a drug while on the job;
- the employer has a *bona fide* rehabilitation program for alcohol and drug abuse and the program is available to the employee; and
- the employee may not be terminated if the test result is positive and the employee agrees to participate in and then successfully completes the program. The employee may be suspended only for the period of time necessary to complete the program, but in no event longer than three months. The employee may be terminated if, after completion of an employee assistance program, the employer subsequently administers a drug test in compliance with the drug testing law and the test result is positive.[87]

Drug Test Administration. An employer may request that an applicant for employment or an employee submit to a drug test only if the following conditions are met. The test must be administered only to detect the presence of drugs and alcohol at nontherapeutic levels and the employer may not request or require that a blood sample be drawn for the purpose of administering a drug test. The testing must be performed

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[81] VT. STAT. ANN. tit. 21, §§ 511 *et seq.*

[82] VT. STAT. ANN. tit. 21, § 512.

[83] VT. STAT. ANN. tit. 21, § 512.

[84] VT. STAT. ANN. tit. 21, § 512(b)(2).

[85] VT. STAT. ANN. tit. 21, § 513(a).

[86] VT. STAT. ANN. tit. 21, § 513(b).

[87] VT. STAT. ANN. tit. 21, § 513(c).

by a laboratory designated by the Department of Health. The collector must establish a chain of custody procedure for sample collection and testing that ensures anonymity of the individual being tested and verifies the identity of each sample and test result.[88]

If a urinalysis procedure is used, the employer must: (1) require the laboratory to confirm any sample that tests positive; and (2) provide the person tested with an opportunity, at the person's request and expense, to have a blood sample drawn at the time the urine sample is provided. A positive result may only be reported by a laboratory if a urine sample is positive both in an initial test and confirmation test; but, the detection of a drug at a therapeutic level must be reported as a negative test result. The employer must contract with or employ a certified medical review officer to review and evaluate all drug test results from the laboratory. As well, the employer must designate a collector to collect specimens from job applicants and employees. The collector may be an employee for the purposes of collecting specimen from job applicants.[89]

A medical review officer must contact personally an employee or applicant who has a positive test result and explain the results and why the results may not be accurate. The medical review officer must also provide any applicant or employee who has a positive test result with an opportunity to retest a portion of the sample at an independent laboratory at the expense of the person tested and must consider the results of the retest.[90]

Written Policy Requirement. Employers must provide all applicants and/or employees tested with a written policy that identifies the circumstances under which persons may be required to submit to drug tests; lists the particular test procedure and the drugs that will be screened; states that over-the-counter medications and other substances may result in a positive test; and explains the consequences of a positive test result.[91]

Confidentiality. Employers must keep confidential all information concerning employee drug and alcohol tests and may disclose test-related information only with the voluntary written consent of the tested individual or if court-ordered to do so.[92]

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

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

Employers cannot require any employee or applicant for employment to pay for the cost of medical examinations as a condition of employment.[93]

1.3(f)(ii) *Salary History Inquiry Restrictions*

Vermont's Fair Employment Practices Act restricts preemployment salary history inquiries. An employer is prohibited from:

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[88] VT. STAT. ANN. tit. 21, § 514.

[89] VT. STAT. ANN. tit. 21, § 514.

[90] VT. STAT. ANN. tit. 21, § 515.

[91] VT. STAT. ANN. tit. 21, § 514(2).

[92] VT. STAT. ANN. tit. 21, § 516(b).

[93] VT. STAT. ANN. tit. 21, § 301.

- inquiring about or seeking information regarding a prospective employee's current or past compensation from either the prospective employee or a current or former employer of the prospective employee;
- requiring that a prospective employee's current or past compensation satisfy minimum or maximum criteria; or
- determining whether to interview a prospective employee based on the prospective employee's current or past compensation.[94]

For purposes of these provisions, *compensation* includes wages, salary, bonuses, benefits, fringe benefits, and equity-based compensation.[95]

Notwithstanding the prohibitions above, if a prospective employee voluntarily discloses information about their current or past compensation, an employer may, after making an offer of employment with compensation to the prospective employee, seek to confirm or request that the prospective employee confirm that information.[96]

In addition, the statute does not prevent an employer from:

- inquiring about a prospective employee's salary expectations or requirements; or
- providing information about the wages, benefits, compensation, or salary offered in relation to a position.[97]

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

[94] VT. STAT. ANN. tit. 21, § 495m(a).

[95] VT. STAT. ANN. tit. 21, § 495m(d).

[96] VT. STAT. ANN. tit. 21, § 495m(b).

[97] VT. STAT. ANN. tit. 21, § 495m(c).

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	36B of the Internal Revenue Code of 1986[98] and a cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act[99] 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.[100] 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.[101]
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.[102] 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.[103]
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

[98] 26 U.S.C. § 36B.

[99] 42 U.S.C. § 18071.

[100] 29 U.S.C. § 218b.

[101] 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.

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

[103] 29 C.F.R. § 2590.606-1.

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	general notice to each new employee upon hiring.[104] 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.[105] 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.[106]
Immigration Documents: Form I-9	Employers must ensure that individuals properly complete Form I-9 section 1 ("Employee Information and Verification") at the time of hire and sign the attestation with a handwritten or electronic signature. Also, individuals must present employers documentation establishing their identity and employment authorization. Within three business days of the first day of employment, employers must physically examine the documentation presented in the employee's presence, ensure that it appears to be genuine and relates to the individual, and complete Form I-9, section 2 ("Employer Review and Verification"). Employers must also, within three business days of hiring, sign the attestation with a handwritten or electronic signature. Employers that hire individuals for a period of less than three business days must comply with these requirements at the time of hire.[107] 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.[108]
Uniformed Services Employment and Reemployment Rights	Employers must provide to persons covered under USERRA a notice of employee and employer rights, benefits, and obligations. Employers

[104] 29 C.F.R. § 825.300(a).

[105] 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.

[106] 29 C.F.R. § 825.300(a).

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

[108] 26 C.F.R. § 31.3402(f)(2)-1. The IRS provides this form at https://www.irs.gov/pub/irs-pdf/fw4.pdf.

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
Act (USERRA) Documents	may meet the notice requirement by posting notice where employers customarily place notices for employees.[109]
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.[110]

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: Paid Sick Leave	In addition to a workplace posting, employers must inform employees, at the time of hiring, of their rights under the Earned Sick Time Act.[111]
Drug-Testing Policy	As discussed in **1.3(e)(ii)**, Vermont employers may voluntarily implement a drug and alcohol testing program if, among other things, they create and disclose a written testing policy. Employers must provide all applicants and/or employees tested with a written policy that identifies the circumstances under which persons may be required to submit to drug tests, the particular test procedures, the drugs that will be screened, a statement that over-the-counter medications and other substances may result in a positive test, and the consequences of a positive test result.[112]
Fair Employment Practices	Upon being hired, employers must provide new employees individual copies of the written policy against sexual harassment. The policy must include: • a statement that sexual harassment in the workplace is unlawful;

[109] 38 U.S.C. § 4334. This notice is available at https://www.dol.gov/sites/dolgov/files/VETS/legacy/files/USERRA_Private.pdf.

[110] 29 C.F.R. § 531.59.

[111] VT. STAT. ANN. tit. 21, § 483(j). The required workplace notice is available at https://labor.vermont.gov/sites/labor/files/doc_library/Earned%20Sick%20Time%20%5BEnglish%5D%20Poster.pdf.

[112] VT. STAT. ANN. tit. 21, § 514(2).

Table 3. State Documents to Provide at Hire	
Category	**Notes**
	• a statement that it is unlawful to retaliate against an employee for filing a complaint of sexual harassment or for cooperating in an investigation; • a description and examples of sexual harassment; • a statement of the range of consequences for employees who commit sexual harassment; • if the employer has more than five employees, a description of the process for filing internal complaints about sexual harassment and the names, addresses, and telephone numbers of the person or persons to whom complaints should be made; and • the complaint process of the appropriate state and federal employment discrimination enforcement agencies, and directions as to how to contact such agencies.[113]
Tax Documents	Employees must complete a state exemption certificate, Form W-4VT, if their Vermont withholding differs from the federal Form W-4 withholding.[114]
Wage & Hour Documents	An employer must notify a job applicant, prior to or at the time of hire, of any cost to the employee for required apparel. Moreover, no deduction from wages can be made for any uniform purchase or maintenance unless certain criteria are satisfied, as discussed in **3.7(b)(vii)**.[115]

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

[113] VT. STAT. ANN. tit. 21, § 495h. A model policy concerning sexual harassment is available at http://labor.vermont.gov/sites/labor/files/doc_library/Sexual%20Harassment%20Model%20Policy.pdf.

[114] VT. STAT. ANN. tit. 32, § 5841 ("Every person who is required under the laws of the United States to withhold federal income tax from payments that are also subject to Vermont income tax shall deduct and withhold during the calendar year from the payments made by such person such amount as the Commissioner shall prescribe.") Form W-4VT is available at https://tax.vermont.gov/sites/tax/files/documents/W-4VT.pdf. Additional forms and resources are available at http://tax.vermont.gov/research-and-reports/document-library/tax-forms/business-taxes.

[115] 24-090-003 VT. CODE R. § XII; *see also* 24-090-003 VT. CODE R. § XI (setting forth requirements for uniform deductions, including employee consent and other criteria).

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

1. employers must report to the appropriate state agency the employee's name, address, and Social Security number, as well as the employer's name, address, and federal tax identification number provided by the Internal Revenue Service;
2. employers may file the report by first-class mail, electronically, or magnetically;
3. if the report is transmitted by first-class mail, the report must be made not later than 20 days after the date of hire;
4. if the report is transmitted electronically or magnetically, the employer may report no later than 20 days following the date of hire or through two monthly transmissions not less than 12 days nor more than 16 days apart;
5. the format of the report must be a Form W-4 or, at the option of the employer, an equivalent form; and
6. the maximum penalty a state may set for failure to comply with the state new hire law is $25 (which increases to $500 if the failure to comply is the result of a conspiracy between the employer and the employee to not supply the required report or to supply a false or incomplete report).[117]

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

[117] 42 U.S.C. § 653a.

Contact By Mail or Fax	Contact Online
Department of Health and Human Services Administration for Children and Families Office of Child Support Enforcement Multi-State Employer Registration Box 509 Randallstown, MD 21133 Fax: (410) 277-9325	Register online by submitting a multistate employer notification form over the internet.[118] Multistate employers can receive assistance with registration as a multistate employer from the Multistate Help Desk by calling (410) 277-9470, 9:00 A.M. to 5:00 P.M., Eastern Time.

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

The following is a summary of the key elements of Vermont's new hire reporting law.

Who Must Be Reported. An employer must report newly-hired employees and those previously employed but have been separated from that employment for at least 60 consecutive days.[119]

Report Timeframe. Employers must submit the report within 10 days of the hiring date.[120]

Information Required. The report must include the employee's name, address, date of remuneration, and Social Security number, as well as the employer's name, address, and federal identification number.[121]

Form & Submission of Report. Employers must report via the federal Form W-4 or the employer's own form with the specified data elements. The report may be submitted by first-class mail, fax, magnetic media, electronically, or by inputting data elements via the telephone.[122]

Location to Send Information.

Vermont Department of Labor
ATTN: New Hire Reporting
5 Green Mountain Drive
P.O. Box 488
Montpelier, VT 05601
(800) 786-3214
(802) 828-4286 (fax)

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

[119] VT. STAT. ANN. tit. 33, § 4110(b), (c)(4).

[120] VT. STAT. ANN. tit. 33, § 4110(b)(1).

[121] VT. STAT. ANN. tit. 33, § 4110(b)(2).

[122] VT. STAT. ANN. tit. 33, § 4110(b)(3).

https://labor.vermont.gov/unemployment-insurance/unemployment-information-employers/employer-online-services/new-hire

2.3 Restrictive Covenants, Trade Secrets & Protection of Business Information

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

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

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

Protections against trade secret misappropriation are also available to employers. Until 2016, trade secrets were the only form of intellectual property (*i.e.*, copyrights, patents, trademarks) not predominately governed by federal law. However, the Defend Trade Secrets Act of 2016 (DTSA) now provides a federal court civil remedy and original (but not exclusive) jurisdiction in federal court for claims of trade secret misappropriation.[123] As such, the DTSA provides trade secret owners a uniform federal law under which to pursue such claims. The DTSA operates alongside more limited existing protections under the federal Economic Espionage Act of 1996 and the Computer Fraud and Abuse Act, as well as through state laws adopting the Uniform Trade Secrets Act (UTSA).

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*

Vermont has no statute of general applicability, but a "school of barbering or cosmetology shall not require, as a condition of training for licensure, that a person enter into a [noncompete] with the training organization or affiliate."[124] Vermont courts have adopted a means similar to the Restatement for determining whether a noncompete is enforceable.[125] The Restatement (Second) of Contracts provides that a restrictive covenant is an unreasonable restraint on trade if the restraint is greater than necessary

[123] 18 U.S.C. §§ 1832 *et seq.*

[124] VT. STAT. ANN. tit. 26, § 281.

[125] *Systems & Software, Inc. v. Barnes*, 886 A.2d 762, 764 (Vt. 2005).

to protect the employer's legitimate interests or the employer's need is outweighed by the hardship on the employee.[126]

Vermont courts will enforce a noncompete agreement to the extent that it is reasonably tailored to protect an employer's legitimate business interest.[127] Noncompetition agreements may protect an employer's legitimate interest including customer relationships and employee specific goodwill that are significantly broader than proprietary information.[128] While an employer may want to protect its legitimate interests through noncompete agreements, the employer is not entitled to protection against ordinary competition.[129] In determining whether the noncompetition agreement is unduly restrictive of the rights of the employee, courts look to the restrictions imposed on time and place.[130]

Enforceability Following Employee Discharge. While there is no direct case law or statute on point, in *dicta*, the Vermont Supreme Court compared two authorities suggesting that an employer's act of terminating the employment relationship may be considered a factor in whether a noncompete is enforceable.[131]

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

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

In Vermont, the signing of a noncompete at the inception of the employment relationship provides sufficient consideration to support the covenant.[132] Continued employment with an implicit employer good faith obligation is sufficient consideration to support a noncompete entered into during employment.[133] In addition, a change in terms of employment likely provides adequate consideration if the change is made in connection with the signing of a noncompete agreement.[134]

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[126] RESTATEMENT (SECOND) OF CONTRACTS § 188(1) (1981).

[127] *Systems & Software, Inc.*, 886 A.2d at 764.

[128] RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 6.05.

[129] *Summit 7, Inc. v. Kelly*, 886 A.2d 365, 369 (Vt. 2005).

[130] *Roy's Orthopedic, Inc. v. Lavigne*, 454 A.2d 1242, 1244 (Vt. 1982).

[131] *Summits 7, Inc.*, 886 A.2d at 374-75 (discussing authority stating that if an employee resigns voluntarily, no improper discharge is involved and enforcement of the covenant is fair with Vermont case, *Vermont Elec. Supply Co. v. Andrus*, 315 A.2d 456 (Vt. 1974), noting that the employee was "not placed in the double bind of being both fired and subject to five years of employment restraint" because he voluntarily left his employer to start a competing business).

[132] *Summits 7, Inc.*, 886 A.2d at 370 ("For the most part, courts have generally assumed that the requirements of ancillarity or consideration are satisfied when the noncompetition agreement is made at the onset of an employment relationship, even an at-will relationship.").

[133] *Summits 7, Inc.*, 886 A.2d at 373.

[134] *Summits 7, Inc.*, 886 A.2d at 373 (disagreeing with lower court's decision that increased compensation and promotions were adequate consideration because there was no evidence that the promotions and raises were

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.

Vermont will enforce a noncompete to the extent that it is reasonable.[135]

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

When an employee leaves a business, the employee will sometimes take valuable information of the business to use for competitive purposes. In addition to noncompetition agreements, Vermont law provides other means for employers to protect themselves from a recently departed employee's misuse of proprietary information acquired from the employer. Vermont has adopted the Uniform Trade Secrets Act.[136] The purpose of the Act is to prevent the misuse of business information and it displaces other common-law remedies for misappropriation.[137]

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

1. derives independent economic value, present or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
2. is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[138]

In a trade secrets case, there is no general or concrete rule that can be laid down, rather, a Vermont court will look at the conduct of each party and the particular information at issue.[139]

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

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connected to the noncompete agreement defendant signed); *Vermont Elec. Supply Co.*, 315 A.2d 456 (while court does not specifically address sufficiency of consideration, the defendant signed an enforceable noncompete one year into his employment in exchange for education about kitchen designs and sales).

[135] *Summit 7, Inc. v. Kelly*, 886 A.2d 365, 374 (Vt. 2005) ("a trial court can enforce restrictive covenants to the extent that they are reasonable").

[136] VT. STAT. ANN. tit. 9, §§ 4601 *et seq*.

[137] *Dicks v. Jensen*, 768 A.2d 1279 (Vt. 2001).

[138] VT. STAT. ANN. tit. 9, § 4601(3).

[139] *Dicks*, 768 A.2d at 1284.

1. acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
2. disclosure or use of a trade secret of another without express or implied consent by a person who:
    a. used improper means to acquire knowledge of the trade secret; or
    b. at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was:
        i. derived from or through a person who had utilized improper means to acquire it;
        ii. acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
        iii. derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
    c. before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.[140]

Vermont courts may enjoin actual or threatened misappropriation of a trade secret.[141] Courts may also award damages including the actual loss caused by the misappropriation and any unjust enrichment caused by the misappropriation.[142]

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

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

3. DURING EMPLOYMENT

3.1 Posting, Notice & Record-Keeping Requirements

3.1(a) *Posting & Notification Requirements*

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

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

Table 5. Federal Posting & Notice Requirements

Poster or Notice	Notes
Employee Polygraph Protection Act (EPPA)	Employers must post and keep posted on their premises a notice explaining the EPPA.[143]

[140] VT. STAT. ANN. tit. 9, § 4601(2).

[141] VT. STAT. ANN. tit. 9, § 4602.

[142] VT. STAT. ANN. tit. 9, § 4603.

[143] 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.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
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.[144]
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.[145]
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.[146]
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.[147]
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.[148]
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.[149]

[144] 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.

[145] 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.

[146] 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.

[147] 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.

[148] 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.

[149] 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.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
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.[150]
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.[151] The second page includes reference to government contractors.
Annual EEO, Affirmative Action Statement	Government contractors covered by the Affirmative Action Program (AAP) requirements are required to post a separate EEO/AA Policy Statement (in addition to the required "EEO is the Law" Poster), which indicates the support of the employer's top U.S. official. This statement should be reaffirmed annually with the employer's AAP.[152]
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.[153]
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.[154]
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

[150] 20 C.F.R. app. § 1002. This poster is available at http://www.dol.gov/vets/programs/userra/poster.htm.

[151] 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.

[152] 41 C.F.R. §§ 60-300.44, 60-741.44.

[153] 29 C.F.R. § 5.5(a)(l)(i). This poster is available at https://www.dol.gov/whd/regs/compliance/posters/davis.htm.

[154] 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.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	visible to prospective employees and all employees who are verified through the system.[155]
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.[156]
Notification of Employee Rights Under Federal Labor Laws	Government contractors are required under Executive Order No. 13496 to post this notice in conspicuous locations and, if the employer posts notices to employees electronically, it must also make this poster available where it customarily places other electronic notices to employees about their jobs. Electronic posting cannot be used as a substitute for physical posting. Where a significant portion of the workforce is not proficient in English, the notice must be provided in the languages spoken by employees.[157]
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.[158]
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.[159] **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

[155] 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.

[156] 29 C.F.R. § 525.14. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/disab.htm.

[157] 29 C.F.R. § 471.2. This poster is available at https://www.dol.gov/olms/regs/compliance/EO13496.htm.

[158] 48 C.F.R. §§ 3.1000 *et seq*. This poster is available at https://oig.hhs.gov/documents/root/243/OIG_Hotline_Ops_Poster_-_Grant__Contract_Fraud.pdf.

[159] 29 C.F.R. § 13.26. This poster is available at https://www.dol.gov/whd/govcontracts/eo13706/index.htm. Additional resources on the sick leave requirement are available at https://www.dol.gov/whd/govcontracts/eo13706/index.htm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	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).[160]
Pay Transparency Nondiscrimination Provision	Employers covered by Executive Order No. 11246 must either post a copy of this nondiscrimination provision in conspicuous places available to employees and applicants for employment, or post the provision electronically. Additionally, employers must distribute the nondiscrimination provision to their employees by incorporating it into their existing handbooks or manuals.[161]
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.[162]

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

Table 6 details the basic state workplace posting and notice requirements. Additional requirements may apply to certain industries, including, for example, health care employers.[163] 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.

[160] 29 C.F.R. § 13.5.

[161] 41 C.F.R. § 60-1.35(c). This poster is available at https://www.dol.gov/agencies/ofccp/posters.

[162] 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.

[163] VT. STAT. ANN. tit. 21, §§ 507(a)(3), 509(b). A whistleblower's protection poster is required for such employers and is available at https://labor.vermont.gov/document/healthcare-whistleblower-poster.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Benefits & Leave: Family & Parental Leaves	Employers with 10 or more employees must post and maintain this poster in a conspicuous place, informing employees about their rights and obligations under the Vermont parental and family leave laws.[164]
Benefits & Leave: Paid Sick Leave	All employers must post notice informing employees of their rights under the Earned Sick Time Act. Notice must be displayed where employees are likely to see it and in languages spoken by employees.[165]
Child Labor	Employers that employ minors must post notice, in a conspicuous place where minors are employed, summarizing the state restrictions on child labor.[166]
Fair Employment Practices: Pregnancy Accommodation	An employer must post notice of the pregnancy accommodation provisions in a form provided by the Labor Commissioner in a place conspicuous to employees at the workplace.[167]
Fair Employment Practices: Sexual Harassment	All employers must post notice, in a prominent and accessible place, informing employees of the prohibition against sexual harassment and who to contact to make a complaint of harassment or retaliation.[168]
Leaves: Crime Victims Leave	All employers must post notice in a conspicuous place in each of its places of business regarding an employee's right to take unpaid leave to attend various criminal proceedings.[169]
Unemployment Compensation	All employers must post notice, where readily accessible to employees, informing employees about unemployment benefits and identifying job center locations for assistance.[170]
Wages, Hours & Payroll	All employers must post conspicuous notice informing employees about the state minimum wage rates and tipped credit allowances.[171]

[164] VT. STAT. ANN. tit. 21, § 472. This poster is available at http://labor.vermont.gov/document/family-leave.

[165] VT. STAT. ANN. tit. 21, § 483(j). This poster is available at http://labor.vermont.gov/document/earned-sick-time-poster-english-mandatory.

[166] VT. STAT. ANN. tit. 21, § 442. This poster is available at http://labor.vermont.gov/document/child-labor-poster.

[167] VT. STAT. ANN. tit. 21, § 495k. This poster is available at https://labor.vermont.gov/document/accommodations-pregnant-employees-poster.

[168] VT. STAT. ANN. tit. 21, § 495h. This poster is available at https://labor.vermont.gov/document/sexual-harassment-poster.

[169] VT. STAT. ANN. tit. 21, § 472c. This poster is available at https://labor.vermont.gov/document/crime-victims-rights-poster.

[170] VT. STAT. ANN. tit. 21, § 1346. This poster is available at https://labor.vermont.gov/document/24-unemployment-poster.

[171] VT. STAT. ANN. tit. 21, § 393. This poster is available at https://labor.vermont.gov/sites/labor/files/documents/Minimum Wage Poster - 2024_1.pdf.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Workers' Compensation: Notice to Employees	All employers must post and maintain, in a conspicuous place, in and about each place of business, notice informing employees about their rights and duties under the workers' compensation law and identifying the employer's insurance carrier.[172]
Workers' Compensation: Reinstatement Rights	According to the state Department of Labor, employers with 10 or more employees must post notice of a worker's right to reinstatement after a worker has incurred a work-related injury, with certain exceptions.[173]
Workplace Safety: No Smoking Signs (Recommended)	Generally speaking, smoking is prohibited in Vermont workplaces. While there is no mandated posting requirement, the Vermont Department of Health recommends that employers post its 100% Smoke Free poster where smoking is prohibited.[174]
Workplace Safety: Posting of Safety Records	All employers must post notice advising employees where they may review the employer's record of workplace safety and identifying a contact at the employer for more information.[175]
Workplace Safety: VOSHA Health and Safety Protection on the Job	All employers must post notice, where readily accessible to employees, summarizing their rights under the Vermont Occupational Health and Safety Code.[176]

3.1(b) *Record-Keeping Requirements*

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

Table 7 summarizes the federal record-keeping requirements.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Age Discrimination in Employment Act	*Covered employers must maintain the following payroll or other records for each employee:* • employee's name, address, and date of birth;	At least 3 years from the date of entry.

[172] VT. STAT. ANN. tit. 21, § 691. This poster is available at https://labor.vermont.gov/document/workers-compensation-form-31-english.

[173] See VT. DEP'T OF LABOR poster, available at https://labor.vermont.gov/sites/labor/files/doc_library/Workers Compensation Reinstatement Rights Poster.pdf.

[174] *See* VT. STAT. ANN. tit. 18 § 1421. Resources are available at http://healthvermont.gov/wellness/tobacco.

[175] VT. STAT. ANN. tit. 21 § 691a. This poster is available at http://labor.vermont.gov/document/safety-records-poster-0.

[176] VT. STAT. ANN. tit. 21, § 228. This poster is available at http://labor.vermont.gov/document/vosha-poster.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
(ADEA): Payroll Records	• occupation; • rate of pay; and • compensation earned each week.[177]	
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.[178]	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.[179]	For the full period the plan or system is in effect, and for at least 1 year after its termination.
Title VII & the Americans with Disabilities Act (ADA): Personnel Records	*Employers must preserve any personnel or employment record made, including:* • requests for reasonable accommodation; • application forms submitted by applicants; • other records having to do with hiring, promotion, demotion, transfer, lay-off, or termination; • rates of pay or other terms of compensation; and	At least 1 year from the date the records were made, or from the date of the personnel action involved,

[177] 29 U.S.C. § 626; 29 C.F.R. § 1627.3(a).

[178] 29 C.F.R. § 1627.3(b).

[179] 29 C.F.R. § 1627.3(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• selection for training or apprenticeship.[180]	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.[181]	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).[182]	Most recent form must be retained for 1 year.
Employee Polygraph Protection Act (EPPA)	*Records pertaining to a polygraph test must be maintained for the specified time period including, but not limited to, the following:* • a copy of the statement given to the examinee regarding the time and place of the examination and the examinee's right to consult with an attorney; • the notice to the examiner identifying the person to be examined; • copies of opinions, reports, or other records given to the employer by the examiner; • where the test is conducted in connection with an ongoing investigation involving economic loss or injury, a statement setting forth the specific incident or activity under investigation and the basis for testing the particular employee; and • where the test is conducted in connection with an ongoing investigation of criminal or other misconduct	At least 3 years following the date on which the polygraph examination was conducted.

[180] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[181] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[182] 29 C.F.R. § 1602.7.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	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.[183]	
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.[184]	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).[185]	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.[186]	At least 2 years.
Fair Labor Standards Act (FLSA): Payroll Records	*Employers must maintain the following records with respect to each employee subject to the minimum wage and/or overtime provisions of the FLSA:* • full name and any identifying symbol used in place of name on time or payroll records; • home address with zip code; • date of birth, if under 19; • sex and occupation in which employed; • time of day and day of week on which the employee's workweek begins;	3 years from the last day of entry.

[183] 29 U.S.C. §§ 2001 *et seq.*; 29 C.F.R. § 801.30.

[184] 29 U.S.C. § 1027.

[185] 29 C.F.R. § 1620.32(a).

[186] 29 C.F.R. § 1620.32(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• 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).[187] The record should also indicate for each week whether the employee adhered to the schedule and, if not, show the exact number of hours worked each day each week.	
Fair Labor Standards Act (FLSA): Tipped Employees	*Employers must maintain and preserve all Payroll Records noted above as well as:* • a symbol, letter, or other notation on the pay records identifying each employee whose wage is determined in part by tips; • weekly or monthly amounts reported by the employee to the employer of tips received (*e.g.*, information reported on Internal Revenue Service Form 4070); • amount by which the wages of each tipped employee have been deemed to be increased by tips as determined by the employer (not in excess of the	

[187] 29 C.F.R. §§ 516.2, 516.5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	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.[188]	
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.[189]	3 years from the last day of entry.
Fair Labor Standards Act (FLSA): Agreements & Other Records	*In addition to payroll information, employers must preserve agreements and other records, including:* • collective bargaining agreements and any amendments or additions; • individual employment contracts or, if not in writing, written memorandum summarizing the terms; • written agreements or memoranda summarizing special compensation arrangements under FLSA sections 7(f) or 7(j); • certain plans and trusts under FLSA section 7(e); • certificates and notices listed or named in the FLSA; and	At least 3 years from the last effective date.

[188] 29 C.F.R. § 516.28.

[189] 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**
	• sales and purchase records.[190]	
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.[191]	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. *Covered employers with no eligible employees must only maintain the following records:*	At least 3 years.

[190] 29 C.F.R. § 516.5.

[191] 29 C.F.R. § 516.6.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• 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 GINA must be maintained in accordance with the confidentiality requirements of Title II of GINA.[192]	

[192] 29 U.S.C. § 2616; 29 C.F.R. § 825.500.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
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).[193]	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.[194]	3 years after the date of hire or 1 year following the termination of employment, whichever is later.

[193] 26 C.F.R. §§ 31.6001-1, 31.6001-2.

[194] 8 C.F.R. § 274a.2.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
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.[195]	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.[196]	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.[197]	As long as it is in effect and at least 4 years thereafter.
Unemployment Insurance	*Employers are required to maintain all relevant records under the Federal Unemployment Tax Act, including:*	At least 4 years after the later of the date the tax

[195] 26 U.S.C. § 3402; 26 C.F.R. § 1.6001-1.

[196] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

[197] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• 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.[198]	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, collection methodology, analytic methods used, and a	At least 30 years.

[198] 26 C.F.R. § 31.6001-4.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	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.[199]	
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.[200]	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 employee exposure or medical records, or information	At least 30 years.

[199] 29 C.F.R. § 1910.1020(d).

[200] 29 C.F.R. § 1910.1020(d).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
and Exposure Records	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.[201]	
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.[202]	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.[203]	Immediately preceding AAP year.
Equal Employment Opportunity: Personnel & Employment Records	*Government contractors covered by Executive Order No. 11246 and those required to provide affirmative action to persons with disabilities and/or disabled veterans and veterans of the Vietnam Era must retain the following records:* • records pertaining to hiring, assignment, promotion, demotion, transfer, lay off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship; • other records having to do with requests for reasonable accommodation, the results of any physical examination, job advertisements and postings, applications, resumes; and • any and all expressions of interest through the internet or related electronic data technologies as to which the contractor considered the individual for a particular position, such as on-line resumes or internal resume databases, records identifying job seekers contacted	3 years recommended; regulations state "not less than two years from the date of the making of the record or the personnel action involved, whichever occurs later." If the contractor has fewer than 150 employees or does not have a contract

[201] 29 C.F.R. § 1910.1020(d).

[202] 29 C.F.R. §§ 1904.33, 1904.44.

[203] 41 C.F.R. § 60-1.12(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	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.[204]	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.[205]	Until final disposition of the complaint, compliance review or action.

[204] 41 C.F.R. §§ 60-1.12, 60-300.80, and 60-741.80.

[205] 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.[206]	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.

[206] 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.[207]	
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.[208]	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

[207] 29 C.F.R. § 13.25.

[208] 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.[209]	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.[210]	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**
Benefits & Leave: Paid Sick Leave	Employers must keep true and accurate records of accrued and used leave. In doing so, employers are not required to track accrual balances in increments of less than one hour.[211]	3 years.

[209] 29 C.F.R. § 4.6.

[210] 41 C.F.R. § 50-201.501.

[211] Vermont Earned Sick Time Rules, §§ 5, 12. These rules are available at https://labor.vermont.gov/document/earned-sick-time-rules.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Unemployment Insurance	*All employing units must keep true and accurate records, including, for each pay period:* • total amount of remuneration paid for subject employment; • total amount of remuneration paid for nonsubject employment; • pay periods; and • the beginning and ending dates of each subject employment and each nonsubject employment. *Records must also be kept for each worker and must include*: • name, address, and Social Security number; • place of employment; • date of hire or return to work after temporary layoff; • date and reason for separation; • actual days the worker performed services in each week and the actual number of hours the worker performed services in each day; and • remuneration paid to each employee for each pay period showing separately; ▪ money payments (excluding special remuneration); ▪ the reasonable value of noncash remuneration; ▪ the amount of gratuities reported by the worker to the employer; ▪ amounts paid as allowances or reimbursements for business expenses, dates of payment and amount of such expenditures actually incurred and accounted for; and ▪ special remuneration of all kinds showing separately money payments, reasonable cash value of noncash payments, the nature of the special remuneration, and the periods during which the services were performed for which the special remuneration was paid. *Payroll records must be maintained in such a way that it will be possible to identify workers who may be eligible for partial benefits, including:* • wages earned by weeks; • whether any week was in fact a week of less than full-time work;	None specified.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• time lost, if any, by each worker and the reason therefore.[212]	
Unemployment Insurance: Short-Time Compensation (STC) Plans	Employers that wish to participate in a STC plan must meet certain criteria, including maintenance of records relating to their plans.[213]	3 years.
Wages, Hours & Payroll	*Every employer must keep true and accurate payroll records, including:* • hours worked by each employee; • wages paid to each employee; and • for tipped employees, employers are required to maintain an employee's signed report (constructed on a weekly basis) indicating the total amount of tips received and retained by the employee during the previous seven-day period.[214]	For hours and wages information: not specified in statute but agency imposes a 2-year retention period. For tipped employee reports: 3 years.
Workers' Compensation	Every employer must keep a record of all injuries, fatal or otherwise, sustained by employees in the course of employment.[215]	

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.

[212] VT. STAT. ANN. tit. 21, § 1314; 24-005-001 VT. CODE R. § 7.

[213] VT. STAT. ANN. tit. 21, § 1452.

[214] VT. STAT. ANN. tit. 21, § 393; Vermont Dep't of Labor, Wage & Hour Program, *A Summary of Vermont Wage and Hour Laws*, at 6 (rev. Jan. 2009), *available at* https://labor.vermont.gov/sites/labor/files/doc_library/WH-13-Wage-and-Hour-Laws-2019%20.pdf.

[215] VT. STAT. ANN. tit. 21, § 701.

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

Vermont does not have an access to personnel files statute. However, Vermont's paid sick leave law requires an employer to maintain certain records and permit employees access to those records, as detailed in **3.9(b)(ii)**.

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*

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

3.2(c) *Marijuana Laws*

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

Under federal law, it is illegal to possess or use marijuana.[216]

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

Vermont allows the use of medical marijuana for patients with certain medical conditions and permits recreational marijuana possession and use under limited circumstances.

The medical marijuana law does not contain any relevant employment-related provisions.[217]

The recreational marijuana law does not prevent an employer from adopting a policy that prohibits marijuana use in the workplace, or prohibiting or otherwise regulating the use, consumption, possession, transfer, display, transportation, sale, or growing of marijuana on its premises.[218] Under the recreational marijuana law, an employer is not required to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growing of marijuana in the workplace.[219] Additionally, the recreational marijuana law does not create a cause of action against an employer that discharges an employee for violating a policy that restricts or prohibits marijuana use by employees.[220] The recreational

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[216] 21 U.S.C. §§ 811-12, 841 *et seq*.

[217] *See generally* VT. STAT. ANN. tit. 7, §§ 951 *et seq.*

[218] VT. STAT. ANN. tit. 18, § 4230a.

[219] VT. STAT. ANN. tit. 18, § 4230a.

[220] VT. STAT. ANN. tit. 18, § 4230a.

marijuana law does not, *e.g.*, repeal or modify existing laws or policies concerning the operation of vehicles of any kind while under the influence of marijuana or for consuming marijuana while operating a motor vehicle.[221] Neither a person operating, nor a passenger in, a motor vehicle on a public highway can consume marijuana (which, for the driver, includes consuming secondhand marijuana smoke). Additionally, they cannot possess an open container containing contains marijuana in the vehicle's passenger area.[222] A person cannot consume marijuana in a public place, which includes, *e.g.*, any place where the use or possession of a lighted tobacco product, tobacco product, or tobacco substitute is prohibited.[223] An employer who is injured in person, property, or means of support by a person under 21 years of age who is impaired by marijuana, or as a consequence thereof has a right of action against any person(s) who wholly or partly caused such impairment by knowingly dispensing marijuana to the person or enabling the person's consumption of marijuana.[224]

Note, however, Vermont's Attorney General has cautioned that, notwithstanding the medical and recreational marijuana laws, employers remain subject to Vermont's Fair Employment Practices Act, which *may* protect employees with a medical marijuana card and individuals dealing with substance abuse issues.[225]

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.[226]

The tax relief provisions above do not apply to:

- cash provided in lieu of identity protection services;

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[221] VT. STAT. ANN. tit. 18, § 4230a(b)(2).

[222] VT. STAT. ANN. tit. 23, §§ 1134(a)-(c), 1134a(a)-(c).

[223] VT. STAT. ANN. tit. 18, § 4230a(a)(2)(A). *See also* VT. STAT. ANN. tit. 7, § 833.

[224] VT. STAT. ANN. tit. 18, § 4230g.

[225] Vermont Office of the Attorney General, *Guide to Vermont's Laws on Marijuana in the Workplace* (June 2018), *available at* https://ago.vermont.gov/wp-content/uploads/2018/06/Employer-MJ-Guidance-TOC.pdf.

[226] 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.

- 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.[227]

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

In Vermont, when a covered entity discovers or is notified of a security breach, notice is required. Notification is not required if the covered entity establishes that misuse of personal information is not reasonably possible and the covered entity provides notice of the determination to the Vermont Attorney General's office or department of banking, insurance, securities, or health care administration as applicable. If the covered entity later determines or finds that misuse of personal information has occurred or is occurring, then notice is required.[228] A *security breach* is the unauthorized acquisition or access of computerized data that compromises the security, confidentiality, or integrity of personal information or login credentials maintained by the covered entity. *Login credentials* means a consumer's username or email address, in combination with a password or an answer to a security question, that together permit access to an online account.[229]

Covered Entities & Information. Any covered entity that owns or licenses computerized personal information that includes personal information concerning a consumer. *Personal information* means an individual's first name or first initial and last name in combination with any one or more of the following:

- Social Security number;
- driver license or nondriver State identification card number, individual taxpayer identification number, passport number, military identification card number, or other identification number that originates from a government identification document that is commonly used to verify identity for a commercial transaction; or
- financial account number or credit or debit card number, if circumstances exist in which the number could be used without additional identifying information, access codes, or passwords; or
- a password, personal identification number, or other access code for a financial account; or
- unique biometric data generated from measurements or technical analysis of human body characteristics used by the owner or licensee of the data to identify or authenticate the consumer, such as a fingerprint, retina or iris image, or other unique physical representation or digital representation of biometric data; or
- genetic information; or
- health records or records of a wellness program, a healthcare professional's medical diagnosis or treatment, or a health insurance policy number.[230]

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

[228] VT. STAT. ANN. tit. 9, §§ 2430 *et seq*.

[229] VT. STAT. ANN. tit. 9, § 2430(8)(A).

[230] VT. STAT. ANN. tit. 9, § 2430(5)(A).

Personal information does not include data that is encrypted, redacted, or data that is protected by another method that renders the data unreadable or unusable or information which is lawfully available publicly from federal, state, or local government records.[231]

Waivers of this statute are void. A covered entity may be considered to be in compliance with the data security breach statute and thus exempt from the notification requirements if it:

- is subject to and complies with title V of the Gramm-Leach-Bliley Act;
- is a financial institution subject to and in compliance with the Federal Interagency Guidance on Response Programs for Unauthorized Access to Consumer Information and Customer Notice; or
- is a Vermont law enforcement agency, including the Department of Public Safety.[232]

Content & Form of Notice. Notice must be clear and conspicuous and include a description of the following:

- the incident in general terms;
- the type of personal information that was subject to the unauthorized access and acquisition;
- the general acts of the business or government agency to protect the personal information from further unauthorized access;
- a toll-free telephone number that the person may call for further information and assistance; and
- advice that directs the person to remain vigilant by reviewing account statements and monitoring free credit reports.[233]

Notice may be in one of the following formats:

- written notice to the consumer's residence;
- email notice for those consumers for whom the data collector has a valid email address if:
  - the covered entity's primary method of communication with the consumer is by electronic means;
  - the electronic notice does not request or contain a hypertext link to a request that the consumer provide personal information; and
  - the electronic notice conspicuously warns consumers not to provide personal information in response to electronic communications regarding security breaches; or
  - it is compliant with the federal e-sign act;
- telephonic notice, provided that contact is made directly with the affected persons and the telephonic contact is not through a prerecorded message; or

[231] VT. STAT. ANN. tit. 9, § 2430(5).

[232] VT. STAT. ANN. tit. 9, § 2435.

[233] VT. STAT. ANN. tit. 9, § 2435(b)(5).

- substitute notice if the covered entity demonstrates that:
  - the data collector demonstrates that the lowest cost of providing notice to affected consumers among written, email, or telephonic notice to affected consumers would exceed $10,000.00; or
  - the covered entity does not have sufficient contact information.[234]

Substitute notice must consist of all of the following:

- conspicuous posting of the notice on the website of the covered entity if the covered entity maintains a website; and
- notification by major statewide and regional media.[235]

Exceptions to the typical notification requirements:

- If the data collected determines that the misuse of personal information or login credentials is not reasonably possible, then a detailed explanation must be sent to the state attorney general or Department of Financial Regulation.
- If a security breach is limited to an unauthorized acquisition of login credentials for an online account other than an email account, the data collector must provide notice of the security breach to the consumer electronically or through one or more of the approved methods, and advise the consumer to take steps necessary to protect the online account, including a recommendation to change the login credentials for the account and for any other account for which the consumer uses the same login credentials.
- If a security breach is limited to an unauthorized acquisition of login credentials for an email account, the data collector cannot provide notice of the security breach through the affected email account, but must provide notice of the security breach through one or more of the other available methods or by clear and conspicuous notice delivered to the consumer online when the consumer is connected to the online account from an Internet protocol address or online location from which the data collector knows the consumer customarily accesses the account.
- If the data collector is subject to the federal HIPAA, the data collector is deemed to be in compliance if the breach is limited to personal information and the data collector provides notice to affected consumers.

Timing of Notice. Notice must be given in the most expedient time possible and without unreasonable delay, but not later than 45 days following discovery of the breach.[236] However, notification may be delayed if:

- law enforcement determines that notification may impede an investigation or national or homeland security. If such a request is made other than in writing, the covered entity must document such request contemporaneously in writing, including the name of the law enforcement officer making the request and the officer's law enforcement agency engaged

[234] VT. STAT. ANN. tit. 9, § 2435(b)(6).

[235] VT. STAT. ANN. tit. 9, § 2435(b)(6)(B)(ii).

[236] VT. STAT. ANN. tit. 9, § 2435(b)(5).

in the investigation. A law enforcement agency must promptly notify the covered entity when the law enforcement agency no longer requires the delay. Upon a written notification withdrawing its request for delay, the covered entity may proceed with notification of affected individuals;

- the covered entity needs time to determine the scope of the breach; or
- the covered entity needs time to restore the reasonable integrity, security, and confidentiality of the data system.[237]

Additional Provisions. If more than 1,000 persons at a single time will be notified, then the covered entity must also notify all nationwide consumer reporting agencies of the timing, distribution, and content of the notices.[238]

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.[239] 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.[240]

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.[241]

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237 VT. STAT. ANN. tit. 9, § 2435(b)(3)(B).

238 VT. STAT. ANN. tit. 9, § 2435(b)(1).

239 29 U.S.C. § 218(a).

240 29 U.S.C. § 206.

241 29 U.S.C. §§ 203, 206.

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.[242]

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

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

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

The minimum wage in Vermont is $13.67 per hour. On January 1 of each year the minimum wage must be increased by 5% or a rate that corresponds with increases of the consumer price index, whichever is less. In these instances, the minimum wage will be rounded off to the nearest cent.[244]

3.3(b)(ii) *Tipped Employees*

Tipped employees are paid differently. For employees in the hotel, motel, tourism, and restaurant industries who customarily and regularly receive more than $120 per month in tips for direct and personal customer services, an employer must pay a minimum cash wage per hour (50% of the minimum wage) and may take a maximum tip credit of up to a specific dollar amount per hour.[245] Note that if an employee does not make the tip credit amount in tips per hour, an employer must make up the difference between the wage actually made and the minimum wage. An employer bears the burden of proving that it is not taking a tip credit larger than the amount of tips actually received by the employee. In 2024, because the minimum wage will be an odd number, $13.67, the minimum cash wage will be $6.84 per hour whereas the maximum tip credit will be $6.83 per hour.

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

Vermont's minimum wage statute does not apply to employers with fewer than two employees.[246]

Certain types of workers are also excluded from coverage under the statute. The definition of *employee* for purposes of the Vermont minimum wage provisions does not include:

- individuals employed in agriculture;
- individuals employed in domestic service in or about a private home;
- individuals employed by the United States;
- individuals employed in the activities of a public supported nonprofit organization, except laundry employees, nurses' aides, or practical nurses;
- individuals employed in a *bona fide* executive, administrative, or professional capacity;

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[242] 29 U.S.C. § 3(m)(2)(B).

[243] 29 U.S.C. § 207.

[244] VT. STAT. ANN. tit. 21, § 384.

[245] VT. STAT. ANN. tit. 21, § 384.

[246] VT. STAT. ANN. tit. 21, § 383.

- individuals making home deliveries of newspapers or advertising;
- taxi-cab drivers;
- outside salespersons; and
- students working during all or any part of the school year or regular vacation periods.[247]

Unlike many other states, Vermont does not provide for payment of subminimum wage to learners, students, apprentices, or workers with disabilities. Although the state labor department has the authority to recommend a suitable scale of rates for such workers which may be less than the regular minimum wage rate,[248] the labor department has not done so.

3.3(c) *State Guidelines on Overtime Obligations*

Employers with two or more employees must pay nonexempt employees one-and-one-half times their regular rate for all hours worked over 40 in a week.[249]

3.3(d) *State Guidelines on Overtime Exemptions*

In addition to the employees excluded from Vermont's minimum wage provisions as set forth in **3.3(b)(iii)**, state overtime requirements do not apply to:

- employees of any *retail or service establishment*, meaning an establishment in which 75% of its annual volume of sales of goods or services is not for resale and is recognized as retail sales or services in the particular industry;
- employees of an establishment which is an amusement or recreational establishment, if:
  - the establishment does not operate for more than seven months in any calendar year; or
  - during the preceding calendar year, its average receipts for any six months of that year were not more than one-third of its average receipts for the other six months of the year;
- employees of an establishment which is a hotel, motel, or restaurant;
- employees of hospitals, public health centers, nursing homes, maternity homes, therapeutic community residences, and residential care homes, provided:
  - the employer pays the employee on a biweekly basis;
  - the employer files an election with the state labor commissioner; and
  - the employee receives not less than one and one-half times the regular wage rate for any work done by the employee in excess of eight hours for any workday or 80 hours for any biweekly period;
- employees of a business engaged in the transportation of persons or property to whom the overtime provisions of the federal FLSA do not apply, but does apply to all other employees of such businesses;
- employees of a political subdivision of the state; and

[247] VT. STAT. ANN. tit. 21, § 383.

[248] VT. STAT. ANN. tit. 21, § 385.

[249] VT. STAT. ANN. tit. 21, § 384.

- state employees covered by the federal FLSA.[250]

Although Vermont law exempts *bona fide* executive, administrative, or professional employees and outside sales employees from the state overtime provisions, these terms are undefined. It is recommended that employers follow the federal exemption tests.[251]

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.[252] 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.[253]

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.[254] 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.[255] 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,

[250] VT. STAT. ANN. tit. 21, § 384.

[251] VT. STAT. ANN. tit. 21, § 383.

[252] 29 C.F.R. § 785.19.

[253] 29 C.F.R. § 785.18.

[254] 29 U.S.C. § 218d.

[255] 29 U.S.C. § 218d(b)(2).

which may be used by an employee to express breast milk.[256] Exemptions apply for smaller employers and air carriers.[257]

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.[258] Lactation is considered a related medical condition.[259] 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.[260] 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 & Rest Periods. There are no generally applicable meal or rest period requirements for adults in Vermont. However, employers must provide employees with a "reasonable opportunity" during work periods to eat and use toilet facilities to protect employee health and hygiene.[261] Although the law does not identify what a "reasonable opportunity" is, the state labor department refers to federal law on whether a meal period is considered compensable.[262] Employers covered by the FLSA should consult the federal provisions.

Exempt Employees. The statute applies to exempt employees. The statute does not define the term *employee*. However, the general definitions statute defines the term as "every person who may be permitted, required, or directed by any employer, in consideration of direct or indirect gain or profit, to perform services;" it does not contains any exceptions.[263]

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

Although no specific meal period requirements for minors exist, when minors are employed, employers must post a printed notice "describing permitted and prohibited operations, occupations and machines at which a child may be employed, stating the number of hours' work permitted on each day of the week, the hours of commencing and stopping work, and the hours when the time allowed for meals begins and ends."[264]

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[256] 29 U.S.C. § 218d(a).

[257] 29 U.S.C. § 218d(c), (d).

[258] 42 U.S.C. § 2000gg–1.

[259] 29 C.F.R. § 1636.3.

[260] 29 C.F.R. § 1636.3.

[261] VT. STAT. ANN. tit. 21, § 304.

[262] Vermont Dep't of Labor, *A Summary of Vermont Wage and Hour Law* (rev. June 2019), *available at* https://labor.vermont.gov/sites/labor/files/doc_library/WH-13-Wage-and-Hour-Laws-2019%20.pdf.

[263] VT. STAT. ANN. tit. 21, § 302.

[264] VT. STAT. ANN. tit. 21, § 442.

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

Employers that fail to provide employees reasonable opportunities during work periods to eat and use toilet facilities can be assessed a civil penalty up to $100 for each and every violation.[265] Violation of the posting requirement regarding breaks for minors will result in a fine up to $5,000 per offense; for subsequent convictions, a fine, imprisonment up to six months, or both.[266]

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

An individual has the right to breast feed in public where the individual is authorized to be present with their child.[267]

Specific to the employment context, employers must provide employees with a private space to express breast milk that is not a bathroom stall. Employers must also provide a nursing mother with reasonable break time throughout the day to express breast milk for her nursing child for up to three years following the birth of the child. The break time may be paid or unpaid at the employer's discretion, unless addressed in a collective bargaining agreement. An employer may be exempted from the requirements if providing time or an appropriate private space for expressing breast milk would substantially disrupt its operations.[268]

Antiretaliation Provisions. An employer may not retaliate or discriminate against an employee who exercises or attempts to exercise her lactation accommodation and break rights.[269] An employer that violates the law can be assessed a civil penalty of $100 for each violation.[270]

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.[271] Therefore, courts and agency regulations have developed a body of law looking at whether an activity—such as on-call, training, or travel time—is or is not "work." In addition, the Portal-to-Portal Act of 1947 excluded certain preliminary and postliminary activities from "work time."[272]

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*

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[265] VT. STAT. ANN. tit. 21, § 303.

[266] VT. STAT. ANN. tit. 21, § 449.

[267] VT. STAT. ANN. tit. 9, § 4502.

[268] VT. STAT. ANN. tit. 21, § 305.

[269] VT. STAT. ANN. tit. 21, §§ 495, 495b.

[270] VT. STAT. ANN. tit. 21, § 303.

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

[272] *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").

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*

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

3.6 Child Labor

3.6(a) *Federal Guidelines on Child Labor*

The FLSA limits the tasks minors, defined as persons under 18 years of age, can perform and the hours they can work. Occupational limits placed on minors vary depending on the age of the minor and whether the work is in an agricultural or nonagricultural occupation. There are exceptions to the list of prohibited activities for apprentices and student-learners, or if an individual is enrolled in and employed pursuant to approved school-supervised and school-administered work experience and career exploration programs.[273] 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.[274] For more information on the FLSA's child labor restrictions, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

3.6(b) *State Guidelines on Child Labor*

Vermont's child labor laws forbid employment of minors in harmful and dangerous occupations. The state child labor laws expressly "reflect federal protections regarding the employment of children, but … continue to provide additional protection for children in Vermont where particular circumstances warrant greater protection[.]"[275]

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

General Restrictions. Like federal law, Vermont restricts the employment of minors under age 18 by age and by type of occupation (see Table 9).

[273] 29 C.F.R. §§ 570.36, 570.50.

[274] 29 C.F.R. § 570.6.

[275] VT. STAT. ANN. tit. 21, § 430.

Table 9. State Restrictions on Type of Employment by Age	
Age Range	**Restrictions**
Under Age 18	*Minors under age 18 cannot work at or on any occupations, employment, operations, or machines determined to be hazardous by the federal or state labor departments, including:* • occupations in or about plants manufacturing explosives or articles containing explosive components; • occupation of motor vehicle driver and helper; • coal mining, and mining; • logging, work in saw, lath, shingle, or cooperage-stock mills; • operation of power-driven machinery; • occupations involving exposure to radioactive substances; • operation of power-driven hoisting apparatus; • meat slaughtering and packing; • brick, tile, and kindred product manufacturing; • operation of circular and band saws, guillotine shears; • wrecking, demolition, and ship-breaking; • roofing; and • excavation.[276]
Ages 14 & 15	*In addition to the above restrictions, minors age 14 and 15 cannot perform the following work:* • manufacturing, mining, and processing occupations; • operating, cleaning, oiling, adjusting, or setting up power-driven machinery and hoisting apparatus; • operation of motor vehicles or services as helpers on such vehicles; • public messenger service; • occupations in connection with transportation of persons or property by rail, highway, air, water, pipeline, or other means; • warehousing and storage; • communications and public utilities; • construction; • work performed in boiler or engine rooms; • maintenance or repair of machinery or equipment; • outside window washing that involves working from window sills or requires use of a ladder, scaffolding, or their substitutes; • cooking (except at soda fountains, lunch counters, snack bars, or cafeteria serving counters) and baking; • work in freezers and meat coolers; and • loading and unloading goods to and from trucks.[277] *On the other hand, minors aged 14 and 15 may perform the following work:*

[276] VT. STAT. ANN. tit. 21, § 437; 24-010-009 VT. CODE R. § 570.2.

[277] 24-010-009 VT. CODE R. §§ 570.33, 570.34.

Table 9. State Restrictions on Type of Employment by Age	
Age Range	**Restrictions**
	• office and clerical work, including the operation of office machines; • cashiering, selling, modeling, art work, work in advertising departments, window trimming, and comparative shopping; • price marking and tagging by hand or by machine, assembling orders, packing, and shelving; • bagging and carrying out customers' orders; • errand and delivery work by foot, bicycle, and public transportation; • clean-up work, including the use of vacuum cleaners and floor waxers, and grounds maintenance (does not include the use of power-driven mowers, or cutters); • kitchen work and other work involved in preparing and serving food and beverages, including operating machines and devices used in performing such work, including, but not limited to, dishwashers, toasters, dumbwaiters, popcorn poppers, milk shake blenders, and coffee grinders; • work in connection with cars or trucks if limited to dispensing oil and gasoline, courtesy service, or washing, cleaning, and polishing (does not include work involving the use of pits, racks, or lifting apparatus, or work involving the inflation of tires mounted on a rimmed equipped with a removable retaining ring); and • cleaning vegetables and fruits, and wrapping, sealing, labeling, weighing, pricing, and stocking goods when performed in areas physically separate from freezers, meat coolers, or areas where meat is prepared for sale.[278]
Under Age 14	In Vermont, minors under age 14 cannot work in any occupation unless the occupation has been approved by the state labor department and the employment occurs during vacation and before and after school.[279]

Restrictions on Selling or Serving Alcohol. In Vermont, individuals under age 18 cannot work for a first class licensee (on-premises, malt liquor, or wine) or third class licensee (sale in a hotel, restaurant, cabaret, club, boat, or dining car) as a bartender for the purpose of preparing, mixing, or dispensing alcoholic beverages. Additionally, individuals under age 18 cannot work for a first class or third class licensee as a waitress or waiter for the purpose of serving alcoholic beverages.[280]

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

In Vermont, minors under age 16 cannot work:

- more than three hours on a school day;
- more than eight hours on a nonschool day;

[278] 24-010-009 VT. CODE R. §§ 570.33, 570.34.

[279] VT. STAT. ANN. tit. 21, § 436.

[280] VT. STAT. ANN. tit. 7, § 222.

- more than 18 hours in a week that school is in session;
- more than 40 hours in a week that school is not in session;
- more than six days a week; or
- between 7:00 P.M. and 7:00 A.M., except that minors may work until 9:00 P.M. from June 1 to Labor Day.[281]

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

The Vermont minimum age requirements do not apply to the employment of a minor by their parent or by a person standing *in loco parentis* of a child in their custody, except in occupations to which the 18-year age minimum applies and in manufacturing and mining occupations.[282] Exceptions to the minimum age requirements also exist for minors enrolled in technical education programs approved by the state board of education[283] as well as for minors working as newspaper carriers, or as actors or performers in motion pictures, theatrical productions, radio, and television.[284]

The time and hour restrictions do not apply to employment as a newspaper carrier or work connected with agriculture or domestic service. Additionally, special rules apply to minors employed as an actor or performer, or as a baseball bat person.[285]

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

Minors under age 16 must give their employer a certificate from the state labor department that states they are eligible for employment. Certificates are available only to minors who have completed elementary school, received an equivalent education, or have been excused from further school attendance. This requirement does not apply to minors employed during vacations or before or after sessions of school.[286]

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

The Vermont Department of Labor enforces the state child labor laws. Employers that violate these laws will be fined up to $5,000 for each offense and, upon a subsequent conviction, may be fined or imprisoned for not more than six months, or both.[287]

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.

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[281] VT. STAT. ANN. tit. 21, §§ 434, 437.

[282] 24-010-009 VT. CODE R. § 570.2.

[283] VT. STAT. ANN. tit. 21, § 438.

[284] VT. STAT. ANN. tit. 21, § 436.

[285] VT. STAT. ANN. tit. 21, §§ 434, 437.

[286] VT. STAT. ANN. tit. 21, §§ 431, 432.

[287] VT. STAT. ANN. tit. 21, § 449.

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).[288]

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.[289]

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.[290]

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.[291] 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.[292]

Employers that use payroll card accounts must comply with several requirements set forth in the prepaid rule. Employers must give employees certain disclosures before the employees choose to be paid via a payroll card account, including a short-form disclosure, a long-form disclosure, and other information that must be disclosed in close proximity to the short-form disclosure. Employees must receive the short-form disclosure and either receive or have access to the long-form disclosure before the account is activated. All disclosures must be provided in writing. Importantly, within the short-form disclosure, employers must inform employees in writing and before the card is activated that they need not receive wages by payroll card. This disclosure must be very specific. It must provide a clear fee disclosure and include the following statement or an equivalent: "You do not have to accept this payroll card. Ask your employer about other ways to receive your wages." Alternatively, a financial institution or employer may provide a statement

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[288] 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").

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

[290] 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.

[291] 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/.

[292] 12 C.F.R. § 1005.2(b)(3)(i)(A).

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.[293] 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.[294]

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.[295]

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.[296]

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

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

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

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

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

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[293] 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.

[294] 12 C.F.R. § 1005.18.

[295] *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.

[296] 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)(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.[297] 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.[298] Accordingly, among other items, an employer may be required to reimburse an employee for expenses related to work uniforms,[299] tools and equipment,[300] and business transportation and travel.[301] 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.[302]

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;[303]
- 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);[304]
- 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);[305]

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[297] *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).

[298] 29 C.F.R. §§ 531.35, 531.36, and 531.37.

[299] 29 U.S.C. § 203(m); 29 C.F.R. §§ 531.3, 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c12.

[300] 29 U.S.C. § 203(m); 29 C.F.R. §§ 531.3, 531.35; U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA 2001-7 (Feb. 16, 2001).

[301] 29 C.F.R. § 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c04.

[302] 29 C.F.R. § 778.217.

[303] 29 C.F.R. § 531.38.

[304] 29 C.F.R. § 531.39. The amount subject to withholding is governed by the federal Consumer Credit Protection Act. 15 U.S.C. §§ 1671 *et seq*.

[305] 29 C.F.R. § 531.40.

- 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;[306]
- 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;[307] 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.[308]

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.[309]

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.[310] 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

[306] 29 C.F.R. § 531.40.

[307] 29 U.S.C. § 203. However, the cost cannot be treated as wages if prohibited under a collective bargaining agreement.

[308] 29 C.F.R. § 825.213.

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

[310] 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.

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.[311]

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.[312]

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.[313]

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.[314]

3.7(b) *State Guidelines on Wage Payment*

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

Authorized Instruments. Wages may be paid by cash, check, debit card, or voluntary direct deposit with the employee's written approval.[315]

Direct Deposit. Mandatory direct deposit is not permitted in Vermont. However, with an employee's written authorization, an employer may pay wages by electronic transfer or direct deposit into an account maintained by the employee.[316]

Payroll Debit Card. With an employee's written authorization, a Vermont employer may pay wages by credit to a payroll card account directly or indirectly established in a federally insured depository institution to which electronic fund transfers of the employee's wages, salary, or other employee compensation is made on a recurring basis, other than a checking, savings, or other deposit account described in connection with direct deposit, provided all of the following requirements are met:

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311 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.

312 29 C.F.R. § 531.36.

313 29 C.F.R. § 531.37.

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

315 VT. STAT. ANN. tit. 21, § 342; 24-090-003 VT. CODE R. § VIII.

316 VT. STAT. ANN. tit. 21, § 342; 24-090-003 VT. CODE R. § VIII.

- the employer provides the employee a written disclosure in plain language and in at least ten-point type of both the following:
  - all the employee's wage payment options; and
  - the terms and conditions of the payroll card account option, including a complete list of all known fees that may be deducted from the employee's payroll card account by the employer or the card issues and whether third parties may assess fees in addition to the fees assessed by the employer or issuer;
- copies of the written disclosures required by the law must be provided to the employee in the employee's primary language or in a language the employee understands;
- the employee voluntarily consents in writing to payment of wages by payroll card account after receiving the required disclosures, and consent is not a condition of hire or continued employment;
- the employer ensures that the payroll card account provides that during each pay period, the employee has at least three free withdrawals from the payroll card, one of which permits withdrawal of the full amount of the balance at a federally insured depository institution or other location convenient to the place of employment;
- none of the employer's costs associated with the payroll card account are passed on to the employee, and the employer cannot receive any financial remuneration for using the pay card at the employee's expense;
- at least 21 days before any change to the payroll card policy takes effect, the employer provides the employee with written notice in plain language, in at least ten-point type, of the following:
- any change to any of the terms and conditions of the payroll card account, including any changes in the itemized list of fees; and
- the employee's right to discontinue receipt of wages by a payroll card account at any time and without penalty;
- the employer cannot charge the employee any additional fees until the employer has notified the employee in writing of the changes;
- the employer provides the employee the option to discontinue receipt of wages by a payroll card account at any time and without penalty to the employee;
- the payroll card issued to the employee must be a branded-type payroll card that complies with both the following:
  - the card can be used at a PIN-based or a signature-based outlet; and
  - the payroll card agreement prevents withdrawals in excess of the account balance and to the extent possible protects against the account being overdrawn;
- the employer ensures that the payroll card account provides one free replacement payroll card per year at no cost to the employee before the card's expiration date. A replacement card need not be provided if the card has been inactive for a period of at least 12 months or the employee is no longer employed by the employer;

- a nonbranded payroll card may be issued for temporary purposes and must be valid for no more than 60 days;
- the payroll card account cannot be linked to any form of credit, including a loan against future pay or a cash advance on future pay;
- the employer cannot charge the employee an initiation, loading, or other participatory fee to receive wages payable in an electronic fund transfer to a payroll card account, with the exception of the cost required to replace a lost, stolen or damaged payroll card;
- the employer ensures that the payroll card account provides to the employee, upon the employee's written or oral request, one free written transaction history each month which includes all deposits, withdrawals, deductions, or charges by any entity from or to the employee's payroll card account for the preceding 60 days; and
- the employer ensures that the account allows the employee to elect to receive the monthly transaction history by email.[317]

If a payroll card account is established with a financial institution as an account that is individually owned by the employee, the employer's obligations and the protections afforded directly above will cease 30 days after the employer-employee relationship ends and the employee has been paid their final wages.[318]

Upon the termination of the relationship between the employer and the employee who owns the individual payroll card account:

- the employer must notify the financial institution of any changes in the relationship between the employer and employee; and
- the financial institution holding the individually owned payroll card account must provide the employee with a written statement in plain language describing a full list of the fees and obligations the employee might incur by continuing a relationship with the financial institution.[319]

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

Employers generally must pay employees on a weekly basis. However, after providing written notice to employees, an employer may issue paychecks on a biweekly or semi-monthly basis. The payday must be within six days of the last day of the workweek (or 13 days if so provided in a collective bargaining agreement). If an employee is absent on the regularly scheduled payday, the employee is entitled to payment on demand thereafter.[320] Vermont employers cannot pay employees on a monthly basis.[321]

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

Discharge. Upon termination, an employee must be paid within 72 hours from the time of discharge.[322]

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317 VT. STAT. ANN. tit. 21, § 342; 24-090-003 VT. CODE R. § VIII.

318 VT. STAT. ANN. tit. 21, § 342.

319 VT. STAT. ANN. tit. 21, § 342.

320 VT. STAT. ANN. tit. 21, § 342.

321 VT. STAT. ANN. tit. 21, § 342.

322 VT. STAT. ANN. tit. 21, § 342.

Resignation. An employee who voluntarily resigns must be paid on the last regular payday, or, if there is no regular payday, on the following Friday.[323]

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

Along with each wage payment, employers must provide employees a detailed written statement stating:

- gross pay;
- hours worked;
- hourly rate; and
- all deductions, fully itemized (including the number of meals for which deductions are made and gross meal deductions, unless weekly full room and board is charged).[324]

Neither the statute, nor the state labor department, addresses whether electronic delivery of wage statements is permitted.

3.7(b)(v) *Wage Transparency*

Under Vermont's fair employment practices statute, an employer cannot require as a condition of employment that an employee refrain from disclosing the amount of their wages or inquiring about or discussing the wages of other employees. The employer cannot require an employee to sign a waiver or other document that purports to deny the employee the right to disclose the amount of their wages or to inquire about or discuss the wages of other employees. Further, an employer cannot discriminate against any employee because the employee has disclosed their wages or has inquired about or discussed the wages of other employees.[325]

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

There are no general notice requirements for changing an employer's regular paydays or an employee's rate of pay. However, it is recommended that employees receive advance written notice before a change occurs.

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

In Vermont, there is no general obligation to indemnify an employee for business expenses. However, the law contains provisions specific to work uniforms.

Vermont employers are not required to reimburse employees for uniform expenses. An employer cannot deduct any amount for providing, cleaning, or maintaining required apparel (including a uniform), and other compensation cannot pass from an employee to an employer for required apparel (including a uniform or the maintenance thereof), unless the employee provides voluntarily written consent for the deduction and the deduction does not:

- reduce total pay below the minimum wage;
- include any administrative fees or charges; or

[323] VT. STAT. ANN. tit. 21, § 342.

[324] 24-090-003 VT. CODE R. § VI.

[325] VT. STAT. ANN. tit. 21, § 495.

- amend, nullify, or violate the terms and conditions of any collective bargaining agreement.[326]

Notably, although it promulgated a regulation permitting a deduction for uniforms with an employee's voluntary, written consent, if the deduction does not cause an employee's pay to fall below the minimum wage, the Vermont Department of Labor contends that deductions for costs incurred for maintaining uniforms are unlawful.[327]

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

Permissible Deductions. Vermont law permits an employer to take deductions from wages for:

- goods or services the employer provides to employees if the following conditions are met:
  - the deduction does not reduce the employee's pay below the hourly minimum wage;
  - the employee provides written authorization or the employer sufficiently documents the employee's intention to repay;
  - the deduction is not prohibited by state or federal law; and
  - the deduction does not exceed the amount the employee agreed to;
- deductions authorized by law (*e.g.*, state and federal taxes and child support);
- contribution for health insurance or retirement plans, if the employee provides written authorization; or
- employer-provided meals and lodging actually furnished and accepted.[328]

An employer may also deduct for the cost of the following facilities, which may cause an employee's pay to fall below the minimum wage or required overtime rate: board, lodging, apparel, rent, and utilities.[329]

The state labor department has issued a flow chart on wage deductions, which covers deductions required by law, for wage advances, or those authorized by the employee. By answering the questions provided, employers may determine the labor department's conclusion concerning whether the deduction is permitted, and whether the deduction can cause the employee's wage to fall below the minimum wage.[330]

Prohibited Deductions. An employer cannot take wage deductions for:

- claimed damages;
- cash register shortages;
- a medical exam that is a condition of employment;
- maintaining required apparel, including a uniform; money cannot flow to the employer for required apparel, including a uniform or the maintenance thereof, unless the employee

[326] VT. STAT. ANN. tit. 21, § 385; 24-090-003 VT. CODE R. § XI.

[327] *See* Vermont Dep't of Labor, *A Summary of Vermont Wage and Hour Laws* (rev. June 2019), *available at* https://labor.vermont.gov/sites/labor/files/doc_library/WH-13-Wage-and-Hour-Laws-2019%20.pdf.

[328] 24-090-003 VT. CODE R. § X.

[329] VT. STAT. ANN. tit. 21, § 384.

[330] Vermont Dep't of Labor, *A Summary of Vermont Wage and Hour Laws* (rev. June 2019), *available at* https://labor.vermont.gov/sites/labor/files/doc_library/WH-13-Wage-and-Hour-Laws-2019%20.pdf.

voluntarily consents to such deduction or compensation in writing and the deduction does not:

- reduce total pay below minimum wage;
- include any administrative fees or charges; and
- amend, nullify or violate the terms and conditions of any collective bargaining agreement; or

- the cost of personal protective equipment required by occupational safety and health regulations, except as allowed by federal regulations.[331]

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

Orders of Support. When an employer receives a wage withholding order in connection with an employee's child support obligation, the employer must begin withholding from the employee's wages within 10 business days of receiving actual notice of the order or upon the next regular payment of wages.[332] The amount withheld from each paycheck pursuant to the wage withholding order cannot exceed the limits set under the federal Consumer Credit Protection Act (CCPA).[333] The employer may also deduct an administrative fee of $5 for the costs incurred by the wage withholding. The employer must remit the withheld amounts to the state child enforcement agency within seven days of each pay period, and must keep a record of all withholdings and remittances.[334]

If the employee's employment terminates, the employer must notify the state child enforcement agency within 10 days of the termination.[335] Employers are prohibited from discharging or disciplining an employee because the employee's wages are subject to a withholding order for child support.[336]

Debt Collection. Upon service of an order to withhold an employee's wages to enforce a money judgment (known as a *trustee process* in Vermont), the employer must begin withholding the required amounts from the debtor-employee's wages.[337] The amount withheld cannot exceed:

1. 75% of the employee's weekly disposable earnings, or 30 times the federal minimum hourly wage, whichever is greater; or
2. if the judgment debt arose from a consumer credit transaction, as that term is defined by the federal CCPA, 85% of the employee's weekly disposable earnings, or 40 times the federal minimum hourly wage, whichever is greater; or
3. if the court finds that the employee's weekly expenses reasonably incurred for their maintenance and that of their dependents exceed the amounts exempted under (1) or (2), an amount of earnings as ordered by the court.[338]

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[331] *See* 29 C.F.R. §§ 1910.132(h), 1926.95(d).

[332] VT. STAT. ANN. tit. 15, § 787.

[333] VT. STAT. ANN. tit. 15, § 787; 15 U.S.C. § 1673.

[334] VT. STAT. ANN. tit. 15, § 787.

[335] VT. STAT. ANN. tit. 15, § 787.

[336] VT. STAT. ANN. tit. 15, § 790.

[337] VT. STAT. ANN. tit. 12, §§ 3169, 3171.

[338] VT. STAT. ANN. tit. 12, § 3170.

If the employee's employment terminates, the employer must notify the court "as soon as reasonably practicable."[339] The statute prohibits an employer from discharging an employee because the employee's wages are subject to a trustee process order.[340]

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

Wage Payment. The Vermont Department of Labor enforces the state's wage payment provisions. Within two years of the date the wages were alleged to be due, an employee may file an administrative wage complaint. The department has the authority to investigate and resolve the complaint and may award the employee the amount of wages found to be unpaid. The department may also award an additional amount of damages for willful violations not to exceed twice the amount of unpaid wages, half of which will be remitted to the employee and half of which will be retained by the department to offset administrative and collection costs.[341] The department may also assess civil penalties for wage payment violations. Employers that violate the weekly wage payment and/or authorized instruments of payment provisions may be fined up to $5,000.[342]

An employee may also file a civil action for violation of the wage payment provisions within two years of the alleged violation.[343] A prevailing employee may recover the unpaid wages, plus double damages, attorneys' fees, and costs.[344]

Minimum Wage & Overtime. The Vermont Department of Labor also enforces the state's minimum wage and overtime provisions. The department has the authority to investigate and resolve the complaint and may award the employee the amount of wages found to be unpaid.[345] Employers that pay employees less than the applicable minimum wage and/or overtime rate, or permit employees to be paid less than required, may also be fined up to $100 per day that an employee is paid less than required.[346]

The statute affords a private right of action. An employee alleging minimum wage and/or overtime violations may file suit within six years of the alleged violation.[347] A prevailing employee may recover twice

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339 VT. STAT. ANN. tit. 12, § 3171.

340 VT. STAT. ANN. tit. 12, §§ 3171, 3172.

341 VT. STAT. ANN. tit. 21, § 342a.

342 VT. STAT. ANN. tit. 21, § 345.

343 VT. STAT. ANN. tit. 12, § 502; VT. STAT. ANN. tit. 2122, §§ 342, 347. Vermont's main wage payment provisions do not contain a statute of limitations. A general limitations statute provides that actions brought under section 342 are subject to a two-year limitations period. For wage payment claims raised outside section 342, a six-year limitations period will apply based on a general limitations statute providing that "[a] civil action, except one brought upon the judgment or decree of a court of record of the United States or of this or some other state . . . ." *See, e.g.*, *Egri v. U.S. Airways, Inc.*, 804 A.2d 766 (Vt. 2002).

344 VT. STAT. ANN. tit. 21, § 347.

345 VT. STAT. ANN. tit. 21, § 385.

346 VT. STAT. ANN. tit. 21, § 394.

347 VT. STAT. ANN. tit. 12, § 502; VT. STAT. ANN. tit. 21, § 394. As noted above, Vermont's minimum wage and overtime provisions do not contain a statute of limitations. Thus, a general six-year limitations period will apply based on a general limitations statute providing that "[a] civil action, except one brought upon the judgment or decree of a court of record of the United States or of this or some other state . . . ." *See, e.g.*, *Egri*, 804 A.2d 766.

the amount of the minimum wage less any amount actually paid by the employer, together with costs and reasonable attorneys' fees.[348]

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).[349] 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.[350] 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.[351]

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

Vermont law does not require an employer to offer employees other benefit compensation such as vacation pay, holiday pay, personal time off, bonuses, severance pay, or pensions.[352] However, once an employer establishes 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.

In Vermont, whether an employer may cap accrual, impose a "use-it-or-lose-it" policy, or require forfeiture of accrued vacation upon termination is determined by an employer's written vacation policy. According to the Vermont Department of Labor, "An employer is not required to provide its employees with . . . paid or unpaid vacation time . . . when an employee leaves the business. However, employers who are parties to written agreements, which can be in the form of an employee handbook, memorandum, correspondence, etc., providing for vacation time . . . are liable to their employees for these benefits. . . . "[353] Similarly, in *Guyon v. Intake Advantage, Inc.*,[354] a state trial court granted summary to an employer on a former employee's breach of contract claim for payout of unused vacation. Per the

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[348] VT. STAT. ANN. tit. 21, § 395.

[349] 29 U.S.C. § 1002.

[350] 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.

[351] 490 U.S. 107, 119 (1989).

[352] Vermont Dep't of Labor, *A Summary of Vermont Wage and Hour Law* (rev. June 2019), *available at* https://labor.vermont.gov/sites/labor/files/doc_library/WH-13-Wage-and-Hour-Laws-2019%20.pdf.

[353] Vermont Dep't of Labor, *A Summary of Vermont Wage and Hour Laws*, *available at* https://labor.vermont.gov/sites/labor/files/doc_library/WH-13-Wage-and-Hour-Laws-2019%20.pdf.

[354] 2015 WL 5176781, at **2, 4 (Vt. Super. Ct. July 22, 2015).

court, the former employee did not establish evidence of a contractual foundation for payout of vacation. The employer's policy, under the heading "Resignation," stated: "In the event notice is given, employees are entitled to receive all earned, but unused vacation. If notice is not received, unused vacation will not be paid." The policy, however, was silent on what happens to vacation when an employee is fired. The court held the plaintiff did not claim the defendant made a representation suggesting she would be entitled to unused vacation in the event of termination, and did not cite legal authority establishing at-will employees can reasonably expect to receive compensation for accrued vacation time if they are terminated. Per the court, the policy was "completely silent about vacation days when the employee is terminated. Such silence cannot be deemed to afford Plaintiff an affirmative contract right." Note, however, at least one federal court has concluded that "accrued vacation time" could be considered something employees must be "paid" under the final wages statute: "[t]he plain meaning of section 342[] requires *all* employer debts to be discharged within seventy-two hours of termination, which includes accrued vacation time."[355]

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*

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

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

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

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

Whether such state laws apply to an employer's benefit plans depends on whether the benefits are subject to ERISA. Most state and local laws that relate to an employer's provision of health benefit plans for employees are preempted by ERISA. Self-insured plans, for example, are preempted by ERISA. If the plan is preempted by ERISA, employers may not be required to comply with the states' directives on requiring coverage for domestic partners or parties to a civil union.[356] 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

[355] *Cole v. Green Mt. Landscaping*, 2009 WL 2179657, at *2 (D. Vt. July 22, 2009) (emphasis in original).

[356] 29 U.S.C. § 1144.

termination from employment).[357] However, under COBRA, only an employee and the employee's spouse and dependent children are considered "qualified beneficiaries."[358] 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*

Until same-sex marriage became legal in Vermont on September 1, 2009, the state performed civil unions.[359] Although the state stopped solemnizing civil unions on that date, existing civil unions remain valid as they were not automatically converted to marriages, so long as the partners have not subsequently married and dissolved their civil union.[360] Vermont affords the same rights to civil union partners as are provided to married couples. With respect to employee benefits, under Vermont's civil union laws, an individual or group health insurance policy that provides coverage for a spouse or family member of the insured must also provide the equivalent coverage for parties to a civil union.[361] Importantly, employers domiciled outside Vermont cannot provide health insurance coverage to Vermont employees in same-sex civil unions or marriages that differs from coverage provided to employees in heterosexual marriages.[362] The state's mini-COBRA statute also requires continuation of group health coverage to eligible dependents, including a civil union partner, upon an employee's termination or other qualifying event.[363]

In Vermont, domestic partnerships are available only to state employees.

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;[364]
- to care for an immediate family member (spouse, child, or parent) with a serious health condition;[365]

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[357] 29 U.S.C. § 1161.

[358] 29 U.S.C. § 1167(3).

[359] VT. STAT. ANN. tit. 15, §§ 8, 1201 *et seq*.

[360] VT. STAT. ANN. tit. 15, § 1206(d).

[361] VT. STAT. ANN. tit. 8, § 4063a(b); VT. STAT. ANN. tit. 15, § 1204.

[362] VT. STAT. ANN. tit. 8, § 4063b.

[363] VT. STAT. ANN. tit. 8, §§ 4090a, 4090c.

[364] 29 C.F.R. §§ 825.102, 825.112, 825.113, 825.120, and 826.121.

[365] 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).

- to take medical leave when the employee is unable to work because of a serious health condition;[366]
- 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.[367] 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.[368] For information on the FMLA, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

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

Coverage & Eligibility. Employers with 10 or more employees who work an average of at least 30 hours per week are subject to the leave provisions of the Vermont Parental and Family Leave Act (VPFLA). Employers with 15 or more employees who work an average of at least 30 hours per week are subject to the family leave provision of the VPFLA.[369]

Individuals eligible for leave under the VPFLA are those who have been continuously employed by the same employer for at least one year for an average of at least 30 hours per week.[370] An employee is not entitled to leave if, prior to requesting leave, the employee had been given notice or had given notice that employment would terminate.[371]

Purpose & Length of Leave. During any 12-month period, eligible employees are entitled to unpaid leave of up to 12 weeks of parental leave or family leave.[372]

Parental leave may be taken for the birth of a child or initial placement with the employee of a child 16 years or younger for adoption. This leave may be used during pregnancy and following the birth of a child and is available to both male and female employees.[373]

Family leave may be taken for the serious illness of the employee, the employee's child, stepchild or ward who lives with the employee, foster child, parent, spouse, party to a civil union, or parent-in-law.[374] *Serious illness* means an accident, disease or physical or mental condition that: (1) poses imminent danger of

[366] 29 C.F.R. §§ 825.112, 825.113.

[367] 29 U.S.C. § 2611(4); 29 C.F.R. §§ 825.104 to 825.109.

[368] 29 U.S.C. § 2611(2); 29 C.F.R. §§ 825.110 to 825.111.

[369] VT. STAT. ANN. tit. 21, § 471(1).

[370] VT. STAT. ANN. tit. 21, § 471(2).

[371] VT. STAT. ANN. tit. 21, § 472(f).

[372] VT. STAT. ANN. tit. 21, § 472.

[373] VT. STAT. ANN. tit. 21, §§ 471(4), 472(a).

[374] VT. STAT. ANN. tit. 21, §§ 471(3), 472(a).

death; (2) requires impatient care in a hospital; or (3) requires continuing in-home care under the direction of a physician.[375]

Employer Obligations. Upon return, an employee must be offered the same or a comparable job at the same level of compensation, employment benefits, seniority, or other term or condition of employment that existed when the leave began.[376] An employee is not entitled to reinstatement if the employer can demonstrate that: (1) during the leave, the employee's job would have been terminated or the employee laid off for reasons unrelated to the leave or the condition that gave rise to the leave; or (2) the employee performed unique services and hiring a permanent replacement after giving the employee notice of the intent to do so, was the only way to prevent substantial and grievous economic injury to the employer's operations.[377]

The employer must continue employment benefits during the leave at the level and under the conditions coverage would have been provided had the employee not taken leave. The employee may be required to contribute to the cost of benefits during the leave at the existing rate of contribution.[378] Except for the serious illness of the employee, an employee who does not return to employment must return the value of any compensation paid to or one behalf of the employee during the leave, except payments for accrued sick leave or vacation leave.[379]

An employer may not discharge or in any manner retaliate against an employee who complained (or the employer believes will complain) about a violation of the VPFLA or cooperated with the attorney general in an investigation of a violation of the VPFLA.[380]

Employee Rights & Obligations. Employees may choose to use accrued sick, vacation, or other accrued paid leave for up to six weeks during a leave.[381] Employee must give reasonable notice of their intent to take leave. The notice must include the expected start date and estimated duration. Employers may not require that notice be given more than six weeks before the expected start of the leave. In the case a serious illness of the employee or family member, an employer may require certification from a physician to verify the condition and amount and necessity of the leave requested.[382]

At the time the need for a leave arises, an employee may waive some or all of the rights provided under the VPFLA provided the waiver is informed and voluntary and changes in the conditions of employment are agreed upon by the employer and employee.[383]

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[375] VT. STAT. ANN. tit. 21, § 471(5).

[376] VT. STAT. ANN. tit. 21, § 472(c).

[377] VT. STAT. ANN. tit. 21, § 472(f); *Woolaver v. State*, 833 A.2d 849 (Vt. 2003) ("an employer may deny reinstatement to an employee if the employee would have been terminated for reasons not related to the leave or the condition of which the leave was granted").

[378] VT. STAT. ANN. tit. 21, § 472(c).

[379] VT. STAT. ANN. tit. 21, § 472(h).

[380] VT. STAT. ANN. tit. 21, § 473.

[381] VT. STAT. ANN. tit. 21, § 472(b).

[382] VT. STAT. ANN. tit. 21, § 472(e).

[383] VT. STAT. ANN. tit. 21, § 472(g).

3.9(a)(iii) *State Guidelines on Short-Term Family Leave*

In Vermont, an employee may take a total of four hours off in any 30-day period, not to exceed 24 hours in any 12-month period, for the following reasons:

- to participate in preschool or school activities directly related to the academic advancement of the employee's child, stepchild, foster child, or ward who lives with the employee;
- to accompany a child (including stepchild, foster child, or ward who lives with the employee), parent, parent-in-law or spouse, to routine medical or dental appointments;
- to accompany a parent, spouse, or parent-in-law to other appointments for professional services related to their care and well-being; and/or
- to respond to a medical emergency involving the employee's child (including stepchild, foster child, or ward who lives with the employee), parent, spouse, or parent-in-law.

Eligible employees are those who have been employed by the same covered employer for a period of one year for an average of at least 30 hours per week. Covered employers are those that employ 15 or more individuals for an average of 30 or more hours per week.

An employee must provide the earliest possible notice to the employer, but in no case later than seven days before the leave except in the case of an emergency (*i.e.*, circumstances in which seven days' notice could have a significant adverse impact on a family member). The employee must make a reasonable attempt to schedule appointments outside of regular work hours. The employee may elect to use accrued paid leave (including vacation and personal leave).[384]

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.[385] 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*

Vermont's paid sick leave law requires employers to provide paid sick leave.[386] Vermont employers must allow employees to accrue and use at least 40 hours of earned sick time in a 12-month period.[387] Employers with a current paid time off (PTO) policy that provides employees with paid time off for the same reasons as the Vermont paid sick leave law, and under which employees accrue and may use the paid time off at a rate that is equal to or greater than the rates required by the paid sick leave law, are not

[384] VT. STAT. ANN. tit. 21, §§ 471, 472a.

[385] 80 Fed. Reg. 54,697-54,700 (Sept. 10, 2015).

[386] VT. STAT. ANN. tit. 21, §§ 481 *et seq*.

[387] VT. STAT. ANN. tit. 21, §§ 482(c), 483(c).

required to change their PTO policy or offer additional paid leave. An employer is free to provide PTO that is more generous than what the law requires.[388]

Coverage & Eligibility. The law applies to any employer doing business in or operating within Vermont.[389] New employers in Vermont will have one year after hiring their first employee to comply with the law.[390] Importantly, an employer will be presumed to be subject to the law unless the employer proves that a period of no more than one year passed between the date the employer hired its first employee and the date the employer is alleged to have violated the law.[391] An employer cannot transfer an employee to a second employer with whom it has, at the time of the transfer, common ownership, management or control, in order to claim the new employer exception.[392]

The law applies to all full-time and certain part-time employees working in Vermont,[393] except that the law excludes the following types of workers from coverage:

- individuals employed by the federal government;
- individuals employed by an employer for 20 weeks or fewer in a calendar year in a job scheduled to last 20 weeks or fewer for the purpose of supporting or supplementing the employer's workforce in certain situations, including employee absences, temporary skill shortages, seasonal workloads, and special assignments and projects;
- certain high-level individuals employed by the state, including the state legislature and court employees;
- employees of health care facilities who work on a per diem or intermittent basis;
- certain substitute teachers;
- guest workers employed pursuant to a federal work visa program or who are exempt from the visa issuance process for specified reasons;
- individuals who are either sole proprietors or partner owners of an unincorporated business who are excluded from the workers' compensation provisions (independent contractors), or executive officers, managers, or members of a corporation or a limited liability company for whom the state labor department has approved an exclusion from the workers' compensation provisions;
- individuals who work an average of less than 18 hours per week during a 12-month period;
- individuals under the age of 18; and

[388] VT. STAT. ANN. tit. 21, § 484.

[389] VT. STAT. ANN. tit. 21, § 481(1).

[390] VT. STAT. ANN. tit. 21, § 486(a).

[391] VT. STAT. ANN. tit. 21, § 486(b).

[392] VT. STAT. ANN. tit. 21, § 486(c).

[393] VT. STAT. ANN. tit. 21, § 481(5).

- individuals who work on a per diem or intermittent basis, work only when they indicate that they are available to work, are under no obligation to work for the employer offering the work, and have no expectation of continuing employment with the employer.[394]

Permitted Uses, Notice & Documentation. Employees may use earned sick time for any of the following purposes:

- the employee is ill or injured;
- the employee requires professional diagnostic, preventive, routine, or therapeutic health care;
- the employee needs to care for a parent, grandparent, spouse, child, brother, sister, parent-in-law, grandchild, or foster child, including helping that individual obtain diagnostic, preventive, routine, or therapeutic health care;
- to accompany a parent, grandparent, spouse, or parent-in-law to an appointment related to their long-term care;
- the employee needs to arrange for social or legal services or obtain medical care or counseling for the employee or the employee's parent, grandparent, spouse, child, brother, sister, parent-in-law, grandchild, or foster child, who is a victim of domestic violence, sexual assault, or stalking or who is relocating as the result of domestic violence, sexual assault, or stalking; or
- the employee needs to care for a parent, grandparent, spouse, child, brother, sister, parent-in-law, grandchild, or foster child, because the school or business where the individual is normally located during the employee's workday is closed for public health or safety reasons.[395]

Until December 31, 2018, employers could limit the amount of sick time used to a maximum of 24 hours in a 12-month period. Beginning on January 1, 2019, employers may limit the amount of sick time used to a maximum of 40 hours in a 12-month period.[396]

Employers may require that employees wait to use accrued sick time until they have worked for the employer for one year. Employees accrue paid sick time during the one-year waiting period, but may not use earned sick time until after the waiting period has ended.[397]

The law does not provide any specific requirements regarding how and when an employee should notify the employer of their need to take sick leave. However, employers can require that employees planning to take earned sick time make reasonable efforts to avoid scheduling routine or preventive health care during regular work hours and notify the employer as soon as practicable of the intent to take earned sick

[394] VT. STAT. ANN. tit. 21, § 481(5).

[395] VT. STAT. ANN. tit. 21, § 483(a).

[396] VT. STAT. ANN. tit. 21, § 483(c).

[397] VT. STAT. ANN. tit. 21, § 482(b).

time and the expected duration of the absence.[398] Employers may require reasonable proof that the employees use of earned sick time is for purposes allowed by the act.[399]

If an employee does not need to use a full day of earned sick time, employers must allow employees to use earned sick time in the smallest time increment that the employer's payroll system uses to account for other absences or that the employer's paid time off policy permits. Employers are not required, however, to permit employees to use earned sick time in increments that are shorter than one hour.[400]

Employers cannot require employees to find someone to cover their shifts during qualifying absences under the law. However, employers can agree to allow employees who do not want to use earned sick time to make up the time the employee was absent by working an equivalent number of hours during the same pay period or by trading shifts with another employee.[401]

Employees must be compensated for earned sick time at a rate that is equal to or the greater of: (1) the normal hourly wage rate for the employee; or (2) the minimum wage rate under Vermont law.[402] If the employee is compensated on an hourly basis, the normal hourly rate is the amount that an employee is regularly paid for each hour of work.[403] If the employee is paid a salary, the normal hourly rate means the employee's total earnings in the previous pay period divided by the total hours worked during the previous pay period.[404] If an employee is paid on commission (whether base wage plus commission or commission only), the normal hourly rate means the greater of the base wage or the effective minimum wage.[405] If an employee ordinarily receives tips, the normal hourly rate means the nontipped minimum wage rate.[406]

Employers also must continue group insurance benefits during the use of earned sick leave, but may require that employees contribute to the cost of the benefits during the use of earned sick time at the existing rate of employee contribution.[407]

Accrual, Caps, Carry-Over, Cash Value, Cash-Out & Negative Balance. Employees must accrue at least one hour of earned sick time for every 52 hours worked. Full-time employees who are overtime-exempt under the FLSA accrue paid sick leave based on a 40-hour workweek.[408]

Until December 31, 2018, employers could limit the amount of sick time accrued to a maximum of 24 hours in a 12-month period. Beginning on January 1, 2019, employers may limit the amount of sick time

398 VT. STAT. ANN. tit. 21, § 483(h).

399 13-5-9 VT. CODE R. § (g).

400 VT. STAT. ANN. tit. 21, § 483(b).

401 VT. STAT. ANN. tit. 21, § 483(g), (i).

402 VT. STAT. ANN. tit. 21, § 482(d).

403 13-5-7 VT. CODE R. § (e).

404 13-5-7 VT. CODE R. § (g).

405 13-5-7 VT. CODE R. § (h).

406 13-5-7 VT. CODE R. § (i).

407 VT. STAT. ANN. tit. 21, § 482(d).

408 VT. STAT. ANN. tit. 21, § 482(a), (c)(2).

accrued to a maximum of 40 hours in a 12-month period. Employers can choose to allow employees to accrue more sick time than the law requires.[409]

Employers must allow employees to carry over any unused sick time at the end of the year in which it was accrued. However, employers can avoid carry-over requirements by either paying employees for unused earned sick time at the end of each year, or by "frontloading" the full amount of available sick time or other paid time off at the beginning of each 12-month period. If an employer frontloads, it is not required to provide additional earned sick time to an employee who chooses to use paid time off that could be used for a covered purpose for a different purpose, and the frontloaded paid sick time off does not carry over from one annual period to the next.[410]

Employers are not required to pay employees for unused earned sick time upon separation from employment, unless agreed upon.[411]

Antiretaliation Provisions. Employers cannot retaliate against employees for using paid sick leave under the law, complaining about a violation of the law, cooperating with the Vermont Labor Department in investigating a violation of the law, or because the employer believes the employee may complain or cooperate in an investigation of a violation of the law.[412]

Posting & Record Keeping. Employers must post a notice setting out the provisions of the law in a place conspicuous to employees in a form provided by the state labor commissioner.[413] Employers also must notify employees of the provisions of the paid sick leave law upon hire.[414]

Additionally, employers must calculate the amount of sick time an employee has accrued as the leave accrues during each pay period or on a quarterly basis.[415] Employers must keep true and accurate records of each employee's accrual and use of earned sick time for three years and must provide copies to the state labor commissioner within 10 days upon request and to any employee within five days of a request.[416]

State Enforcement, Remedies & Penalties. Vermont's Department of Labor is responsible for enforcing the paid sick leave law, although a federal trial court judge allowed a plaintiff to privately pursue through trial a retaliation cause of action.[417] An employee or the department may file a complaint, not later than

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[409] VT. STAT. ANN. tit. 21, § 483(c).

[410] VT. STAT. ANN. tit. 21, § 483(d).

[411] VT. STAT. ANN. tit. 21, § 483(e).

[412] VT. STAT. ANN. tit. 21, §§ 483(l), 397(a).

[413] VT. STAT. ANN. tit. 21, § 483(j).

[414] VT. STAT. ANN. tit. 21, § 483(j).

[415] VT. STAT. ANN. tit. 21, § 482(e).

[416] Vermont Earned Sick Time Rules, §§ 5, 12. These rules are available at https://labor.vermont.gov/document/earned-sick-time-rules.

[417] VT. STAT. ANN. tit. 21, §§ 483(n), 342a. *But see Cole v. Foxmar, Inc.*, 387 F. Supp. 3d 370 (D. Vt. 2019) (Granting leave to amend complaint), 2021 WL 5178822 (D. Vt., Mar. 8, 2021) (denying in part defendant's motion for summary judgment), 2022 WL 842881 (D. Vt. Mar. 22, 2022) (granting in part defendant's motion for a new trial), 2022 WL 18456824(D. Vt. June 13, 2022) (denying plaintiff's motion for reconsideration), 2024 WL 74902 (2d Cir. Jan. 8, 2024) (affirming new trial on damages), and 2024 WL 2116341(U.S., May 13, 2024) (denying plaintiff's petition to review).

two years from the date the violation occurred. If after an investigation a violation is determined to have occurred, the department must attempt to settle the matter between the employer and employee. If the settlement attempt fails, the department must issue a written determination and order for collection, which must specify the facts and conclusions upon which the determination is based. The department must collect from the employer the amounts due and remit them to the employee. If the department determines that the violation was willful, the order for collection may provide that the employer is liable to pay an additional amount not to exceed twice the amount of unpaid wages, one-half of which will be remitted to the employee and one-half of which the department will retain to offset administrative and collection costs.[418]

Employers that violate the law are subject to penalties of up to $5,000. Where the employer is a corporation, the president or other officers who have control of the payment operations of the corporation are considered employers and liable to the employee for actual wages due when the officer has willfully and without good cause participated in knowing violations of the law.[419] In addition, any person who believes that they have been retaliated against in violation of the law may bring a civil action seeking compensatory and punitive damages or equitable relief, including restraint of prohibited acts, restitution of wages or benefits, reinstatement, costs, reasonable attorneys' fees, and other appropriate relief.[420]

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.[421] 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.

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[418] VT. STAT. ANN. tit. 21, § 342a.

[419] VT. STAT. ANN. tit. 21, §§ 483(m), 345.

[420] VT. STAT. ANN. tit. 21, §§ 483(l), 397(b).

[421] 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.[422] 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 wha0t an employer would normally provide under a sick leave policy for reasons related to the impairment.[423] 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 women, 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*

Currently, there are no specific statutory requirements for pregnancy leave for private-sector employees in Vermont. However, an eligible employee may take up to 12 weeks of leave in a 12-month period for a variety of reasons including the employee's own serious illness under Vermont's Parental and Family Leave Act (VPFLA). It is likely that pregnancy disability would be considered a serious illness under the Act, although this issue is not addressed in the statute or in case law.[424] For more information about the VPFLA, see **3.9(a)(ii)**.

Employers must also provide reasonable accommodations for an employee's pregnancy-related condition, unless it would impose an undue hardship on the employer.[425] See **3.11(c)(ii)** for additional information.

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**.

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[422] 29 C.F.R. § 825.202.

[423] 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.

[424] VT. STAT. ANN. tit. 21, §§ 471 *et seq*.

[425] VT. STAT. ANN. tit. 21, § 495k.

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

Pursuant to the Vermont Parental and Family Leave Act, an employee who has worked for a covered employer for one year for an average of at least 30 hours per week, may take up to 12 weeks of unpaid leave during a 12-month period for a variety of reasons including the placement of a child 16 years or younger with the employee for purposes of adoption.[426] For more information about the VPFLA, see **3.9(a)(ii)**.

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*

School activities leave is contained within Vermont's short-term family leave law. An employee is entitled to take a total four hours off in any 30-day period, not to exceed 24 hours in any 12-month period, to participate in preschool or school activities directly related to the academic advancement of the employee's child, stepchild, foster child, or ward who lives with the employee.[427] For a more complete discussion of short-term family leave, see **3.9(a)(iii)**.

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*

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

3.9(g) *Voting Time*

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

There is no federal law concerning time off to vote.

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

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

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

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

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

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[426] VT. STAT. ANN. tit. 21, §§ 471 *et seq*.

[427] VT. STAT. ANN. tit. 21, §§ 471, 472a.

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

Annual Town Meetings. Employees have the right to take unpaid leave from work to attend an annual town meeting provided the time off does not conflict with the essential operations of the employer. An employee must notify their employer at least seven days prior to the date of the town meeting.[428]

Legislative Leave. An employee may take a leave of absence to perform official duties as a member of the State General Assembly. Such employees may not lose any job status, seniority, or benefits due to a legislative leave of absence.[429] An employee who intends to seek election to the General Assembly must provide notice to their employer within 10 days of declaring their campaign. Failure to provide notice alleviates the employer's duty to provide a leave of absence.

Employers with five or fewer employees are exempt from this provision. Additionally, an employer may contend the leave as an unreasonable hardship by filing for relief with the chairman of the state labor relations board. Factors that will be considered include:

- the length of time the employee has been employed by the employer;
- the number of employees in the employer's business;
- the nature of the employer's business;
- the nature of the position held by the employee and the ease or difficulty and cost of temporarily filling the position during the leave of absence; and
- any agreement entered into between the employee and employer as a condition of employment.[430]

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.[431] 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

[428] VT. STAT. ANN. tit. 21, § 472b.

[429] VT. STAT. ANN. tit. 21, § 495.

[430] VT. STAT. ANN. tit. 21, §§ 495, 4496.

[431] 28 U.S.C. § 1875.

additional federal statutes.[432] For more information, see LITTLER ON LEAVES OF ABSENCE: MILITARY & CIVIC DUTY LEAVES.

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

Leave to Serve on a Jury. An employer must not discharge, discriminate against, or otherwise penalize an employee because of service on a jury. The Vermont Attorney General has opined that an employer need not compensate an employee for time spent on jury service. Jury service time is to be considered active employment for purposes of determining seniority, fringe benefits, credits toward vacation, and other rights privileges, and benefits.[433]

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*

Criminal Code. Employers may not discharge or discipline a victim of a listed crime or a victim's family member or representative for taking time off from work to honor a subpoena to testify in legal proceedings.[434] *Family member* means a spouse, child, sibling, parent, next of kin, domestic partner, or legal guardian of a victim.[435] *Listed crimes* are all degrees or attempts of the following as defined under state law:

- stalking,
- domestic assault;
- sexual assault;
- lewd or lascivious conduct;
- murder;
- manslaughter;
- assault;
- assault and robbery;
- arson;
- maiming;
- kidnapping;

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[432] *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).

[433] VT. STAT. ANN. tit. 21, § 499; 1972 Op. Vt. Att'y Gen. 116.

[434] VT. STAT. ANN. tit. 13, § 5313.

[435] VT. STAT. ANN. tit. 13, § 5301.

- unlawful restraint;
- recklessly endangering another person;
- violation of abuse prevention order;
- operating vehicle under the influence;
- careless or negligent operation;
- leaving the scene of an accident with serious bodily injury or death;
- burglary into an occupied dwelling;
- abuse;
- aggravated sexual assault of a child; and
- human trafficking.[436]

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

Labor Code. An eligible employee is entitled to take unpaid leave for the purpose of attending a deposition or court proceeding related to:

- a criminal proceeding, when the employee is a victim as defined in title 13 Vt. Stat. Ann. § 5301 and the employee has a right or obligation to appear at the proceeding;
- a relief from abuse hearing pursuant to title 15 Vt. Stat. Ann. § 1103, when the employee seeks the order as plaintiff;
- a hearing concerning an order against stalking or sexual assault pursuant to title 12 Vt. Stat. Ann. § 5133, when the employee seeks the order as plaintiff; or
- a relief from abuse, neglect, or exploitation hearing pursuant to title 33 Vt. Stat. Ann. chapter 69, when the employee is the plaintiff.[437]

Leave is in addition to the parental and family leave provided in Vt. Stat. Ann. tit. 21, § 472.[438]

Covered employers are those doing business in or operating within the state of Vermont.[439] However, the leave requirement does not apply to an employer that provides goods or services to the general public, if the employee's absence would require the employer to suspend all business operations at a location that is open to the general public.[440]

Employee means a person who is an alleged crime victim and has been continuously employed by the same employer for a period of 6 months for an average of at least 20 hours per week. An *alleged victim* means a person who is alleged in an affidavit filed by a law enforcement official with a prosecuting attorney of competent state or federal jurisdiction to have sustained physical, emotional, or financial

[436] VT. STAT. ANN. tit. 13, § 5301.

[437] VT. STAT. ANN. tit. 21, § 472c(b).

[438] VT. STAT. ANN. tit. 21, § 472c(b).

[439] VT. STAT. ANN. tit. 21, § 472c(a)(1).

[440] VT. STAT. ANN. tit. 21, § 472c(h).

injury or death as a direct result of the commission or attempted commission of a crime or act of delinquency. The term *alleged victim* also includes a family member of such a person if the person:

- is a minor;
- has been found to be incompetent;
- is alleged to have suffered physical or emotional injury as a result of the violent crime or act of delinquency; or
- was killed as a result of the alleged crime or act of delinquency.[441]

A family member, as used in the definition of *alleged victim*, means an individual who is not identified in the affidavit as the defendant and is the alleged victim's:

- child, foster child, or stepchild;
- ward who lives with the alleged victim;
- spouse, domestic partner or civil union partner;
- sibling grandparent;
- grandchild;
- parent or a parent of the alleged victim's spouse, domestic partner, or civil union partner;
- legal guardian; or
- an individual for whom the alleged victim stands in loco parentis or who stood in loco parentis for the alleged victim when the alleged victim was a child.[442]

Leave is unpaid. During the leave, at the employee's option, the employee may use accrued sick leave, vacation leave, or any other accrued paid leave. Use of accrued paid leave does not extend the leave entitlement.[443] An employee may also use accrued paid sick leave pursuant to the Vermont Earned Sick Time Act.[444]

The employer must continue the employee's employment benefits for the duration of the leave at the level and under the same conditions as coverage would be provided if the employee remained in employment continuously for the duration of the leave. The employer may require that the employee contribute to the cost of benefits during the leave at the existing rate of employee contribution.[445]

Upon returning from leave, the employee must be offered the same or comparable job at the same level of compensation, employment benefits, seniority, or any other term or condition of the employment existing on the day leave began. This provision does not apply if:

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441 VT. STAT. ANN. tit. 21, § 472c(a)(1)(A).

442 VT. STAT. ANN. tit. 21, § 472c(1)(B)(i).

443 VT. STAT. ANN. tit. 21, § 472c(c).

444 VT. STAT. ANN. tit. 21, § 483(a)(4); 24-010-014 VT. CODE R. § 6(c)(4).

445 VT. STAT. ANN. tit. 21, § 472c(d).

- prior to requesting leave, the employee had been given notice or had given notice that the employment would terminate; or
- the employer can demonstrate by clear and convincing evidence that during the period of leave the employee's job would have been terminated or the employee would have been laid off for reasons unrelated to the leave or the condition for which the leave was granted.[446]

An employee may, at the time a need for leave arises, waive some or all of the rights granted under the statute, provided that the waiver is informed and voluntary and that any changes in conditions of employment related to the waiver is mutually agreed upon between the employer and the employee.[447]

3.9(k) *Military-Related Leave*

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

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

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

Some states provide greater protections for employees with respect to military leave. USERRA, however, establishes a "floor" with respect to the rights and benefits an employer is required to provide to an employee to take leave, return from leave, and be free from discrimination. Any state law that seeks to supersede, nullify, or diminish these rights is void under USERRA.[448]

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

[446] VT. STAT. ANN. tit. 21, § 472c(f).

[447] VT. STAT. ANN. tit. 21, § 472c(g).

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

member of the National Guard who faces recall to active duty if a qualifying exigency exists.[449] 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.[450] Notably, leave is only available for covered relatives of military members called to active *federal* service by the president and is not available for those in the armed forces recalled to state service by the governor of the member's respective state.

2. **Military Caregiver Leave.** An eligible employee may take up to 26 weeks of unpaid leave in a single 12-month period to care for a "covered servicemember" with a serious injury or illness if the employee is the servicemember's spouse, child, parent, or next of kin.

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

Military Leave. Any member of the reserve components of the armed forces, the ready reserve, or the National Guard, including the National Guard of another state, is entitled to a leave of absence to engage in military drills, training, or other temporary duty pursuant to state or federal orders.[451]

The leave may be with or without pay at the employer's discretion. During leave, the employee must accrue seniority, vacation, sick leave, bonuses, advancement, and any other advantages of employment normally to be anticipated in the employee's position.[452]

If any member of the Vermont National Guard or the National Guard of another state with civilian employer-sponsored insurance coverage is ordered to state active duty by the governor for up to 30 days, the service member may, at the member's option, continue their civilian health insurance under the same terms and conditions as were in effect for the month preceding the member's call to state active duty, including a continuation of the same levels of employer and employee contributions toward premiums and cost-sharing.[453]

If a member of the Vermont National Guard or the National Guard of another state is called to state active duty for more than 30 days, the member may continue their civilian health insurance. For a member whose employer chooses not to continue regular contributions toward premiums and cost-sharing during the period of the member's state active duty in excess of 30 days, the state of Vermont is responsible for paying the employer's share of the premium and cost-sharing.[454]

Employees who are still qualified to perform the duties of their job are entitled to be reinstated to their previous position, or a similar position with the same status, pay, and seniority, provided they offer evidence of satisfactory completion of training immediately upon return.[455] Any person who is absent

[449] 29 C.F.R. § 825.126(a).

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

[451] VT. STAT. ANN. tit. 21, § 491(a).

[452] VT. STAT. ANN. tit. 21, §§ 491, 492.

[453] VT. STAT. ANN. tit. 21, § 492(c).

[454] VT. STAT. ANN. tit. 21, § 492(c).

[455] VT. STAT. ANN. tit. 21, § 491(a).

from employment to serve in the National Guard is entitled to the reemployment rights and benefits provided by USERRA.[456]

Other Military-Related Protections: Spousal Unemployment. An individual must not be disqualified for benefits if the individual left employment to accompany a spouse who is on active duty with the U.S. armed forces and is required to relocate due to permanent change of station orders, activation orders, or unit deployment orders, when such relocation would make it impractical or impossible for the individual to continue working for the employer.[457]

3.9(l) *Other Leaves*

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

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

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

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

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.[458] Employers are also required to comply with all applicable occupational safety and health standards.[459] To enforce these standards, the federal Occupational Safety and Health Administration ("Fed-OSHA") is authorized to carry out workplace inspections and investigations and to issue citations and assess penalties. The Fed-OSH Act also requires employers to adopt reporting and record-keeping requirements related to workplace accidents. For more information on this topic, see LITTLER ON WORKPLACE SAFETY.

Note that the Fed-OSH Act encourages states to enact their own state safety and health plans. Among the criteria for state plan approval is the requirement that the state plan provide for the development and enforcement of state standards that are at least as effective in providing workplace protection as are comparable standards under the federal law.[460] Some state plans, however, are more comprehensive than the federal program or otherwise differ from the Fed-OSH Act.

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[456] VT. STAT. ANN. tit. 21, § 492(b).

[457] VT. STAT. ANN. tit. 21, § 1344(a)(2)(A).

[458] 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.

[459] 29 U.S.C. § 654(a)(2).

[460] 29 U.S.C. § 667(c)(2).

3.10(a)(ii) *State-OSH Act Guidelines*

Vermont, under agreement with Fed-OSHA, operates its own state occupational safety and health program in accordance with section 18 of the Fed-OSH Act.[461] Thus, Vermont 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.[462] The Vermont State Plan applies to all private-sector workplaces except for maritime and contract U.S. Postal Services workers.[463] It is enforced by the Vermont Occupational Safety and Health Administration (VOSHA).[464] VOSHA has adopted the Fed-OSHA standards by reference.[465] However, there are two standards unique to Vermont that address permissible air contaminant exposure limits and electrical lineworker safety.[466]

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*

A driver may not operate a motor vehicle while texting. *Texting* means the reading or the manual composing or sending of electronic communications, including text messages, instant messages, or emails, using a portable electronic device.[467] *Portable electronic device* is a portable electronic or computing device, including a cellular telephone, personal digital assistant (PDA), or laptop computer.[468]

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

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*

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

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461 29 U.S.C. § 667.

462 VT. STAT. ANN. tit. 21, § 221.

463 *See* https://www.osha.gov/dcsp/osp/stateprogs/vermont.html.

464 VT. STAT. ANN. tit. 18, § 1418.

465 VT. STAT. ANN. tit. 21, §§ 203, 221, and 222.

466 *See* https://labor.vermont.gov/vermont-occupational-safety-and-health-administration-vosha/rules-publications/rules-regulations.

467 VT. STAT. ANN. tit. 23, § 1099.

468 VT. STAT. ANN. tit. 23, § 4 (82).

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*

Smoking is prohibited in all workplaces in Vermont. The prohibition on smoking in the workplace includes use of tobacco substitutes. A *tobacco substitute* is a product, including electronic cigarettes or other electronic or battery-powered devices, that contains and is designed to deliver nicotine or other substances into the body through inhaling vapor and that have not been approved by the U.S. Food and Drug Administration for tobacco cessation or other medical purposes. The prohibition on using tobacco substitutes in a workplace does not apply to a business that does not sell food or beverages but that is established for the sole purpose of providing a setting for patrons to purchase and use tobacco substitutes and related paraphernalia.[469]

A *workplace* is defined as an enclosed structure where employees perform services for an employer, or the enclosed portion of a structure to which the employee is assigned, and includes restaurants, bars, and other establishments in which food or drinks, or both, are served. For lodging establishments used for transient traveling or public vacationing, such as resorts, hotels, and motels, *workplace* includes the sleeping quarters and adjoining rooms rented to guests.[470]

Posting Requirements. While there is no mandated posting requirement in Vermont, the Vermont Department of Health recommends that employers post its 100% Smoke Free poster. The poster summarizes the law and can be obtained from the Vermont Department of Health website.[471]

Antiretaliation Provisions. Employers may not discharge or retaliate against an employee due to the employee reporting a violation or otherwise exercising their rights under this law.[472]

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*

Vermont 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

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[469] VT. STAT. ANN. tit. 7, § 1001; VT. STAT. ANN. tit. 18, § 1421; *see also* Vermont Dep't of Health, *Smoking in the Workplace Law, available at* http://healthvermont.gov/wellness/tobacco.

[470] VT. STAT. ANN. tit. 18, § 1421.

[471] Resources are available at http://healthvermont.gov/wellness/tobacco.

[472] VT. STAT. ANN. tit. 18, § 1421.

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*

Vermont law does not address employer workplace violence protection orders.

3.11 Discrimination, Retaliation & Harassment

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

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

The federal equal employment opportunity laws that apply to most employers include: (1) Title VII of the Civil Rights Act of 1964 ("Title VII");[473] (2) the Americans with Disabilities Act (ADA);[474] (3) the Age Discrimination in Employment Act (ADEA);[475] (4) the Equal Pay Act;[476] (5) the Genetic Information Nondiscrimination Act of 2009 (GINA);[477] (6) the Civil Rights Acts of 1866 and 1871;[478] and (7) the Civil Rights Act of 1991. As a result of these laws, federal law prohibits discrimination in employment on the basis of:

- race;
- color;
- national origin (includes ancestry);
- religion;
- sex (includes pregnancy, childbirth, or related medical conditions, and pursuant to the U.S. Supreme Court's decision in *Bostock v. Clayton County, Georgia*, includes sexual orientation and gender identity);[479]
- 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.[480] Employees must first exhaust their administrative remedies by filing a

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[473] 42 U.S.C. §§ 2000e *et seq.* Title VII applies to employers with 15 or more employees. 42 U.S.C. § 2000e(b).

[474] 42 U.S.C. §§ 12101 *et seq.* The ADA applies to employers with 15 or more employees. 42 U.S.C. § 12111(5).

[475] 29 U.S.C. §§ 621 *et seq*. The ADEA applies to employers with 20 or more employees. 29 U.S.C. § 630.

[476] 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.

[477] 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)).

[478] 42 U.S.C. §§ 1981, 1983.

[479] 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.

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

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.[481]

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

The Vermont Fair Employment Practices Act (VFEP) is Vermont's comprehensive antidiscrimination law. It prohibits discrimination and harassment on the basis of the following:

- race (**Effective July 1, 2024**, the definition of race includes traits associated with or perceived to be associated with race, including hair type, hair texture, hairstyles, and protective hairstyles. "Protective hairstyles"[482] include individual braids, cornrows, locs, twists, Bantu knots, afros, afro puffs, and other formations, as well as wigs, headwraps and other head coverings).
- color;
- religion;
- national origin;
- sex (includes pregnancy);
- sexual orientation;
- gender identity;
- ancestry;
- place of birth;
- age (18+);
- disability or mental or physical condition;
- HIV status; or
- crime victim status.[483]

A separate section of the VFEP also prohibits employers from refusing to hire, discharge, or otherwise discriminating against an individual with respect to employment because of the individual's credit report or credit history. With some exceptions, it also prohibits employers from inquiring about an applicant or employee's credit report or credit history.[484] For more information on this provision, see **1.3(b)(i)**.

The antidiscrimination protections of the VFEP apply to all employers with at least one employee.[485] This provides for broader coverage than federal Title VII protections, which only apply to employers with 15 or more employees.[486] However, any religious or denominational institution or organization, or any organization operated for charitable or educational purposes may give preference to persons of the same

[481] 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.

[482] VT. STAT. ANN. tit. 21, § 495d.

[483] VT. STAT. ANN. tit. 21, §§ 495, 495d; *Lavalley v. E.C. & A.C. Whiting Co.*, 692 A.2d 367 (Vt. 1997).

[484] VT. STAT. ANN. tit. 21, § 495i.

[485] VT. STAT. ANN. tit. 21, § 495d.

[486] 42 U.S.C. § 2000e.

religion or denomination, and with respect to discrimination on the basis of sexual orientation or gender identity may take any action in employment matters to promote the religious principles for which it is established.[487]

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

Complaints under the VFEP must be filed within one year.[488] The Vermont Attorney General's Office Civil Rights Unit enforces the employment aspects of the VFEP against private employers.[489] The Attorney General may enforce the provisions of VFEP by restraining prohibited acts, seeking civil penalties, obtaining assurances of discontinuance, and conducting civil investigations.[490] The Civil Rights Unit is authorized to accept administrative charges of discrimination, conduct investigations based on the submissions and documentation provided by both parties, and interview witnesses and perform site visits. The Civil Rights Unit may also conduct mediations and assist the parties in reaching a settlement. If conciliation efforts are unsuccessful, the office may issue findings, stating the nature of the charge, the evidence discovered during the investigation, and whether there was a violation of law. If the office determines a violation occurred, the Attorney General may file a complaint against the employer in state court, or may seek to intervene in any private action that the employee has filed. The statute of limitations for filing a claim for discrimination in employment must be commenced within six years after the cause of action accrued.[491] Legal remedies for violations include injunctive relief (*e.g.*, reinstatement and training requirements), back pay awards, front pay awards, damages, civil penalties, and attorneys' fees and costs.[492]

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

Genetic Information. Employers are prohibited from requiring genetic testing or using knowledge of genetic testing or the results of genetic testing to affect the terms or condition of employment. Employers may use genetic testing in connection with life, disability, income, or long-term care insurance provided under an employee benefit plan.[493]

National Guard Membership. An employer may not discriminate in any manner of employment against an individual because of membership, application for membership, or service in the federal or state National Guard, including the National Guard of a state other than Vermont. Employees must not be denied initial employment, reemployment, retention of employment, promotion, or any benefit of employment because of service, application for service, or obligation to serve.[494]

Captive Audience. An employer cannot discharge, discipline, penalize, or otherwise discriminate against an employee based on the employee's refusal to:

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[487] VT. STAT. ANN. tit. 21, § 495.

[488] 80-250-001 VT. CODE R. § 2.

[489] VT. STAT. ANN. tit. 21, § 495b; *see also* https://ago.vermont.gov/divisions/civil-rights.

[490] VT. STAT. ANN. tit. 21, § 495b.

[491] VT. STAT. ANN. tit. 12 § 525.

[492] *See* http://ago.vermont.gov/civil-rights-unit-process/.

[493] VT. STAT. ANN. tit. 18, §§ 9331, 9333.

[494] VT. STAT. ANN. tit. 21, § 491.

- attend or participate in an employer-sponsored meeting where the primary purpose is to communicate the employer's opinion about religious or political matters; or
- view or participate in communications with or from the employer where the primary purpose is to communicate the employer's opinion about religious or political matters.

There are exceptions for employers that are affiliated with religious or denominal institutions, or political organizations.[495]

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."[496] 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.[497]

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

The VFEP makes it an unlawful employment practice for an employer to discriminate between employees on the basis of the protected classifications of sex, race, national origin, sexual orientation, gender identity, or physical or mental condition by paying wages to employees of one protected classification at a rate less than the rate paid to employees of another protected classification for equal work that requires equal skill, effort, and responsibility and is performed under similar working conditions.[498] An employer may pay different wage rates under this subsection when the differential wages are made pursuant to: (1) a seniority system; (2) a merit system; (3) a system in which earnings are based on quantity or quality of production; or (4) a *bona fide* factor other than sex, race, national origin, sexual orientation, gender identity, or physical or mental condition. An employer asserting that differential wages are paid pursuant to such a *bona fide* factor must demonstrate that the factor does not perpetuate a differential in compensation based on sex, race, national origin, sexual orientation, gender identity, or physical or

[495] VT. STAT. ANN. tit. 21, § 495o.

[496] 29 U.S.C. § 206(d)(1).

[497] 42 U.S.C. § 2000e-5.

[498] VT. STAT. ANN. tit. 21, § 495.

mental condition, that the factor is job-related with respect to the position in question, and that it is based upon a legitimate business consideration.

As discussed in **3.11(a)(iii)**, an employee alleging a violation of the VFEP may file an administrative complaint with the Civil Rights Unit of the state attorney general's office, or may elect to file a civil action within one year of the alleged violation.[499]

Beginning in July 2025, Vermont law will also require employers of five or more employees to ensure that any advertisement for a Vermont job opening includes the compensation or range of compensation for the job opening. *Advertisement* means written notice, in any format, of a specific job opening that is made available to potential applicants, but does not include:

- general announcements that notify potential applicants that employment opportunities may exist with the employer but do not identify any specific job openings; or
- verbal announcements of employment opportunities that are made in person or on the radio, television, or other electronic mediums.[500]

Vermont job opening and *job opening* mean any position of employment that is:

- either physically located in Vermont, or a remote position that will predominantly perform work for an office or work location that is physically located in Vermont; and
- a position for which an employer is hiring, including:
  - positions that are open to internal candidates or external candidates, or both; and
  - positions into which current employees of the employer can transfer or be promoted.[501]

Likewise, those terms do not include a position that is physically located outside of Vermont and that performs work that is predominantly for one or more offices or work locations that are physically located outside of Vermont.

The term *potential applicants* includes both current employees of the employer and members of the general public. *Range of compensation* means the minimum and maximum annual salary or hourly wage for a job opening that the employer expects in good faith to pay for the advertised job at the time the employer creates the advertisement.[502]

Additional rules apply for jobs that will involve tipped work and jobs that will be paid on a commission basis. An advertisement for a job opening that is paid in whole or in part on a commission basis must disclose that fact and is not required to disclose the compensation or range of compensation. An advertisement for a job opening that is paid on a tipped basis must disclose that fact as well as the base wage or range of base wages for the job opening. *Base wage* means the hourly wage that an employer pays to a tipped employee and does not include any tips that the employee receives. *Range of base wages*

[499] VT. STAT. ANN. tit. 21, § 495b; 80-250-001 VT. CODE R. § 2.

[500] VT. STAT. ANN. tit. 21, § 495o.

[501] VT. STAT. ANN. tit. 21, § 495o.

[502] VT. STAT. ANN. tit. 21, § 495o.

means the minimum and maximum base wages for a job opening that the employer expects in good faith to pay for the advertised job at the time the employer creates the advertisement.[503]

An employer is not prevented from hiring an employee for more or less than the range of compensation contained in a job advertisement based on circumstances outside of the employer's control, such as an applicant's qualifications or labor market factors.[504]

Vermont law also prohibits employers from barring employees from disclosing their wages or inquiring about other employees' wages (see **3.7(b)(v)**), and from seeking information about a prospective employee's salary history, see **1.3(f)(ii)**.

3.11(c) *Pregnancy Accommodation*

3.11(c)(i) *Federal Guidelines on Pregnancy Accommodation*

As discussed in **3.9(c)(i)**, the federal Pregnancy Discrimination Act (PDA), which amended Title VII, the Family and Medical Leave Act (FMLA), and the Americans with Disabilities Act (ADA) may be implicated in determining the extent to which an employer is required to accommodate an employee's pregnancy, childbirth, or related medical conditions.

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

- fail or refuse to make reasonable accommodations for the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on its business operations;
- require a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process;
- deny employment opportunities to a qualified employee, if the denial is based on the employer's need to make reasonable accommodations for the qualified employee;
- require a qualified employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided; or
- take adverse action related to the terms, conditions, or privileges of employment against a qualified employee because the employee requested or used a reasonable accommodation.[505]

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:

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[503] VT. STAT. ANN. tit. 21, § 495o.

[504] VT. STAT. ANN. tit. 21, § 495o.

[505] 42 U.S.C. § 2000gg-1. The regulations provide definitions of *pregnancy*, *childbirth*, and *related medical conditions*. 29 C.F.R. § 1636.3.

- 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).[506]

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.[507] To request a reasonable accommodation, the employee or the employee's representative need only communicate to the employer that the employee needs an adjustment or change at work due to their limitation resulting from a physical or mental condition related to pregnancy, childbirth, or related medical conditions. The employee must also participate in a timely, good faith interactive process with the employer to determine an effective reasonable accommodation.[508] 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."[509]

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

[506] 29 C.F.R. § 1636.3.

[507] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1636.3.

[508] 29 C.F.R. § 1636.3.

[509] 29 C.F.R. § 1636.4.

- the geographic separateness and administrative or fiscal relationship of the facility where the accommodation will be provided.[510]

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.[511]

The PWFA expressly states that it does not limit or preempt the effectiveness of state-level pregnancy accommodation laws. State pregnancy accommodation laws are often specific in terms of outlining an employer's obligations and listing reasonable accommodations that an employer should consider if they do not cause an undue hardship on the employer's business.

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

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

The VFEP requires employers of one or more employees to provide a reasonable accommodation for an employee's pregnancy-related condition unless doing so would impose an undue hardship on the employer.[512] *Pregnancy-related condition* means a limitation of an employee's ability to perform the functions of a job caused by pregnancy, childbirth, or a medical condition related to pregnancy or childbirth. An employee with a pregnancy-related condition, regardless of whether the employee is an "individual with a disability" has the same rights and is subject to the same standards with respect to the provision of a reasonable accommodation as a qualified individual with a disability. Note, however, that the statute states it is should not construed to indicate that a pregnancy-related condition necessarily constitutes a disability.

Reasonable accommodation is required unless the employer can demonstrate that the accommodation would impose an undue hardship on the employer.[513] The statute does not define undue hardship.

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

[510] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1630.2(p).

[511] 29 C.F.R. § 1636.3.

[512] VT. STAT. ANN. tit. 21, §§ 495d, 495k.

[513] VT. STAT. ANN. tit. 21, § 495k(a).

employers.[514] Multiple decisions of the U.S. Supreme Court[515] 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.[516] Training for all employees, not just managerial and supervisory employees, also demonstrates an employer's "good faith efforts" to prevent harassment. For more information on harassment claims and employee training, see LITTLER ON HARASSMENT IN THE WORKPLACE and LITTLER ON EMPLOYEE TRAINING.

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

Recommended Training Program. The Vermont Fair Employment Practices Act encourages, but does not mandate, employers to conduct an education and training program for new employees on sexual harassment within one year of commencement of employment, to provide additional training for supervisors, and to conduct annual training and education for all employees.[517]

Employers are required to adopt a specific policy prohibiting harassment, provide a written copy of the policy to employees, and post the policy in a prominent place in the workplace. At minimum, the policy must include:

- a statement that sexual harassment in the workplace is unlawful;
- a statement that it is unlawful to retaliate against an employee for filing a complaint of sexual harassment or for cooperating in an investigation of sexual harassment;
- a description and examples of sexual harassment;
- a statement of the range of consequences for employees who commit sexual harassment;
- if the employer has more than five employees, a description of the process for filing internal complaints about sexual harassment and the names, addresses, and telephone numbers of the person or persons to whom complaints should be made; and
- the complaint process of the appropriate state and federal employment discrimination enforcement agencies, and directions as to how to contact such agencies.[518]

If an employer makes changes to its policy against sexual harassment, the employer must provide a written copy of the updated policy to all employees.[519]

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

[515] *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).

[516] 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.

[517] VT. STAT. ANN. tit. 21, § 495h(f).

[518] VT. STAT. ANN. tit. 21, § 495h(b).

[519] VT. STAT. ANN. tit. 21, § 495h(c)(2).

Agency Enforcement. For the purpose of assessing compliance with the Fair Employment Practices Act, the Vermont Attorney General or their designee may, with 48 hours' notice, at reasonable times and without unduly disrupting business operations:

- enter and inspect any place of business or employment;
- question any person who is authorized by the employer to receive or investigate complaints of sexual harassment; and
- examine an employer's records, policies, procedures, and training materials related to the prevention of sexual harassment and the requirements of the Act.[520]

At reasonable times and without unduly disrupting business operations, the employer must make available for questioning any persons authorized by the employer to receive or investigate complaints of sexual harassment. An employer may agree to waive or shorten the 48-hour notice period.[521]

Following an inspection and examination, the Attorney General must notify the employer of the results of the inspection and examination, including any issues or deficiencies identified, provide resources regarding practices and procedures for the prevention of sexual harassment that the employer may wish to adopt or utilize, and identify any technical assistance that the Attorney General may be able to provide to help the employer address any identified issues or deficiencies.[522]

If the Attorney General determines that it is necessary to ensure the employer's workplace is free from sexual harassment, the employer may be required, for a period of up to three years, to provide an annual education and training program to all employees or to conduct an annual, anonymous working-climate survey, or both.[523]

The required education and training program must include:

- an annual education and training program for all employees that includes at a minimum all the sexual harassment prevention information outlined in the statute; and
- an annual education and training program for supervisory and managerial employees that includes at a minimum all the sexual harassment prevention information outlined in the statute, the specific responsibilities of supervisory and managerial employees, and the actions that these employees must take to ensure immediate and appropriate corrective action in addressing sexual harassment complaints.[524]

In addition to these remediation procedures, the Attorney General is empowered to bring a civil action against the employer for violations of the Act.[525]

[520] VT. STAT. ANN. tit. 21, § 495h(i).

[521] VT. STAT. ANN. tit. 21, § 495h(i).

[522] VT. STAT. ANN. tit. 21, § 495h(i).

[523] VT. STAT. ANN. tit. 21, § 495h(i).

[524] VT. STAT. ANN. tit. 21, § 495h(i).

[525] VT. STAT. ANN. tit. 21, § 495h(i).

Private Enforcement. As discussed in 3.11(a)(iii), an individual alleging a violation of the Vermont fair employment practices statute may bring a civil action within one year of the alleged violation.[526] A person that files a claim of sexual harassment under the Act in which neither the Vermont Attorney General nor the Human Rights Commission is a party must provide notice of the action to the Attorney General and the Human Rights Commission within 14 days after filing the complaint. The notice may be submitted electronically and must include a copy of the filed complaint.[527]

3.12 Miscellaneous Provisions

3.12(a) *Whistleblower Claims*

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

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

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

There is no general whistleblower protection statute for private employers in Vermont. However, some protections may be found in several state statutes.

The first protects employees for filing any complaint or proceeding with the Vermont Occupational Safety and Health Administration (VOSHA). It provides that employers must not discharge or in any manner discriminate against an employee because the employee has filed any complaint or caused to be instituted any proceeding under or related to the Vermont Occupational Safety and Health Act or has testified or is about to testify in any proceeding regarding rights under the Act.[528]

The second protects employees for lodging a complaint or cooperating with the state's attorney general in a discrimination complaint under the Vermont Fair Employment Practices Act (VFEP). It is a prohibited employment practice to discharge or discriminate against any employee who has lodged a complaint or testified, assisted, or participated in any manner in an investigation pursuant to the VFEP.[529]

For securities-related information, the Whistleblower and Protection Act prohibits employers from terminating, discharging, demoting, suspending, threatening, harassing, or retaliating against an individual for:

[526] VT. STAT. ANN. tit. 21, § 495b(b); VT. CODE R. 80-250-001(2).

[527] VT. STAT. ANN. tit. 21, § 495h(i).

[528] VT. STAT. ANN. tit. 21, § 231(a).

[529] VT. STAT. ANN. tit. 21, § 495(a)(8).

- providing information to the state or a law enforcement agency concerning a possible violation of state or federal securities laws, including any rules or regulations adopted or promulgated under such laws, that has occurred, is ongoing, or is about to occur;
- initiating, testifying in, or assisting in any investigation or administrative or judicial action of the Commissioner of the Securities and Exchange Commission or other law enforcement agency based upon or related to such information;
- making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002, the Securities Act of 1933, the Securities Exchange Act of 1934, any other law, rule, or regulation subject to the jurisdiction of the federal Securities and Exchange Commission, or the state's Securities Act; or
- making disclosures to a person with supervisory authority over the employee or to another person working for the employer who has the authority to investigate, discover, or terminate misconduct regarding matters subject to the jurisdiction of the Commissioner of the Vermont Department of Financial Regulation or the Securities and Exchange Commission.[530]

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)[531] and the Railway Labor Act (RLA)[532] 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.

[530] VT. STAT. ANN. tit. 9, § 5617.

[531] 29 U.S.C. §§ 151 to 169.

[532] 45 U.S.C. §§ 151 *et seq*.

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

Vermont is not a right-to-work state. The Vermont State Labor Relations Act[533] contains no state labor laws of note because it does not apply to any labor dispute within the meaning of the NLRA.[534]

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).[535] 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.[536] 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*

The Vermont Notice of Potential Layoffs Act requires covered employers to provide 45 days' notice of business closings and mass layoffs to the Vermont Labor Commissioner ("Commissioner") and the Vermont Secretary of Commerce and Community Development ("Secretary"). It requires 30 days' notice of business closings and mass layoffs to affected employees, any bargaining agent or employee representative, and the local chief elected official or administrator.[537]

Coverage. Covered employers are those with 50 or more full-time employees, 50 or more part-time employees, or a combination of 50 full- or part-time employees who work at least 1,040 hours per week.[538] *Business closing* means: (1) the permanent shutdown of a facility; (2) the permanent cessation of operations at one or more worksites in the state that results in the layoff of 50 or more employees over a 90-day period; or (3) the cessation of work or operations not scheduled to resume within 90 days that affects 50 or more employees. *Mass layoff* means a permanent employment loss of at least 50 employees at one or more worksites in Vermont during any 90-day period.[539]

Notice. The employer must send to the Commissioner and the Secretary the approximate number and job titles of affected employees, the anticipated date of the employment loss, and the affected worksites within 45 days prior to the effective date. Concurrent with the 30-day notification to the affected

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[533] VT. STAT. ANN. tit. 21, § 1501 *et seq*.

[534] VT. STAT. ANN. tit. 21, § 1505.

[535] 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.

[536] 20 C.F.R. §§ 639.4, 639.6.

[537] VT. STAT. ANN. tit. 21, § 414.

[538] VT. STAT. ANN. tit. 21, § 411(5).

[539] VT. STAT. ANN. tit. 21, § 411(2), (7).

employees, the employer must also send the Commissioner in writing the actual number of layoffs, job titles, date of layoff, and other information as the Commissioner deems necessary for the purposes of unemployment insurance benefit processing and for accessing federal and state resources to mitigate adverse employment impacts affecting employers, employees, and communities.

Sale of Business. In the case of a sale of part or all of an employer's business where mass layoffs will occur, the seller and the purchaser must comply with the 30-day notice requirement.[540] The selling employer is responsible for providing notice of any business closing or mass layoff connected with the sale up to and including the sale's effective date. After the sale's effective date, the purchasing employer is responsible for providing notice. Any individual who is an employee of the selling employer as of the sale's effective date is considered an employee of the purchasing employer immediately after the sale's effective date.[541]

Exceptions. In the case of a business closing or mass layoff, an employer is not required to comply with the notice requirements and may delay notification if:

- the business closing or mass layoff results from a strike or a lockout;
- the employer is actively attempting to secure capital or investments in order to avoid closing or avoid mass layoffs; and the capital or investments sought, if obtained, would enable the employer to avoid or postpone the business closing or mass layoff, and the employer reasonably and in good faith believes that giving the notice would preclude the employer from securing the needed capital or investment;
- the business closing or mass layoff is caused by business circumstances that were not reasonably foreseeable at the time the 45-day notice would have been required;
- the business closing or mass layoff is due to a disaster beyond the control of the employer;
- the business closing or the mass layoff is the result of the conclusion of seasonal employment or the completion of a particular project or undertaking; or
- the affected employees were hired with the understanding that their employment was limited to the duration of the season, facility, project, or undertaking.

Violations. An employer that violates the notice requirements is liable to each employee who lost employment for:

- one day of severance pay for each day after the first day in the 45-day notice period, up to a maximum of 10 days severance pay; and
- the continuation of existing medical or dental coverage under an employment benefit plan, if any, necessary to cover any delay in an employee's eligibility for obtaining alternative coverage resulting directly from the employer's notice violation (this is limited to up to one month after an employment loss).[542]

[540] VT. STAT. ANN. tit. 21, § 413.

[541] 24-010-013 VT. CODE R. § 4.

[542] VT. STAT. ANN. tit. 21, § 415.

Further, an employer that violates the notice requirements will also be subject to a $500 administrative penalty for each day it was deficient in providing notice.[543]

4.1(c) *State Mass Layoff Notification Requirements*

In the case of a mass separation, employers must file a notice with the Vermont Department of Labor's Unemployment Insurance Claims Center.[544] *Mass separation* means a separation (permanently, for an indefinite period, or for an expected duration of seven or more days) at or about the same time and for the same reason of: (1) 20% or more of the total number of workers employed in an establishment; (2) 50% or more of the total number of workers employed in any division or department of an establishment; or (3) notwithstanding either of the foregoing, of 25 or more workers employed in a single establishment.[545]

The notice must be filed no later than 24 hours after the mass separation and is made on a template provided on the Department of Labor's webpage.[546]

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.[547] 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

[543] VT. STAT. ANN. tit. 21, § 417.

[544] 24-005-001 VT. CODE R. § 8(C).

[545] 24-005-001 VT. CODE R. § 8(C).

[546] 24-005-001 VT. CODE R. § 8(C), *see also* https://labor.vermont.gov/document/mass-separation-spreadsheet.

[547] 29 C.F.R. § 2590.606-1. Model notices and general information about COBRA is available from the U.S. Department of Labor's Employee Benefits Security Administration at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra.

Table 10. Federal Documents to Provide at End of Employment	
Category	**Notes**
	frames that describe their retirement benefits and the procedures necessary to obtain them.[548]

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.	Notice of the continuation privilege must be included in each certificate of coverage and must be provided by the employer to the employee within 30 days following the occurrence of any qualifying event, including loss of employment.[549]
Unemployment Notice	Employers must provide an individual with notification of the availability of unemployment compensation within 24 hours after the individual is separated from employment (whether permanently, for a limited period of time, or indefinitely). The notification may be based on model notification language provided by the U.S. Secretary of Labor. Employers must also post notice where readily accessible to employees, informing them about unemployment benefits and identifying job center locations for assistance.[550] **Multistate Workers.** Vermont does not require that employees be notified as to the jurisdiction under whose unemployment compensation law services have been covered.[551] It is recommended, however, that an employer provide notice of the jurisdiction where services will be covered for unemployment purposes. Additionally, employers should follow that state's general notice requirement, if applicable.

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

[549] VT. STAT. ANN. tit. 8, § 4090a(b), (e).

[550] VT. STAT. ANN. tit. 21, § 1346; 24-005-001 VT. CODE R. § 9. This poster is available at https://labor.vermont.gov/sites/labor/files/doc_library/A-24%20Unemployment%20Poster.pdf.

[551] *See* VT. STAT. ANN. tit. 21, §§ 1318 (reciprocal benefit arrangements), 1319 (agreements for collection and payments of contributions); *see also* 24-005-001 VT. CODE R. § 12 (Interstate Benefit Payments).

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*

Vermont law addressing employer protections for providing references is limited. In fact, under one Vermont statute, in the stated interest of protecting the safety of minors and vulnerable adults, no confidential employment separation agreement shall inhibit the disclosure to prospective employers of factual information about a prospective employee's background that would lead a reasonable person to conclude that the prospective employee has engaged in conduct jeopardizing the safety of a minor or vulnerable adult.[552] *Vulnerable adult* includes all those over the age of 18 who are impaired due to brain damage, infirmities of aging, mental condition, or physical, psychiatric, or developmental disability.[553]

[552] VT. STAT. ANN. tit. 21, § 306.

[553] VT. STAT. ANN. tit. 33, § 6902.