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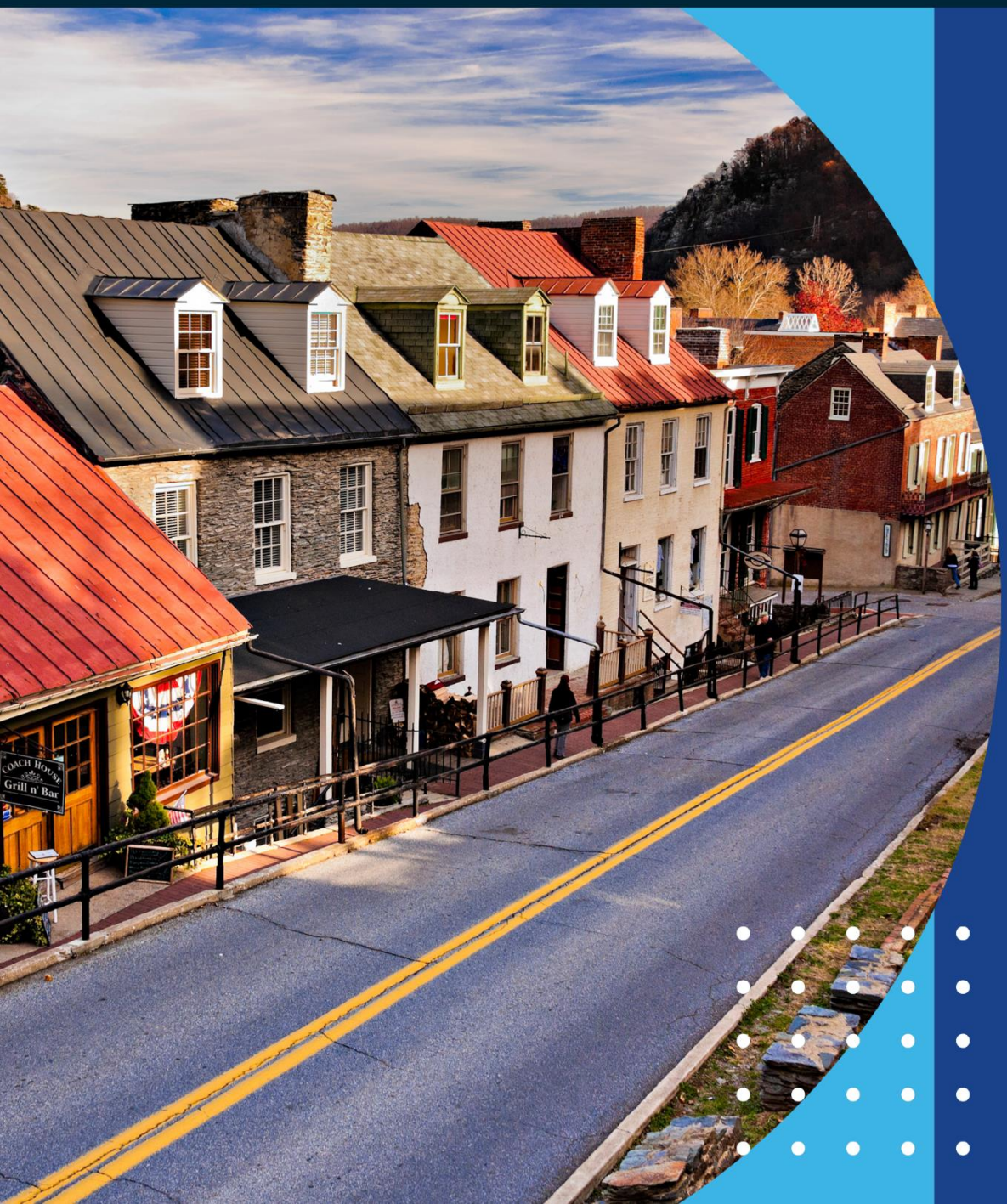
STATE

Littler on

West Virginia 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 West Virginia 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.

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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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ACKNOWLEDGEMENTS

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

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

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

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1. PRE-HIRE

1.1 Classifying Workers: Employees v. Independent Contractors

1.1(a) *Federal Guidelines on Classifying Workers*

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

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

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

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

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

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

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

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

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

Table 1. State Tests for Classifying Workers

Purpose of Determining Employee Status	State Agency	Test to Apply
Fair Employment Practices Laws	West Virginia Human Rights Commission	The state Employment Law Worker Classification Act established a test for workers' compensation, unemployment compensation, the Human Rights Act, and wage payment and collection purposes. Under the Act, a person is an independent contractor for purposes of those laws if they sign a written agreement that states the principal's intent to engage the person as an independent contractor and contains acknowledgments that the person understands that they are: • providing services as an independent contractor; • not going to be treated as an employee; • not going to be provided with either workers' compensation or unemployment compensation benefits; • obligated to pay all applicable federal and state income taxes, and that the principal will not make any tax withholdings; and

[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.

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Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
		• responsible for the majority of supplies and other variable expenses unless the expenses are for travel that is not local, the expenses are reimbursed under an express provision of the contract, or the supplies or expenses reimbursed are commonly reimbursed under industry practice. The agreement must also contain acknowledgments that the person: • has either filed, or is contractually required to file, an income tax return with the appropriate federal, state, and local agencies for a business or for earnings from self-employment; or • provides their services through a business entity, or through a sole proprietorship registered with a "doing business as" as required under state or local law. Further, with the exception of the exercise of control necessary to ensure compliance with regulatory, or other similar obligations, or to protect persons or property, or to protect a franchise brand, the person must actually and directly control the manner and means by which the work is to be accomplished, even though they may not have control over the final result of the work. A person is also an independent contractor if they meet the definition of a direct seller under Section 3508(b)(2) of the Internal Revenue Code or satisfy three or more of the following criteria: • with certain exceptions, the person has control over the amount of time personally spent providing services; • with certain exceptions, the person is not required to work exclusively for one principal; • the person is free to exercise independent initiative in soliciting others to purchase their services; • the person is free to hire employees or to contract with assistants, helpers, or substitutes to perform all or some of the work; • the person cannot be required to perform additional services without a new or modified contract;

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Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
		• the person obtains permission from the principal to utilize any workspace of the principal in order to perform the work; • the IRS has not reclassified the person to be an employee or has not reclassified the category of workers to be employees; and/or • the person is responsible for the costs of any required business licenses, insurance, certifications, or permits. The Act also provides that the classification of workers who do not satisfy the above criteria will be determined by the test set forth in Internal Revenue Service Revenue Ruling 87-41.[5] Previously, there were no relevant statutory definitions or case law identifying a test for independent contractor status in this context.
Income Taxes	West Virginia State Tax Department	Internal Revenue Service (IRS) 20-factor test. Under West Virginia personal income tax law, terms are defined the same as in the Internal Revenue Code, "unless a different meaning is clearly required."[6] Moreover, "[a] determination by the Internal Revenue Service which relieves an employer from the requirement of withholding with respect to wages paid to an employee shall likewise apply for West Virginia personal income tax withholding purposes" as long as the employer notifies the West Virginia Tax Commissioner with the "particulars pertaining to" the grant of such relief, including a copy of the IRS determination.[7]
Unemployment Insurance	Workforce West Virginia	The state Employment Law Worker Classification Act established a test for unemployment insurance purposes,

[5] W.VA. CODE §§ 21-5I-1 *et seq.*

[6] W. VA. CODE § 11-21-9(a). Because West Virginia follows federal law in defining terms such as "employer," "employee," and "wages" for state withholding tax purposes, the state Tax Department looks to federal regulations and the IRS 20-factor test to determine whether an individual is an employee or independent contractor. *See* 1997 WL 837829, at **1-2 (W. Va. Dep't of Tax & Revenue Feb. 27, 1997).

[7] W. VA. CODE R. § 110-21-71.3.

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Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
		as described above under Fair Employment Practices Laws.[8] Previously, the state used a statutory test, adopting the ABC test. Services performed by an individual were presumed to be employment unless it was shown that: "(A) The individual has been and will continue to be free from control or direction over the performance of the services, both under his or her contract of service and in fact; and (B) the service is either outside the usual course of the business for which the service is performed or that such service is performed outside of 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[.]"[9]
Wage & Hour Laws	West Virginia Department of Commerce, Division of Labor, Wage & Hour	The state Employment Law Worker Classification Act established a test for unemployment insurance purposes, as described above under Fair Employment Practices Laws.[10] Previously, there were no state statutory definitions or state case law identifying a test for independent contractor status in this context. However, a West Virginia federal court applied a four-factor test considering the following: 1. selection and engagement of the servant; 2. payment of compensation; 3. power of dismissal; and 4. power of control.[11]

[8] W.VA. CODE §§ 21-5I-1 *et seq.*

[9] W. VA. CODE § 21A-1A-16(7).

[10] W.VA. CODE §§ 21-5I-1 *et seq.*

[11] Noting that "[t]he West Virginia Supreme Court has not addressed the test for independent contractors in the context of state wage law," the U.S. District Court for the Northern District of West Virginia, in *Westfall v. Kendle Int'l, CPU L.L.C.*, 2007 WL 486606, at **12-13 (N.D. W. Va. Feb 15, 2007), applied the same four-factor test for

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Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
		"The first three factors are not essential to the existence of the relationship; the fourth, the power of control, is determinative."[12]
Workers' Compensation	West Virginia Offices of the Insurance Commissioner	The state Employment Law Worker Classification Act established a test for unemployment insurance purposes, as described above under Fair Employment Practices Laws.[13] Previously, there were two different statutory tests for independent contractor status. One applied to workers in nonhazardous industry and the other in hazardous industry. As an initial matter, individuals performing services for compensation were presumed to be employees and must be covered by a West Virginia workers' compensation insurance policy unless it was shown that the worker was an independent contractor. "The burden of proving that an individual is an independent contractor is at all times, on the party asserting independent contractor status."[14] **Nonhazardous Industry.** To overcome the presumption of employee status, *all* of the following criteria must have been met: 1. the individual possesses a license, permit, or other certification required for engaging in the type of work performed by the individual; 2. there is a written contract between the individual and the entity establishing that the individual is an independent contractor and not an employee, and that workers' compensation coverage will not be provided for the individual; and

independent contractor status as used in the context of torts and respondeat superior by the West Virginia Supreme Court in *Paxton v. Crabtree*, 400 S.E.2d 245, 252 (W. Va. 1990), to the determination of independent contractor status under the West Virginia Wage Payment and Collection Act.

[12] *Westfall*, 2007 WL 486606, at *12.

[13] W.VA. CODE §§ 21-5I-1 *et seq.*

[14] W. VA. CODE R. § 85-8-6.2.

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Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
		3. the individual has primary control over the time, means, and manner of the work performed. While the entity may specify the "particular project or type of work to be done and a certain time frame for the work to be completed," it "cannot exert control over the day-to-day schedule of the individual or continuously supervise the individual as a boss would in an employment situation."[15] **Hazardous Industry.** To overcome the presumption of employee status, *all* of the following criteria must have been met: 1. the "individual holds himself or herself out to be in business for himself or herself" (*e.g.*, possesses a license, permit, or other certification; enters into contracts for the work performed; and/or the right, under contractual provisions, to "regularly solicit business from different persons or entities to perform for compensation the type of work that is being performed by the individual"); 2. the individual has control over when work is performed, although this criterion does not prohibit the entity from coming to agreement with the individual on a "completion schedule, range of work hours, and maximum number of work hours to be provided by the individual"); 3. the individual has control "over the means and manner of performance of the work being performed and in achieving the result of the work" (*i.e.*, no ongoing supervision by the entity, but rather, that the individual is given "a description and expectation of the work to be performed;" the fact that an entity

[15] W. VA. CODE R. § 85-8-6.2(b). West Virginia courts will liberally construe workers' compensation provisions in favor of the claimant-individual and employee status. *C&H Taxi Co. v. Richardson*, 461 S.E.2d 442, 448 (W. Va. 1995). Citing a long line of West Virginia case law, the West Virginia Supreme Court of Appeals observed in *Bowens v. Allied Warehousing Services*, 729 S.E.2d 845 (W. Va. 2012), "while it is necessary to consider the entire circumstances of the relationship, the right to exercise control and supervision is the determinative element." The existence of the right to control, rather than actual use, is the determining factor. *Myers v. Workmen's Comp. Comm'r*, 148 S.E.2d 664, 667 (W. Va. 1966). If the right to supervise work exists, an employer-employee relationship exists; if the right does not exist, an independent contractor relationship exists. 148 S.E.2d at 667. The method of payment remains relevant, but it is not conclusive; if paid hourly or by a unit of time, this is strong evidence of an employer-employee relationship. 148 S.E.2d at 667.

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Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
		checks on the status or otherwise monitors the work to determine compliance with federal or state safety laws, does not constitute ongoing supervision); 4. the individual is not required to work exclusively for the entity, unless expressly required by law; and 5. if equipment is needed to perform the work, the individual provides most of the significant equipment required to perform the work (*i.e.*, "the equipment is not provided by, loaned, or leased" to the individual by the entity, but instead the individual separately owns or obtains the equipment from a separate source).[16]
Workplace Safety	Not applicable	There are no relevant statutory definitions or case law identifying a test for independent contractor status in this context. West Virginia does not have an approved state plan under the federal Occupational Safety and Health Act.[17]

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

[16] W. VA. CODE R. § 85-8-6.2(a).

[17] Special independent contractor rules exist in the West Virginia mine health and safety regulations. *See, e.g.*, W. VA. CODE R. § 36-20-3.1(b). However, these are industry-specific and outside the scope of this publication. Independent contractors must register with the Office of Miners' Health, Safety and Training. *See* W. VA. CODE R. §§ 36-20-4.1 *et seq*.

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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.[18]

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.[19] 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.[20]

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

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

1.2(b)(i) *Private Employers*

Employers are prohibited from knowingly employing, hiring, recruiting, or referring for private or public employment within the state an unauthorized worker. Failure to request or review documentation of an employee's legal status or authorization to work is deemed to be "knowingly" within the meaning of the statute.[21]

An employer must verify a prospective employee's legal status or authority to work prior to: (1) employing the individual; or (2) contracting with the individual for employment services. Proof of legal status or authorization to work includes, but is not limited to:

- a valid Social Security card;
- a valid immigrant or nonimmigrant visa, including photo identification;
- a valid birth certificate;
- a valid passport;
- a valid photo identification issued by a government agency;
- a valid work permit or supervision permit authorized by the Division of Labor;
- a valid permit issued by the Department of Justice; or,

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[18] 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.

[19] *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).

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

[21] W.VA. CODE §§ 21-1B-2(e), 21-1B-3(a); W.VA. CODE R. § 42-31-4.

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- other valid document providing evidence of legal residence or authorization to work in the United States.[22]

Record-Keeping Requirements. Employers must document proof of each employee's legal status or authorization to work in the United States. Documents must be retained for two years after the employee has separated from employment. Documents must be stored at the place of employment or an established central record-keeping location where records are customarily maintained. Records must be made available to the West Virginia Labor Commissioner or their representative for inspection. The Labor Commissioner may also ask an employee's name and the name of their employer.[23]

1.2(b)(ii) *State Contractors*

Any service provider whose employees are regularly employed on the grounds or in the buildings of the Capitol Complex, or who have access to sensitive or critical information must submit to a fingerprint-based state and federal background inquiry through the state repository, and must require a new employee who is employed to provide services on the grounds or in the building of the Capitol Complex to submit to an employment eligibility check through E-Verify. A *service provider* is any person or company that provides employees to a state agency or entity of state government to work on the grounds or in the buildings that make up the Capitol Complex or who have access to sensitive or critical information.[24]

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

Enforcement: Notice to Produce Documents. If the West Virginia Labor Commissioner believes that an employer has violated the rules pertaining to the prohibition of employing illegal aliens, the Labor Commissioner is authorized to issue a notice to employers to produce records or documents, describing with particularity the nature of the alleged violation. Employers have up to 72 hours or three business days to respond to the notice with the required documentation. A *business day* is any day other than a Saturday, Sunday, or legal holiday. If employers cannot provide documentation to satisfy the Labor Commissioner that there was no violation, the Labor Commissioner is directed to issue a citation describing with particularity the nature of the violation, which citation must then be presented to the magistrate or circuit judge in the county where the violation occurred.[25]

Penalties. An employer that knowingly employs, hires, recruits, or refers an unauthorized worker is guilty of a misdemeanor and subject to penalties, which vary depending on whether it is a first offense, second offense, or subsequent offense. For third or subsequent offenses, an employer may be jailed, in addition to or instead of being fined. An employer that knowingly and willfully provides false records of legal status or authorization to the West Virginia Labor Commissioner is guilty of a misdemeanor, punishable by jail, a fine, or both.[26]

An employer that knowingly and willfully fails to maintain records as required by the immigration verification law is guilty of a misdemeanor, subject to a fine. Failure to keep records on each employee constitutes a separate offense.[27] In addition, an employer that knowingly and willfully and with fraudulent

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[22] W. VA. CODE § 21-1B-3(b), (c); W. VA. CODE R. §§ 42-31-4, 42-31-5.

[23] W. VA. CODE §§ 21-1B-4, 21-5C-5; W. VA. CODE R. §§ 42-31-5, 42-31-6.

[24] W. VA. CODE § 15-2D-3.

[25] W. VA. CODE § 21-1B-8; W. VA. CODE R. §§ 42-31-3, 42-31-6, and 42-31-7.

[26] W. VA. CODE § 15-2D-5.

[27] W. VA. CODE § 15-2D-5.

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intent sells, transfers, or disposes of substantially all of its assets to evade the record-keeping requirements is guilty of a misdemeanor, punishable by jail, a fine, or both.[28]

Denial of Deductible Business Expense. No wages or remuneration paid to an unauthorized worker of $600 or more per year may be allowed as a deductible business expense for state income tax purposes if the employer is convicted of employing, hiring, recruiting, or referring an unauthorized worker.[29]

Suspension & Revocation of License. The West Virginia Labor Commissioner may order the permanent revocation, or the suspension for a specific period of time, of any license held by the employer upon:

- a third conviction for knowingly employing, hiring, recruiting, or referring an unauthorized worker;
- conviction for providing false records of legal status or authorization; or
- conviction for knowingly and willfully transferring assets for the purpose of evading the record-keeping requirements.[30]

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

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

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[28] W. VA. CODE § 21-1B-5.

[29] W. VA. CODE § 21-1B-6.

[30] W. VA. CODE § 21-1B-7.

[31] 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.

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

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

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

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

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

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

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

A person whose criminal records have been expunged does not have to disclose that a record exists or any matter relating to the record on an application for employment or any other type of application.[32]

Juvenile Records. Employers cannot discriminate against any individual in any manner relating to employment based on the individual's prior juvenile proceedings if the records related to these proceedings have been expunged.[33]

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

Expunged Juvenile Records. An employer that violates the discrimination provisions regarding expunged juvenile records may be found guilty of a misdemeanor, which is publishable by a fine, imprisonment, or both. Additionally, a person who violates the law is liable to the person discriminated against for damages in the amount of $300 or the actual amount of damages, whichever is greater.[34]

1.3(b) *Restrictions on Credit Checks*

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

The Fair Credit Reporting Act (FCRA). The FCRA[35] governs an employer's acquisition and use of virtually any type of information gathered by a "consumer reporting agency"[36] regarding job applicants for use in hiring decisions or regarding employees for use in decisions concerning retention, promotion, or termination. Preemployment reports created by a consumer reporting agency (such as credit reports,

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[32] W. VA. CODE §§ 61-11-25(e), 61-11-26(k).

[33] W. VA. CODE § 49-4-723(a).

[34] W. VA. CODE § 49-4-723(b).

[35] 15 U.S.C. §§ 1681 *et seq*.

[36] A *consumer reporting agency* is any person or entity that regularly collects credit or other information about consumers to provide "consumer reports" for third persons. 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).

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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]."[37]

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

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

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

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

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

- Preemployment action taken against an applicant, or post-employment action taken against an employee, based on information discovered via social media may run afoul of federal civil rights law (*e.g.*, Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act).
- The National Labor Relations Board, which is charged with enforcing federal labor laws, has taken an active interest in employers' social media policies and practices, and has concluded in many instances that, regardless of whether the workplace is unionized, the existence of such a policy or an adverse employment action taken against an employee based on the employee's violation of the policy can violate the National Labor Relations Act.

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

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- 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*

In West Virginia, an employer cannot request, require, or coerce an employee or applicant to:

- disclose a username and password, or any other authentication information that allows access to the individual's personal account; or
- access the individual's personal account in the employer's presence.[38]

Additionally, an employer cannot compel an employee or applicant to add the employer or an employment agency to their contacts list that enable contacts to access a personal account.[39]

A *personal account* is an account, service, or profile on a social networking website that is used by an employee or potential employee exclusively for personal communications unrelated to any business purposes of the employer.[40]

Exceptions. The law does not prevent an employer from accessing information about an employee or applicant that is publicly available.[41] It also does not prevent an employer from complying with applicable laws, rules, or regulations.[42]

With respect to workplace investigations, an employer can conduct an investigation or require an employee to cooperate in an investigation. The law does not diminish an employer's authority and obligation to investigate complaints, allegations, or the occurrence of sexual, racial, or other harassment.[43] An employer can: (1) prohibit an employee or applicant from using a personal account during employment hours, while on employer time or for business purposes; or (2) request that an employee share specific personal account content to ensure compliance with applicable laws, regulatory requirements, or prohibitions against work-related employee misconduct.[44]

In addition, an employer may require an employee to share content that has been reported to make a factual determination, if the employer has specific information about an unauthorized transfer of its proprietary information, confidential information or financial data, to an employee's personal account.[45]

Rules for Employer-Provided Devices & Online Accounts. An employer can require an employee to disclose a username or password or similar authentication information for the purpose of accessing:

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[38] W. VA. CODE § 21-5H-1.

[39] W. VA. CODE § 21-5H-1.

[40] W. VA. CODE § 21-5H-1(e).

[41] W. VA. CODE § 21-5H-1(b)(1).

[42] W. VA. CODE § 21-5H-1(b)(2).

[43] W. VA. CODE § 21-5H-1.

[44] W. VA. CODE § 21-5H-1(b)(5), (6).

[45] W. VA. CODE § 21-5H-1(b)(4).

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- an employer-issued electronic device; or
- an employer-provided account or service, obtained by virtue of the individual's employment, or used for the employer's business purposes.[46]

If an employer inadvertently receives the username, password, or any other authentication information that would enable it to gain access to the individual's personal account through use of an otherwise lawful technology that monitors the employer's network or employer-provided electronic devices for network security or data confidentiality purposes, the employer is not liable for having that information, unless it:

- uses that information, or enables a third party to use that information, to access the individual's personal account; or
- after becoming aware that the information was received, does not delete the information as soon as is reasonably practicable, unless that information is being retained by the employer in connection with an ongoing investigation of an actual or suspected breach of computer, network, or data security. Where an employer knows or, through reasonable efforts, should be aware that its network monitoring technology is likely inadvertently to receive such information, the employer must make reasonable efforts to secure that information.[47]

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.[48] 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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[46] W. VA. CODE § 21-5H-1(b)(3).

[47] W. VA. CODE § 21-5H-1(c).

[48] 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.

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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*

Employers cannot require or request, either directly or indirectly, that an employee or applicant submit to a psychophysiological detection of deception examination, lie detector, or other similar examination utilizing mechanical or electronic measures of physiological reactions to evaluate truthfulness.[49] Moreover, employers cannot knowingly allow the results of any examination administered outside West Virginia to be used to determine whether to employ an applicant or to continue an employee's employment in West Virginia.[50]

Psychophysiological detection of deception instrument means an instrument used for the detection of deception, which records permanently and simultaneously a person's cardiovascular and respiratory patterns and galvanic skin response, provided that the instrument may record other physiological changes pertinent to the detection of deception. *Psychophysiological detection of deception* means an examination which records permanently and simultaneously a person's cardiovascular and respiratory patterns and galvanic skin response.[51]

Exemption. The polygraph provisions do not apply to employees or applicants who would have direct access to the manufacture, storage, distribution, or sale of any controlled substance listed in title 21, section 812 of the U.S. Code.[52] However, the results of any examination must be used solely to determine whether to employ or to continue to employ any person exempted from the law and for no other purpose.[53]

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

A violation of the polygraph law constitutes a misdemeanor, punished by a fine.[54] An aggrieved individual can file a private lawsuit. If successful, the individual will recover three times the damages suffered, reasonable attorneys' fees, filing fees, and reasonable costs (including, but not limited to, expenses of discovery and document reproduction). Moreover, damages may include, but are not limited to, back pay for the period during which the employee did not work or was denied a job.[55]

Additionally, with the written consent of an individual who is or would be aggrieved by an actual or threatened violation of the law, any appropriate employee organization can file a civil action on behalf of the individual or may intervene in any civil action.[56]

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[49] W. VA. CODE § 21-5-5b.

[50] W. VA. CODE § 21-5-5b.

[51] W. VA. CODE § 21-5-5a(3), (5).

[52] As listed in schedule I, II, III, IV, or V of 21 U.S.C. § 812.

[53] W. VA. CODE § 21-5-5b.

[54] W. VA. CODE § 21-5-5d.

[55] W. VA. CODE § 21-5-5d.

[56] W. VA. CODE R. § 42-6-6.1.

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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.[57] 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.[58] Employers not legally mandated to implement workplace substance abuse and drug and alcohol testing policies may still do so to promote workplace safety, deter illegal drug use, and diminish absenteeism and turnover. For more information on drug testing requirements under federal law, see LITTLER ON EMPLOYMENT TESTING.

For the most part, workplace drug and alcohol testing is governed by state law, and state laws differ dramatically in this area and continue to evolve.

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

The West Virginia Safer Workplace Act ("Safer Workplace Act") authorizes private employers to test prospective employees and employees for the presence of drugs and alcohol in accordance with the statutory provisions, either as a condition of hiring or continued employment.[59] To qualify for protection against legal claims based on testing, employers must adhere to the accuracy and fairness safeguards outlined in the Safer Workplace Act.[60]

The new law neither mandates nor prohibits drug testing for private employers. The law states that it should *not* be "construed to encourage, discourage, restrict, limit, prohibit or require on-site drug or alcohol testing."[61] As well, "[n]o cause of action arises in favor of any person against an employer based upon the failure of the employer to establish a program or policy on substance abuse prevention, or to implement drug or alcohol testing."[62]

Written Policy Requirements. If an employer chooses to institute a testing program, it must adopt and disclose written policies to applicants and employees. Testing or retesting for the presence of drugs or alcohol by an employer must be carried out within the terms of the written policy *which has been distributed* to every employee subject to testing, and is available for review by prospective employees.[63]

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[57] 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.

[58] 41 U.S.C. §§ 8101 *et seq*.; *see also* 48 C.F.R. §§ 23.500 *et seq*.

[59] W. VA. CODE §§ 21-3E-1 through 21-3E-16. Note that certain public improvement contractors are required to have and implement a drug-free workplace policy that requires drug and alcohol testing under the West Virginia Alcohol and Drug-Free Workplace Act. *See* W. VA. CODE §§ 21-1D-1.

[60] W. VA. CODE § 21-3E-4.

[61] W. VA. CODE § 21-3E-8(f).

[62] W. VA. CODE § 21-3E-14.

[63] W. VA. CODE § 21-3E-8.

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Testing Requirements. Within the terms of a written policy, an employer is authorized to drug test for, "among other legitimate drug abuse prevention and/or treatment purposes," the following reasons:

- deterrence and/or detection of possible illicit drug use, possession, sale, conveyance, or distribution, or manufacture of illegal drugs, intoxicants, or controlled substances in any amount or in any manner, on or off the job, or the abuse of alcohol or prescription drugs;
- investigation of possible individual employee impairment;
- investigation of accidents in the workplace or incidents of workplace theft or other employee misconduct;
- maintenance of safety for employees, customers, clients or the public at large; or
- maintenance of productivity, quality of products or services, or security of property or information.[64]

An employer must conduct testing and collect samples in accordance with the statutory requirements of the Safer Workplace Act.[65] Employers must test employees during or immediately before or after the regular work period. Testing is "worked time" for the purposes of compensation and benefits. An employer must also pay all actual costs for drug or alcohol testing required by the employer of employees and prospective employees, including reasonable transportation costs if the required testing is conducted at a location other than the employee's normal worksite and transportation is not otherwise provided.[66]

Drug and alcohol testing must include confirmation of any positive test results. For drug testing, confirmation will be by use of a different chemical process than was used by the employer in the initial drug screen.

Adverse Employment Actions. Upon receipt of a confirmed positive drug or alcohol test result which indicates a violation of the employer's written policy, or upon the refusal of an employee or prospective employee to provide a testing sample, an employer may use that test result or test refusal as a valid basis for disciplinary action, which includes, with respect to prospective employees, refusal to hire.[67]

With respect to current employees, an employer may use a confirmed test result or test refusal as a valid basis for disciplinary and rehabilitative action, which includes: (1) a requirement that the employee enroll in an employer-provided or approved rehabilitation, treatment, or counseling program, which may include additional testing, participation in which may be a condition of continued employment, and the costs of which may or may not be covered by the employer's health plan or policies; (2) suspension with or without pay; (3) termination of employment; and (4) other adverse employment action that conforms with the employer's written policy and procedures, including any collective bargaining agreements.[68]

Employers must provide employees, when requested or appropriate, with information as to the existence and availability of counseling, employee assistance, rehabilitation, and other drug abuse treatment

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[64] W. VA. CODE § 21-3E-8(c).

[65] W. VA. CODE § 21-3E-5.

[66] W. VA. CODE § 21-3E-6.

[67] W. VA. CODE §§ 21-3E-7, 21-3E-9.

[68] W. VA. CODE § 21-3E-9; *see also* W. VA. CODE § 21-3E-10 (regarding the handling of confirmed positive drug or alcohol tests of employees in sensitive positions).

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programs the employer offers. However, the Safer Workplace Act does not require that an employer offer any of these services.[69]

If an employer implements a drug-free workplace pursuant to the statutory requirements of the Safer Workplace Act, and an employee tests positive for drugs or alcohol at a level proscribed by the employer's policy, the employee may be terminated. If terminated, the employee will forfeit their eligibility for unemployment compensation benefits, and if injured at the time of the intoxication, to indemnity benefits under the workers' compensation law.[70] The Act emphasizes, however:

> [T]he employer's drug-free workplace program must notify all employees that it is a condition of employment for an employee to refrain from reporting to work or working with the presence of drugs or alcohol in his or her body and that policy must also state that if an injured employee refuses to submit to a test for drugs or alcohol, that employee forfeits eligibility for unemployment compensation benefits, and if injured, for indemnity benefits under the Worker Compensation Laws. *Employers who do not notify their employees of this condition of employment waive their right to assert that eligibility for benefits is entirely forfeited.*[71]

Confidentiality. All communications received by an employer relevant to employee or prospective employee drug or alcohol test results and received through the employer's drug testing program are confidential communications and may only be used in a proceeding related to an action taken by an employer under the Safer Workplace Act.[72]

It remains to be seen how this statute will operate in light of existing case law concerning an individual's right of privacy, which the law expressly does not abrogate.[73]

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,

[69] W. VA. CODE § 21-3E-8(b).

[70] W. VA. CODE § 21-3E-16.

[71] W. VA. CODE § 21-3E-16 (emphasis added).

[72] W. VA. CODE § 21-3E-15.

[73] *See, e.g.*, W. VA. CODE § 21-3E-3 (expressing public policy).

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Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	and the manner in which the employee may contact the exchange to request assistance; • that if the employer-plan's share of the total allowed costs of benefits provided under the plan is less than 60% of such costs, the employee may be eligible for a premium tax credit under section 36B of the Internal Revenue Code of 1986[74] and a cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act[75] 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.[76] 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.[77]
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.[78] 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.[79]

[74] 26 U.S.C. § 36B.

[75] 42 U.S.C. § 18071.

[76] 29 U.S.C. § 218b.

[77] 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.

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

[79] 29 C.F.R. § 2590.606-1.

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Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
Benefits & Leave Documents: Family and Medical Leave Act (FMLA)	In addition to posting requirements, if an FMLA-covered employer has any eligible employees, it must provide a general notice to each employee by including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hiring.[80] 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.[81] 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.[82]
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.[83] 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)

[80] 29 C.F.R. § 825.300(a).

[81] 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.

[82] 29 C.F.R. § 825.300(a).

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

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Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	relating to their marital status and the number of withholding exemptions they claim.[84]
Uniformed Services Employment and Reemployment Rights Act (USERRA) Documents	Employers must provide to persons covered under USERRA a notice of employee and employer rights, benefits, and obligations. Employers may meet the notice requirement by posting notice where employers customarily place notices for employees.[85]
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.[86]

2.1(b) *State Guidelines on Hire Documentation*

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

Table 3. State Documents to Provide at Hire	
Category	**Notes**
Benefits & Leave Documents	No notice requirement located.
Drug Testing Program Documents	If an employer chooses to institute a testing program, it must adopt and disclose written policies to applicants and employees. Testing or retesting for the presence of drugs or alcohol by an employer must be carried out within the terms of the written policy *which has been distributed* to every employee subject to testing, and is available for review by prospective employees.[87]
Fair Employment Practices Documents	No notice requirement located.

[84] 26 C.F.R. § 31.3402(f)(2)-1. The IRS provides this form at https://www.irs.gov/pub/irs-pdf/fw4.pdf.

[85] 38 U.S.C. § 4334. This notice is available at https://www.dol.gov/sites/dolgov/files/VETS/legacy/files/USERRA_Private.pdf.

[86] 29 C.F.R. § 531.59.

[87] W. VA. CODE § 21-3E-8.

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Table 3. State Documents to Provide at Hire	
Category	**Notes**
Tax Documents	No notice requirement located. Because the number of exemptions for federal and West Virginia income withholding purposes is generally the same, the employer may accept the federal Form W-4 filed by the employee, unless such employee elects to file a West Virginia withholding exemption certificate.[88]
Wage & Hour Documents	At the time of hiring, employers must notify employees, in writing, of: (1) the day, hour, place of payment; and (2) rate of pay.[89]

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

1. employers must report to the appropriate state agency the employee's name, address, and Social Security number, as well as the employer's name, address, and federal tax identification number provided by the Internal Revenue Service;
2. employers may file the report by first-class mail, electronically, or magnetically;
3. if the report is transmitted by first-class mail, the report must be made not later than 20 days after the date of hire;
4. if the report is transmitted electronically or magnetically, the employer may report no later than 20 days following the date of hire or through two monthly transmissions not less than 12 days nor more than 16 days apart;
5. the format of the report must be a Form W-4 or, at the option of the employer, an equivalent form; and
6. the maximum penalty a state may set for failure to comply with the state new hire law is $25 (which increases to $500 if the failure to comply is the result of a conspiracy between the employer and the employee to not supply the required report or to supply a false or incomplete report).[91]

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[88] W. VA. CODE R. § 110-21-71; *see also* W. VA. CODE § 11-21-71. The West Virginia State Tax Department provides Form IT104 (West Virginia Employee's Withholding Exemption Certificate), which is available at https://tax.wv.gov/Documents/Withholding/it104.pdf.

[89] W. VA. CODE § 21-5-9; *see also* W. VA. CODE R. § 42-5-4.1 (employer must establish a workweek, pay period and payday, and notify employees in writing or by posted notice accessible to all employees).

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

[91] 42 U.S.C. § 653a.

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

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

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

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

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

Table 4. Multistate Employer New Hire Information

Contact By Mail or Fax	Contact Online
Department of Health and Human Services Administration for Children and Families Office of Child Support Enforcement Multi-State Employer Registration Box 509 Randallstown, MD 21133 Fax: (410) 277-9325	Register online by submitting a multistate employer notification form over the internet.[92] 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 West Virginia's new hire reporting law.

Who Must Be Reported. An employer must report newly-hired employees who reside or work in West Virginia, and to whom the employer anticipates paying earnings. This also includes an independent

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

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contractor if they will receive $2,500 or more for services. An employer must also report employees who are rehired or returned to work after being laid off, furloughed, separated, granted a leave without pay, or terminated from employment.[93]

Report Timeframe. The employer must submit the report within 14 days of hiring date. Employers that submit reports magnetically or electronically must do so twice monthly, not less than 12 nor more than 16 days apart.[94]

Information Required. The report must include the employee's name, address, Social Security number, and date of remuneration, along with the employer's name, address, any different address of the payroll office, and the federal employer identification number.[95]

Form & Submission of Report. Acceptable reporting forms include the federal Form W-4, New Hire Reporting Form, or a computer-generated list if it includes all required information. Reports may be submitted by mail, fax, magnetic media, file transfer protocol, new hire data entry software, electronic transfer via modem, encrypted email, or through the online website.[96]

Location to Send Information.

West Virginia New Hire Reporting Center

PO Box 2998

Trenton, NJ 08690

(304) 346-9513

(877) 625-4669

(304) 346-9518 (fax)

(877) 625-4675 (fax)

https://wv-newhire.com/

Multistate Employers. An employer that has employees in states other than West Virginia and that transmits reports magnetically or electronically is not required to report to the state agency if the employer has filed with the secretary of HHS a written designation of another state in which it has employees or independent contractors as the reporting state.[97]

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[93] W. VA. CODE § 48-18-125(a)(4), (b).

[94] W. VA. CODE § 48-18-125(f).

[95] W. VA. CODE § 48-18-125(e).

[96] W. VA. CODE § 48-18-125(e).

[97] W. VA. CODE § 48-18-125(d).

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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.[98] 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*

There is no general statute governing the enforceability of noncompete agreements in West Virginia. However, West Virginia courts will enforce noncompete agreements pursuant to limitations set forth in West Virginia case law.

To enforce a noncompete under West Virginia law, it must be supported by consideration, ancillary to a lawful contract, and both reasonable and consistent with the public interest. In evaluating reasonableness, agreements must be:

1. no greater than required for the protection of the employer;
2. do not impose undue hardship on the employee; and

[98] 18 U.S.C. §§ 1832 *et seq.*

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3. not injurious to the public.[99]

West Virginia courts have recognized numerous protectable business interests, including:

- direct investments in skills acquired by the employee during their employment;
- confidential or unique information, such as trade secrets or customer lists;[100]
- goodwill of the employer;[101] and/or
- the employer's market share.[102]

Customer lists and other information must be "secret" in order to qualify as a protectable business interests. Paying an employee a high salary, standing alone, is not sufficient to qualify as a protectable business interest justifying the enforcement of a noncompete agreement.[103]

If the former employer can establish that it has a business interest requiring protection from a former employee that the agreement is designed to protect, the noncompete agreement becomes presumptively enforceable. The burden then shifts to the former employee to show that a narrower, less-restrictive covenant would protect the former employer's business interests equally well.[104]

A noncompete agreement will be found to be unreasonable on its face if its time or area limitations are excessively broad, or where the covenant appears designed to intimidate employees.[105] West Virginia courts have enforced restrictive covenants that seek to restrict former employees from contacting the employer's current and prospective customers and clients.[106]

Enforceability Following Employee Discharge. There is no case law or statutory provision to provide guidance on whether a noncompete is enforceable following an employee's termination.

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.

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[99] *Reddy v. Community Health Found. of Man., W. Va.*, 298 S.E.2d 906, 910-11 (W. Va. 1982) (further noting that a noncompete in an employment contract does not violate section 47-18-3(a) of the West Virginia Code, which declares contracts in restraint of trade to be unlawful).

[100] *Voorhees v. Guyan Mach. Co.*, 446 S.E.2d 672, 677 (W. Va. 1994).

[101] *Moore Bus. Forms v. Foppiano*, 382 S.E.2d 499, 501 (W. Va. 1989) (*per curiam*).

[102] *Audiology Distribution, L.L.C. v. Hawkins*, 2014 WL 6775599, at *12 (N.D. W. Va. Dec. 2, 2014).

[103] *Cook v. Robinson*, 2011 WL 4708855, at *5 (N.D. W. Va. Oct. 4, 2011).

[104] *Gant v. Hygeia Facilities Found.*, 384 S.E.2d 842, 846 (W. Va. 1989).

[105] *Huntington Eye Assoc., Inc. v. LoCascio*, 553 S.E.2d 773 (W. Va. 2001).

[106] *Wyckoff v. Painter*, 115 S.E.2d 80, 84 (1960); *Audiology Distributions, L.L.C.*, 2014 WL 6775599.

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Noncompetes entered into at the inception of the employment relationship are likely enforceable in West Virginia and will not fail for lack of consideration as long as the noncompete is not an isolated provision and is contained in a contract in which there are mutual promises.[107] A change in terms of employment may also constitute sufficient consideration.[108] Continued employment alone, however, is not sufficient to constitute adequate consideration.[109]

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.

West Virginia courts may allow partial enforcement and narrow or "blue pencil" a covenant so that it conforms to the parties' actual requirements. Courts may decline to modify if the agreement is so overbroad on its face that it is unreasonable—*i.e.*, "No court should trouble itself to rewrite an inherently unreasonable covenant to bring the covenant within the rule of reason."[110]

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

Like many states, West Virginia has adopted the Uniform Trade Secrets Act.[111] West Virginia's statute defines trade secrets as

> [I]nformation, including, but not limited to, a formula, pattern, compilation program, device, method, technique, or process that: (1) derives independent economic value, actual or potential, from not being generally known to, and not being generally ascertainable by proper means by, others who can obtain economic value from its disclosure and use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[112]

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[107] *Reddy v. Community Health Found. of Man*, *W. Va.*, 298 S.E.2d 906, 910 (W. Va. 1982) (although the restrictive covenant was not signed at hire, court provided broad statement that "[the contract] contains mutual promises, and that is adequate consideration on its face.").

[108] *Costanzo v. EMS USA, Inc.*, 2017 WL 4215952 (N.D. W. Va. Sept. 21, 2017) (plaintiff's access to confidential information in the course of his employment appears to provide the necessary consideration, even though employment was at will).

[109] *Environmental Prods. Co., Inc. v. Duncan*, 285 S.E.2d 889 (W. Va. 1981); *McGough v. Nalco Co*., 496 F. Supp. 2d 729 (N.D. W. Va. 2007).

[110] *Reddy*, 298 S.E.2d at 914-15.

[111] W. VA. CODE § 47-22-1.

[112] W. VA. CODE § 47-22-1(d).

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In addition, West Virginia courts look to numerous factors to determine whether a trade secret exists. Those factors include:

1. the extent to which the information is known outside of the employer's business;
2. the extent to which it is known by the employee and others involved in the employer's business;
3. the extent of the measures taken by the defendant to guard the secrecy of the information;
4. the value of the information to the employer and competitors;
5. the amount of effort or money expended by the employer in developing the information; and
6. the ease or difficulty with which the information could be properly acquired or duplicated by others.[113]

In determining whether there has been a violation, West Virginia courts will first determine whether a protectable trade secret exists, and then will determine if there was misappropriation.[114] The West Virginia statute defines misappropriation as:

1. acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
2. disclosure or use of another person's trade secrets without the other's 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 the disclosure or use, knew or had reason to know that his knowledge of the trade secret was: (1) derived from or through a person who had utilized improper means to acquire it; or (2) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or (3) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
    c. before a material change of his position, knew or had reason to know that the information was a trade secret and that knowledge of it had been acquired by accident or mistake.[115]

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

West Virginia does not have any statutory guidelines addressing ownership of employee inventions and ideas.

[113] *State ex rel Johnson v. Tsapis*, 419 S.E.2d 1 (W.Va. 1992); *IVS Hydro, Inc. v. Robinson*, 93 F. App'x 521, 526-27 (4th Cir. 2004).

[114] *McGough v. Nalco, Co.*, 496 F. Supp. 2d 729 (N.D. W. Va. 2007).

[115] W. VA. CODE § 47-22-1(b).

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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.[116]
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.[117]
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.[118]
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.[119]
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

[116] 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.

[117] 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.

[118] 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.

[119] 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.

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Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	common to migrant or seasonal agricultural workers who are not fluent or literate in English.[120]
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.[121]
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.[122]
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.[123]
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.[124] 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.[125]

[120] 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.

[121] 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.

[122] 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.

[123] 20 C.F.R. app. § 1002. This poster is available at http://www.dol.gov/vets/programs/userra/poster.htm.

[124] 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.

[125] 41 C.F.R. §§ 60-300.44, 60-741.44.

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Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
Employee Rights Under the Davis-Bacon Act Poster	Employers performing work covered by the labor standards of the Davis-Bacon and Related Acts must prominently post notice, where accessible to employees, summarizing the protections of the law.[126]
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.[127]
E-Verify Participation & Right to Work Posters	The Department of Homeland Security requires certain government contractors, under Executive Order Nos. 12989, 13286, and 13465, to post notice informing current and prospective employees of their rights and protections. Notices must be posted in a prominent place that is visible to prospective employees and all employees who are verified through the system.[128]
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.[129]
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.[130]

[126] 29 C.F.R. § 5.5(a)(l)(i). This poster is available at https://www.dol.gov/whd/regs/compliance/posters/davis.htm.

[127] 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.

[128] 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.

[129] 29 C.F.R. § 525.14. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/disab.htm.

[130] 29 C.F.R. § 471.2. This poster is available at https://www.dol.gov/olms/regs/compliance/EO13496.htm.

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Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
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.[131]
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.[132] **Pay Period or Monthly Notice.** A contractor must inform an employee in writing of the amount of accrued paid sick leave no less than once each pay period or each month, whichever is shorter. Additionally, this information must be provided when employment ends and when an employee's accrued but unused paid sick leave is reinstated. Providing these notifications via a pay stub meets the compliance requirements of the executive order. **Pay Stub / Electronic.** A contractor's existing procedure for informing employees of available leave, such as notification accompanying each paycheck or an online system an employee can check at any time, may be used to satisfy or partially satisfy these requirements if it is written (including electronically, if the contractor customarily corresponds with or makes information available to its employees by electronic means).[133]
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.[134]
Worker Rights Under Executive Order Nos. 13658 (contracts entered into on or after January 1, 2015), 14026	Employers that contract with the federal government under Executive Order Nos. 13658 or 14026 must prominently post notice, where

[131] 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.

[132] 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.

[133] 29 C.F.R. § 13.5.

[134] 41 C.F.R. § 60-1.35(c). This poster is available at https://www.dol.gov/agencies/ofccp/posters.

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Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
(contracts entered into on or after January 30, 2022)	accessible to employees, summarizing the applicable minimum wage rate and other required information.[135]

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

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

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Benefits & Leave: Vacation Pay, Sick Leave, etc.	Employers must inform employees of the employment practices and policies regarding vacation pay, sick leave, and comparable matters. Notice can be provided via posting, but written notice will suffice.[136]
Fair Employment Practices	Employers with 12 or more employees must post conspicuous notice, informing employees of the prohibitions against discrimination in employment, public accommodation, and housing under the state human rights act.[137]
Unemployment Compensation	Employers must post and maintain notice of the claims procedure regulations established by the Commissioner of the Bureau of Employment Programs. The notice (Form WVUC-B-59) describes eligibility requirements, includes a benefits rate table, and indicates how to apply for benefits.[138]
Wages, Hours & Payroll: Change in Payday or Rate	Employers must notify employees of any changes to the: (1) the day, hour, place of payment; or (2) rate of pay. Notice may be provided to each employee in writing or via workplace posting, in an accessible place.[139]

[135] 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.

[136] W. VA. CODE § 21-5-9.

[137] W. VA. CODE § 16B-17-17. This poster is available at https://hrc.wv.gov/about/Documents/NEW%20Notice%20HRA%20FHA%20PWFA.pdf.

[138] W. VA. CODE § 21A-7-2. This poster is available at https://workforcewv.org/wp-content/uploads/2024/07/UC-Benefit-Rate-Poster-Updated-7.23.pdf.

[139] W. VA. CODE § 21-5-9(2); *see also* W. VA. CODE R. § 42-5-4.1 (employer must establish a workweek, pay period and payday, and notify employees in writing or by posted notice accessible to all employees).

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Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Wages, Hours & Payroll: Minimum Wage	All employers with six or more employees in any one separate, distinct, and permanent location during any calendar week must comply with the state minimum wage law and must post notice of applicable wage rates.[140]
Wages, Hours & Payroll: Wage Payment and Collection Act	All employers must post, where accessible to all employees, an abstract summarizing employees' rights and protections under the wage payment and collection law.[141]
Workers' Compensation	Employers must post notice that identifies its workers' compensation insurer. The poster must include the name, business address, and telephone number of the insurer and the name of a contact person for questions.[142]
Workplace Safety: Hazardous Chemicals	If an employer has 10 or more employees using or producing any specified hazardous chemical, it must post a warning notice in the area in which the chemical is used. Notice must identify common symptoms of overexposure that are either: (1) published with the standard levels of safe exposure; or (2) certified to the employer by a physician. Good faith reliance on either of these sources if deemed sufficient notice of the common symptoms.[143]
Workplace Safety: No Smoking Signs	Smoking may be prohibited in West Virginian factories, mercantile establishments, mills, or workshops where a no smoking sign is posted.[144] "No Smoking" signs must be posted in order to prohibit smoking in such establishments.

3.1(b) *Record-Keeping Requirements*

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

Table 7 summarizes the federal record-keeping requirements.

[140] W. VA. CODE § 21-5C-9; W. VA. CODE R. § 42-8-4. This poster is available at https://labor.wv.gov/Wage-Hour/Minimum_Wage/Documents/MINIMUM%20WAGE%20POSTER%20012018.pdf.

[141] W. VA. CODE § 21-5-9, W. VA. CODE R. § 42-5-4. This poster is available at https://labor.wv.gov/Wage-Hour/Wage_Collection/Documents/WPC%20Poster.pdf.

[142] W. VA. CODE § 23-2C-15. Employers may obtain the notice from their insurance carrier.

[143] W. VA. CODE § 21-3-18.

[144] W. VA. CODE § 21-3-8.

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Age Discrimination in Employment Act (ADEA): Payroll Records	*Covered employers must maintain the following payroll or other records for each employee:* • employee's name, address, and date of birth; • occupation; • rate of pay; and • compensation earned each week.[145]	At least 3 years from the date of entry.
Age Discrimination in Employment Act (ADEA): Personnel Records	*Employers that maintain the following personnel records in the course of business are required by the ADEA to keep them for the specified period of time:* • job applications, resumes, or other forms of employment inquiry, including records pertaining to the refusal to hire any individual; • promotion, demotion, transfer, selection for training, recall, or discharge of any employee; • job orders submitted by the employer to an employment agency or labor organization for recruitment of personnel for job openings; • test papers completed by applicants which disclose the results of any employment test considered by the employer; • results of any physical examination considered by the employer in connection with a personnel action; and • any advertisements or notices relating to job openings, promotions, training programs, or opportunities to work overtime.[146]	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.[147]	For the full period the plan or system is in effect, and for at least 1 year after its termination.
Title VII & the Americans with Disabilities Act	*Employers must preserve any personnel or employment record made, including:* • requests for reasonable accommodation; • application forms submitted by applicants;	At least 1 year from the date the records were made, or

[145] 29 U.S.C. § 626; 29 C.F.R. § 1627.3(a).

[146] 29 C.F.R. § 1627.3(b).

[147] 29 C.F.R. § 1627.3(b).

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
(ADA): Personnel Records	• other records having to do with hiring, promotion, demotion, transfer, lay-off, or termination; • rates of pay or other terms of compensation; and • selection for training or apprenticeship.[148]	from the date of the personnel action involved, whichever is later.
Title VII & the Americans with Disabilities Act (ADA): Complaints of Discrimination	*When a charge of discrimination has been filed or an action brought against the employer, it must:* • make and keep such records relevant to the determination of whether unlawful employment practices have been or are being committed, including personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person; and • retain application forms or test papers completed by unsuccessful applicants or candidates for the position.[149]	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).[150]	Most recent form must be retained for 1 year.
Employee Polygraph Protection Act (EPPA)	*Records pertaining to a polygraph test must be maintained for the specified time period including, but not limited to, the following:* • a copy of the statement given to the examinee regarding the time and place of the examination and the examinee's right to consult with an attorney; • the notice to the examiner identifying the person to be examined; • copies of opinions, reports, or other records given to the employer by the examiner; • where the test is conducted in connection with an ongoing investigation involving economic loss or injury, a statement setting forth the specific incident or activity	At least 3 years following the date on which the polygraph examination was conducted.

[148] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[149] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[150] 29 C.F.R. § 1602.7.

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	under investigation and the basis for testing the particular employee; and • where the test is conducted in connection with an ongoing investigation of criminal or other misconduct involving loss or injury to the manufacture, distribution, or dispensing of a controlled substance, records specifically identifying the loss or injury in question and the nature of the employee's access to the person or property that is the subject of the investigation.[151]	
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.[152]	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).[153]	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.[154]	At least 2 years.
Fair Labor Standards Act (FLSA): Payroll Records	*Employers must maintain the following records with respect to each employee subject to the minimum wage and/or overtime provisions of the FLSA:* • full name and any identifying symbol used in place of name on time or payroll records; • home address with zip code;	3 years from the last day of entry.

[151] 29 U.S.C. §§ 2001 *et seq.*; 29 C.F.R. § 801.30.

[152] 29 U.S.C. § 1027.

[153] 29 C.F.R. § 1620.32(a).

[154] 29 C.F.R. § 1620.32(b).

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• date of birth, if under 19; • sex and occupation in which employed; • time of day and day of week on which the employee's workweek begins; • regular hourly rate of pay for any workweek in which overtime compensation is due; • basis on which wages are paid (pay interval); • amount and nature of each payment excluded from the employee's regular rate; • hours worked each workday and total hours worked each workweek; • total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation; • total premium pay for overtime hours; • total additions to or deductions from wages paid each pay period, including employee purchase orders or wage assignments; • total wages paid each pay period; • date of payment and the pay period covered by the payment; • records of retroactive payment of wages, including the amount of such payment to each employee, the period covered by the payment, and the date of the payment; and • for employees working on a fixed schedule, the schedule of daily and weekly hours the employee normally works (instead of hours worked each day and each workweek).[155] 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);	

[155] 29 C.F.R. §§ 516.2, 516.5.

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• amount by which the wages of each tipped employee have been deemed to be increased by tips as determined by the employer (not in excess of the difference between $2.13 and the applicable federal minimum wage); • hours worked each workday in which an employee does not receive tips, and total daily or weekly straight-time payment made by the employer for such hours; and • hours worked each workday in occupations in which the employee receives tips, and total daily or weekly straight-time earnings for such hours.[156]	
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.[157]	3 years from the last day of entry.
Fair Labor Standards Act (FLSA): Agreements & Other Records	*In addition to payroll information, employers must preserve agreements and other records, including:* • collective bargaining agreements and any amendments or additions; • individual employment contracts or, if not in writing, written memorandum summarizing the terms; • written agreements or memoranda summarizing special compensation arrangements under FLSA sections 7(f) or 7(j);	At least 3 years from the last effective date.

[156] 29 C.F.R. § 516.28.

[157] 29 C.F.R. §§ 516.2, 516.3. Presumably the regulation's reference to "prerequisites" is an error and should refer to "perquisites."

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• certain plans and trusts under FLSA section 7(e); • certificates and notices listed or named in the FLSA; and • sales and purchase records.[158]	
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.[159]	At least 2 years from the date of last entry.
Family and Medical Leave Act (FMLA)	*Covered employers must make, keep, and maintain records pertaining to their compliance with the FMLA, including:* • basic payroll and identifying employee data, including name, address, and occupation; • rate or basis of pay and terms of compensation; • daily and weekly hours per pay period; • additions to or deductions from wages and total compensation paid; • dates FMLA leave is taken by FMLA-eligible employees (leave must be designated in records as FMLA leave, and leave so designated may not include leave required under state law or an employer plan not covered by FMLA); • if FMLA leave is taken in increments of less than one full day, the hours of the leave; • copies of employee notices of leave furnished to the employer under the FMLA, if in writing; • copies of all general and specific notices given to employees in accordance with the FMLA; • any documents that describe employee benefits or employer policies and practices regarding the taking of paid and unpaid leave; • premium payments of employee benefits; and • records of any dispute between the employer and an employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and the disagreement.	At least 3 years.

[158] 29 C.F.R. § 516.5.

[159] 29 C.F.R. § 516.6.

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

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	GINA must be maintained in accordance with the confidentiality requirements of Title II of GINA.[160]	
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).[161]	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.[162]	3 years after the date of hire or 1 year following the termination

[160] 29 U.S.C. § 2616; 29 C.F.R. § 825.500.

[161] 26 C.F.R. §§ 31.6001-1, 31.6001-2.

[162] 8 C.F.R. § 274a.2.

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
		of employment, whichever is later.
Income Tax: Accounting Records	*Any taxpayer required to file an income tax return must maintain accounting records that will enable the filing of tax returns correctly stating taxable income each year, including:* • regular books of account or records, including inventories, sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown by such person in any return of such tax or information.[163]	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.[164]	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.[165]	As long as it is in effect and at least 4 years thereafter.

[163] 26 U.S.C. § 3402; 26 C.F.R. § 1.6001-1.

[164] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

[165] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Unemployment Insurance	*Employers are required to maintain all relevant records under the Federal Unemployment Tax Act, including:* • total amount of remuneration paid to employees during the calendar year for services performed; • amount of such remuneration which constitutes wages subject to taxation; • amount of contributions paid into state unemployment funds, showing separately the payments made and not deducted from the remuneration of its employees, and payments made and deducted or to be deducted from employee remuneration; • information required to be shown on the tax return and the extent to which the employer is liable for the tax; • an explanation for any discrepancy between total remuneration paid and the amount subject to tax; and • the dates in each calendar quarter on which each employee performed services not in the course of the employer's trade or business, and the amount of the cash remuneration paid for those services.[166]	At least 4 years after the later of the date the tax is due or paid for the period covered by the return.
Workplace Safety / the Fed-OSH Act: Exposure Records	*Employers must preserve and retain employee exposure records, including:* • environmental monitoring or measuring of a toxic substance or harmful physical agent, including personal, area, grab, wipe, or other form of sampling, as well as related collection and analytical methodologies, calculations, and other background data relevant to an interpretation of the results obtained; • biological monitoring results which directly assess the absorption of a toxic substances or harmful physical agent by body specimens; and • Material Safety Data Sheets (MSDSs), or in the absence of these documents, a chemical inventory or other record reveling the identity of a toxic substances or harmful physical agent and where and when the substance or agent was used. *Exceptions to this requirement include:* • background data to workplace monitoring need only be retained for 1 year provided that the sampling results,	At least 30 years.

[166] 26 C.F.R. § 31.6001-4.

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	collection methodology, analytic methods used, and a summary of other background data is maintained for 30 years; • MSDSs need not be retained for any specified time so long as some record of the identity of the substance, where it was used and when it was used is retained for at least 30 years; and • biological monitoring results designated as exposure records by a specific Fed-OSH Act standard should be retained as required by the specific standard.[167]	
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.[168]	Duration of employment plus 30 years.
Workplace Safety: Analyses Using Medical	*Employers must preserve and retain analyses using medical and exposure records*, including any compilation of data, or other study based on information collected from individual	At least 30 years.

[167] 29 C.F.R. § 1910.1020(d).

[168] 29 C.F.R. § 1910.1020(d).

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
and Exposure Records	employee exposure or medical records, or information collected from health insurance claim records, provided that the analysis has been provided to the employer or no further work is being done on the analysis.[169]	
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.[170]	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.[171]	Immediately preceding AAP year.
Equal Employment Opportunity: Personnel & Employment Records	*Government contractors covered by Executive Order No. 11246 and those required to provide affirmative action to persons with disabilities and/or disabled veterans and veterans of the Vietnam Era must retain the following records:* • records pertaining to hiring, assignment, promotion, demotion, transfer, lay off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship; • other records having to do with requests for reasonable accommodation, the results of any physical examination, job advertisements and postings, applications, resumes; and • any and all expressions of interest through the internet or related electronic data technologies as to which the contractor considered the individual for a particular position, such as on-line resumes or internal resume	3 years recommended; regulations state "not less than two years from the date of the making of the record or the personnel action involved, whichever occurs later." If the contractor has fewer than 150 employees or does not

[169] 29 C.F.R. § 1910.1020(d).

[170] 29 C.F.R. §§ 1904.33, 1904.44.

[171] 41 C.F.R. § 60-1.12(b).

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	databases, records identifying job seekers contacted regarding their interest in a particular position, regardless of whether the individual qualifies as an internet applicant under 41 C.F.R. § 60–1.3, tests and test results, and interview notes; ▪ for purposes of record keeping with respect to internal resume databases, the contractor must maintain a record of each resume added to the database, a record of the date each resume was added, the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used and the date of the search; ▪ for purposes of record keeping with respect to external resume databases, the contractor must maintain a record of the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used, the date of the search, and the resumes of job seekers who met the basic qualifications for the particular position who are considered by the contractor). *Additionally, for any record the contractor maintains pursuant to 41 C.F.R. § 60-1.12, it must be able to identify:* • gender, race, and ethnicity of each employee; and • where possible, the gender, race, and ethnicity of each applicant or internet applicant.[172]	have a contract of at least $150,000, the minimum retention period is one year from the date of making the record or the personnel action, whichever occurs later.
Equal Employment Opportunity: Complaints of Discrimination	*Where a complaint of discrimination has been filed, an enforcement action commenced, or a compliance review initiated, employers must maintain:* • personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person; and • application forms or test papers completed by unsuccessful applicants and candidates for the same position as the aggrieved person applied and was rejected.[173]	Until final disposition of the complaint, compliance review or action.

[172] 41 C.F.R. §§ 60-1.12, 60-300.80, and 60-741.80.

[173] 41 C.F.R. §§ 60-1.12, 60-741.80.

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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.[174]	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.

[174] 29 C.F.R. § 23.260.

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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.[175]	
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.[176]	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

[175] 29 C.F.R. § 13.25.

[176] 29 C.F.R. § 5.5.

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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.[177]	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.[178]	At least 3 years from the last date of entry.

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

Table 8 summarizes the primary state record-keeping requirements. Additional requirements may apply to certain employers, including, for example, public employers.[179]

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Fair Employment Practices:	*When a complaint has been served, the employer must preserve all personnel records relevant to the investigation, including:*	Until the complaint is

[177] 29 C.F.R. § 4.6.

[178] 41 C.F.R. § 50-201.501.

[179] West Virginia's occupational safety and health statute applies only to public employers and includes certain record-keeping requirements. W. VA. CODE §§ 21-3A-2, 21-3A-5, and 21-3A-8.

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Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Complaint of Discrimination	• personnel, employment, or membership records relating to the complainant and all other employees or applicants holding or seeking positions similar to that held or sought by the complainant; • applicant forms or test papers completed by any unsuccessful applicant and by all other applicants for the same position as that for which the complainant applied and was not accepted; and • any records relevant to the scope of the investigation and defined in the notice or complaint.[180]	finally adjudicated.
Employment Verification & Employment of Aliens	*All employers must maintain records of proof of legal status or authorization to work for all employees, as well as, for each employee:* • name and address; • rate of pay; • hours of employment; • payroll deductions; and • amount paid for each pay period.[181]	2 years.
Income Tax: General	All employers subject to tax under the West Virginia Personal Income Tax Act, must keep all books of account or records sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown on the tax return.[182]	For a period of 5 years following the close of the calendar year to which they relate.
Income Tax: Withholdings	*Employers must keep all records pertinent to the withholding of income tax from the wages of employees, including:* • amounts and dates of all wage payments subject to state personal income taxes; • the names, addresses, and occupations of employees receiving such payments; • the periods of their employment; • the periods for which employees were paid by the employer while absent due to sickness or personal injuries, and the amount and weekly rate of such payments;	5 years following the close of the calendar year to which they relate.

[180] W. VA. CODE R. § 77-2-3.14.

[181] W. VA. CODE §§ 21-1B-4, 21-5C-5.

[182] W. VA. CODE R. § 110-21-58.1.

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Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• Social Security numbers; • income tax withholding exemption certificates; • the employer's identification number; • records of monthly or quarterly and annual withholding returns and reports filed; and • dates and amounts of withholding tax payments made. *Employers with nonresident employees working both within and without of the state must also maintain records that clearly reflect the amount of income earned within the state and the number of days worked in the state.*[183]	
Unemployment Insurance	*Generally, employers must keep records showing:* • the period covered by the payroll; • the place of employment within the state (special rules apply where the worker performs in more than one county); and • the scheduled hours per day or week. *For each individual worker and each payroll period, the records must show*: • name and Social Security number; • wages for employment under the law; • date of hire, rehire, or return to work after temporary layoff; • date of termination by layoff, quitting, discharge, or death; • money wages in each week and total wages for all periods ending in each calendar quarter, showing separately— ▪ money wages; ▪ the cash value of other remuneration; and ▪ any special payments for services other than those rendered exclusively in a given quarter (*e.g.*, annual bonus, gift, etc.), showing separately money payments, other remuneration, and the nature for such payments; • cause of separation or layoff; • if worker in on a variable pay basis, the hours worked, and wages earned each week; and	Not less than 5 years.

[183] W. VA. CODE R. § 110-21-58.1.6.

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Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	▪ the cause of all lost time for each individual each week.[184]	
Wages, Hours & Payroll: Minimum Wage and Maximum Hours Standards	*For each exempt employee, employers must keep all wage and hour records.* *For each nonexempt employee, employers must keep the following records:* • full name; • home address; • occupational title or job classification; • regular rate of pay; • total hours worked each workday and workweek; • time of day and day of week that workweek begins; • total weekly regular and overtime wages earned each pay period; • itemized deductions for each pay period; • date of payment and pay period covered; • written schedule, if an employer pays an employee using a piece-rate schedule, a commissions schedule, or any schedule other than a regular hourly rate of pay; • record of credits taken, if an employer takes a tip credit, meal credit, or living quarters credit against an employee's wages.[185]	Not less than 2 years.
Wages, Hours & Payroll: Wage Payment and Collection Act	*Every employer must maintain the following records for each employee:* • full name or identifying symbol or number if used in placed of name on any record; • home address; • date of birth if under 18; • total wages paid each pay period; • occupation, title, or job classification; • rate of regular pay and rate of overtime pay, if applicable; • hours worked each workday; • total hours worked each workweek; and	Not less than 5 years.

[184] W. VA. CODE § 21A-10-4.

[185] W. VA. CODE § 21-5C-5; W. VA. CODE R. § 42-8-9.

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Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• documentation of employee's legal status or authorization to work.[186]	
Workers' Compensation: Physical & Vocational Rehabilitation	All employers must maintain hard copies of bills, invoices, reports, etc. for physical and vocational rehabilitation services as submitted to the Fund Commission, Insurance Commissioner, private carrier, or self-insured employer, whether by electronic or other means.[187]	5 years.
Workers' Compensation: Self-Insured Employer: Claims	Every self-insured employer is required to keep, preserve, and maintain all records relevant to workers' compensation claims.[188]	No time period specified.
Workers' Compensation: Self-Insured Employer: General	*All self-insured employers must also maintain:* • complete records showing in detail all expenditures for payroll and separation of such expenditures in the various classifications of the employer's business; and • additional information necessary to determine classification of the employer's activities, as well as other information necessary for a risk assessment.[189] Such records may be required by the commissioner, who may specifically seek: ▪ the number of employees employed during a pertinent period; and ▪ the names, Social Security numbers, payroll, occupations, and classifications of employees.[190] *For matters involving possible fraud, failure to report, or disputes with the commissioner, records must be kept for more than 10 years, or until the commissioner or appropriate administrative, judicial, or appellate body finally resolves the matter and the time for appeal has expired.*	Not less than 10 years after the respective times of the transaction upon which the records are based.

[186] W. VA. CODE § 21-1-3 (one year from date of record for inspection by commissioner); W.VA. CODE R. § 42-5-5 (five years).

[187] W. VA. CODE R. § 85-15-10.11.

[188] W. VA. CODE R. § 85-18-13.3.

[189] W. VA. CODE R. §§ 85-18-13.1, 85-20-5.7(c).

[190] W. VA. CODE R. § 85-18-13.2.

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3.1(c) *Personnel Files*

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

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

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

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

3.2 Privacy Issues for Employees

3.2(a) *Background Screening of Current Employees*

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

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

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

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

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

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

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

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

For information on the West Virginia Safer Workplace Act, 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.[191]

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

West Virginia permits the use of cannabis for medical purposes. The law does not require an employer to commit any act that would put it or any person acting on its behalf in violation of federal law.[192]

Employers cannot discharge, threaten, refuse to hire, or otherwise discriminate or retaliate against an employee regarding an employee's compensation, terms, conditions, location or privileges solely on the basis of the employee's status as an individual who is certified to use medical cannabis.[193] Employers are not required to make any accommodation of the use of medical cannabis on the property or premises of any place of employment. Employers can discipline an employee for being under the influence of medical cannabis in the workplace or for working while under the influence of medical cannabis when the employee's conduct falls below the standard of care normally accepted for that position.[194]

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[191] 21 U.S.C. §§ 811-12, 841 *et seq*.

[192] W. VA. CODE § 16A-5-4.

[193] W. VA. CODE § 16A-5-4.

[194] W. VA. CODE § 16A-5-4.

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Employers can also prohibit employees from performing any task an employer deems life-threatening—to either the employee or other employees—while under the influence of medical cannabis. Also, employers can prohibit employees from performing any duty that could result in a public health or safety risk while under the influence of medical cannabis. The prohibitions are not deemed an adverse employment decision, even if they result in financial harm to the employee.[195]

An individual using medical marijuana (*i.e.*, the patient) is further prohibited from operating or being in physical control of any of the following while under the influence with a blood content of more than three nanograms of active tetrahydrocannabis per milliliter of blood in serum:

- chemicals that require a permit issued by the federal or a state government or agency;
- high-voltage electricity or any other public utility; or
- a vehicle, aircraft, train, boat, or heavy machinery.

In addition, a patient cannot perform any employment duties at heights or in confined spaces, including, but not limited to, mining while under the influence of medical cannabis.[196]

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.[197]

The tax relief provisions above do not apply to:

- cash provided in lieu of identity protection services;
- identity protection services provided for reasons other than as a result of a data breach, such as identity protection services received in connection with an employee's compensation benefit package; or

[195] W. VA. CODE § 16A-5-10.

[196] W. VA. CODE § 16A-5-10.

[197] 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.

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- proceeds received under an identity theft insurance policy.[198]

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

In West Virginia, when a covered entity discovers or is notified of a security breach including personal information, notice must be made. A *security breach* is an unauthorized acquisition of unencrypted and unredacted computerized data that compromises the security, confidentiality, or integrity of personal information maintained by any covered entity, when the entity reasonably believes the breach has caused or will cause identity theft or other fraud to any resident of West Virginia. A breach includes the acquisition of encrypted data when the breach involves access to the encryption key.[199]

Covered Entities & Information. Any person or business that conducts business in Virginia that owns or licenses computerized data that includes personal information. *Personal information* includes an individual's first name or first initial and last name in combination with any one or more of the following:

- Social Security number;
- driver's license number or state identification number issued in lieu of a driver's license; or
- financial account number or credit or debit card number in combination with any required security code, access code, or password that would permit access to the account.[200]

Information which is lawfully available publicly from federal, state, or local government records is not considered personal information. Data that is encrypted or redacted (*i.e.*, altered or truncated data so that only four digits of a Social Security Number, driver's license number, state identification card number, or account number are accessible) is similarly exempt.

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:

- complies with the notification requirements or security breach procedures of its primary or functional federal regulator;
- maintains and complies with a notification procedure as part of an information security policy for the treatment of personal information, if the policy affords the same or greater protection to the affected individuals as the data security breach statute; or
- 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.

Content & Form of Notice. Notice must include the following:

- a description of the categories of information reasonably believed to have been accessed or acquired;

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

[199] W. VA. CODE §§ 46A-2A-101 *et seq*.

[200] W. VA. CODE § 46A-2A-101(6).

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- a telephone number or website an individual may use to learn what types of information the entity maintained about the individual or about individuals in general and whether or not the entity maintained information about that individual; and
- a toll-free contact telephone number and addresses for the major credit reporting agencies and information on how to place a fraud alert or a security freeze.[201]

Notice may be in one of the following formats:

- written notice to the postal address in the records of the covered entity;
- electronic notice if the notice complies with the federal e-sign act;
- telephonic notice; or
- substitute notice if the covered entity demonstrates that:
  - the cost of providing notice would exceed $50,000;
  - the affected class of persons to be notified exceeds 100,000; or
  - the covered entity does not have sufficient contact information.[202]

Substitute notice must consist of any of the two of the following:

- email notice when the covered entity has an electronic mail address for the affected resident;
- conspicuous posting of the notice on the website of the covered entity if the covered entity maintains a website; and
- notification by statewide media.[203]

Notice required under this section will not be considered a debt communication as defined by the federal Fair Debt Collection Practices Act.

Timing of Notice. Notice must be given without unreasonable delay.[204] However, notification may be delayed if:

- A law enforcement agency determines that the notification will impede a criminal investigation.
- A covered entity needs time to determine the scope of the breach.
- A covered entity needs time to restore the reasonable integrity of the data system.[205]

Additional Provisions. If more than 1,000 persons at a single time will be notified, then the covered entity must also notify without unreasonable delay all nationwide consumer reporting agencies of the timing, distribution, and content of the notices. This provision does not require that the covered entity disclose

[201] W. VA. CODE § 46A-2A-102(d).

[202] W. VA. CODE § 46A-2A-101(7).

[203] W. VA. CODE § 46A-2A-101(7)(D).

[204] W. VA. CODE § 46A-2A-102(a).

[205] W. VA. CODE § 46A-2A-102(e).

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names or other personal information of affected residents. This section does not apply to any person subject to and compliant with title V of the Gramm-Leach-Bliley Act.[206]

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.[207] 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.[208]

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.[209]

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.[210]

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

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[206] W. VA. CODE § 46A-2A-102(f).

[207] 29 U.S.C. § 218(a).

[208] 29 U.S.C. § 206.

[209] 29 U.S.C. §§ 203, 206.

[210] 29 U.S.C. § 3(m)(2)(B).

[211] 29 U.S.C. § 207.

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

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

The minimum wage in West Virginia is currently $8.75 per hour for most nonexempt employees of employers with six or more employees.[212]

3.3(b)(ii) *Tipped Employees*

Tipped employees are paid differently. If an employee earns tips, an employer may take a maximum tip credit of up to a 70% of the minimum wage ($6.13) per hour and must pay a specific minimum cash wage ($2.62) per hour. Note that if an employee does not make the tip credit amount in tips per hour, the employer must make up the difference between the wage actually received 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.[213]

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

West Virginia's minimum wage is not applicable to employers of five or fewer employees.[214]

With respect to employee coverage, the definition of *employee* for purposes of the minimum wage law does not include:

- any individual employed by the United States;
- any individual engaged in the activities of an educational, charitable, religious, fraternal, or nonprofit organization where the employer-employee relationship does not in fact exist, or where the services rendered to such organizations are on a voluntary basis;
- newsboys, shoeshine boys, golf caddies, pinboys, and pin chasers in bowling lanes;
- traveling salespersons and outside salespersons;
- services performed by an individual in the employ of their parent, son, daughter, or spouse;
- any individual employed in a *bona fide* professional, executive, or administrative capacity;
- any person whose employment is for the purpose of on-the-job training;
- any person having a physical or mental handicap so severe as to prevent their employment or employment training in any training or employment facility other than a nonprofit sheltered workshop;
- any individual employed in a boys or girls summer camp;
- any person 62 years of age or over who receives retirement or survivors benefits from the Social Security Administration;
- any individual employed in agriculture within the meaning of the federal FLSA;
- any individual employed as a firefighter by the state or a state agency;

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212 W. VA. CODE §§ 21-5C-1, 21-5C-1-2.

213 W. VA. CODE § 21-5C-1-2.

214 W. VA. CODE § 21-5C-1.

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- ushers in theaters;
- any individual employed on a part-time basis who is a student in any recognized school or college;
- any individual employed by a local or interurban motorbus carrier;
- any employee with respect to whom the U.S. Department of Transportation has statutory authority to establish qualifications and maximum hours of service;
- any person employed on a *per diem* basis by the Senate, the House of Delegates, or the Joint Committee on Government and Finance of the Legislature of West Virginia, other employees of the Senate or House of Delegates designated by the presiding officer, and additional employees of the Joint Committee on Government and Finance designated by such joint committee;
- any person employed as a seasonal employee of a commercial whitewater outfitter where the seasonal employee works less than seven months in any one calendar year, and, in such case, only for the limited purpose of exempting the seasonal employee from the maximum hours provisions of the law; or
- any person employed as a seasonal employee of an amusement park where the seasonal employee works less than seven months in any one calendar year and, in such case, only for the limited purpose of exempting the seasonal employee from the maximum hours provisions of the law.[215]

West Virginia law also permits use of a training wage. An employer may pay a subminimum training wage of not less than $6.40 per hour to employees under age 20 for an employee's first 90 days of employment. However, if the employer's business has not been in operation for more than 90 days at the time the employer hired the employee, the employer may pay the employee the subminimum training wage for an additional period not to exceed 90 days.[216]

3.3(c) *State Guidelines on Overtime Obligations*

Employers with six or more employees must pay nonexempt employees one-and-one-half times their regular rate for all hours worked over 40 in a week.[217]

3.3(d) *State Guidelines on Overtime Exemptions*

As with the minimum wage obligations, the West Virginia overtime provisions do not apply to employers of five or fewer employees, or any employer if at least 80% of its employees are subject to the FLSA's overtime provisions. Employers covered by the FLSA should refer to the federal provisions.[218]

In addition to the categories of workers excluded from the definition of *employee* for purposes of the minimum wage provisions, the following types of workers are not considered *employees* for purposes of the state overtime provisions:

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[215] W. VA. CODE § 21-5C-1.

[216] W. VA. CODE § 21-5C-2.

[217] W. VA. CODE §§ 21-5C-1, 21-5C-3.

[218] W. VA. CODE § 21-5C-1.

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- any salesperson, parts man or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft if employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles to ultimate purchasers; or
- any person employed as a seasonal employee of a commercial whitewater outfitter, where the seasonal employee works less than seven months in any one calendar year.[219]

Like the FLSA, West Virginia law creates overtime exemptions for certain white collar employees and salespeople, as set forth below. However, state law contains no express exemption for commissioned sales employees.

Before turning to these overtime exemptions, it is important to reiterate that federal wage and hour laws do not preempt state laws[220] and that the law most beneficial to the employee will apply. Therefore, even if an employee meets one of the exemptions discussed below under state law, if the employee does not meet the requirements of the federal exemption (or vice versa), including the salary thresholds, then the employee will not qualify as exempt.

3.3(d)(i) *Executive Exemption*

Under West Virginia law, an employee is covered by the executive exemption if the employee meets the following requirements:

- the employee is paid on a salary basis at a rate of at least $684 per workweek (or a higher amount set by federal regulations);
- the employee's primary duty is management of the employer's organization, or of a customarily recognized department or subdivision;
- the employee customarily and regularly directs the work of two full-time employees or the equivalent of two or more full-time employees; and
- the employee has the authority to hire or fire other employees, or whose suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees are given particular weight.[221]

3.3(d)(ii) *Administrative Exemption*

An employee is covered by the administrative exemption under West Virginia law if the employee meets the following requirements:

- the employee is paid on a salary or fee basis at a rate of at least $684 per workweek (or a higher amount set by federal regulations);
- the employee's primary duty is the performance of office or nonmanual work directly related to management or general business operations of the employer or its customers; and

[219] W. VA. CODE § 21-5C-1.

[220] 29 U.S.C. § 218(a).

[221] W. VA. CODE § 21-5C-1 (excluded from definition of *employee*, FLSA-based exemption); W. VA. CODE R. §§ 42-8-8.10 (executive exemption) and 42-8-2.2, 42-8-6 (FLSA-based exemption).

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- the employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.[222]

3.3(d)(iii) *Professional Exemption*

An individual employed in a *bona fide* professional capacity is excluded from the definition of *employee*.[223]

Learned Professional. An individual is exempt if the individual meets all the following requirements:

- the employee is paid on a salary or fee basis at a rate of at least $684 per workweek (or a higher amount set by federal regulations); and
- the employee's primary duty is performing work requiring advanced knowledge in a field of science or learning that is customarily acquired by a prolonged course of specialized intellectual instruction.

Salary or fee requirements do not apply to *bona fide* teachers or practitioners of law or medicine.[224]

Creative Professional. An individual is exempt is the individual meets all the following requirements:

- the employee is paid on a salary or fee basis at a rate of at least $684 per workweek (or a higher amount set by federal regulations); and
- the employee's primary duty is performing work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor, such as music, writing, acting, and the graphic arts.[225]

Computer Professional. An individual is exempt is the individual meets all the following requirements:

- the employee is paid either on a salary or fee basis at a rate of at least $684 per workweek (or a higher amount set by federal regulations) or on an hourly basis at a rate of not less than $27.63 per hour (or a higher amount set by federal regulations);
- the individual is employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field performing the following primary duties; and
- the employee's primary duty consists of the following or a combination of the following:
  - the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
  - the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; or

[222] W. VA. CODE § 21-5C-1 (excluded from definition of *employee*, FLSA-based exemption); W. VA. CODE R. §§ 42-8-8.11 (administrative exemption) and 42-8-2.2, 42-8-6 (FLSA-based exemption).

[223] W. VA. CODE § 21-5C-1.

[224] W. VA. CODE R. § 42-8-8.7.

[225] W. VA. CODE R. § 42-8-8.8.

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- the design, documentation, testing, creation or modification of computer programs related to machine operating systems.[226]

3.3(d)(iv) *Outside Sales Exemption*

"Traveling salesmen and outside salesmen" are excluded from the definition of employee.[227] An individual engaged in making outside sales is exempt if all the following requirements are met:

- the employee is customarily and regularly engaged away from their employer's place or places of business; and
- the employee's primary duty is making or obtaining orders or contracts for services or for the use of facilities for which consideration will be paid by a client or customer.[228]

The exemption does not include employees training to work in outside sales who are not independently working on their own.[229]

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.[230] 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.[231]

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.

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[226] W. VA. CODE R. § 42-8-8.9.

[227] W. VA. CODE § 21-5C-1; W. VA. CODE R. § 42-8-8.6.

[228] W. VA. CODE R. § 42-8-8.5 (outside sales exemption); W. VA. CODE R. §§ 42-8-2.2, 42-8-6 (FLSA-based exemption).

[229] W. VA. CODE R. § 42-8-8.5 (outside sales exemption); W. VA. CODE R. §§ 42-8-2.2, 42-8-6 (FLSA-based exemption).

[230] 29 C.F.R. § 785.19.

[231] 29 C.F.R. § 785.18.

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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.[232] 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.[233] An employer must also provide a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.[234] Exemptions apply for smaller employers and air carriers.[235]

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.[236] Lactation is considered a related medical condition.[237] 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.[238] For more information on these topics, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

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

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

Meal Periods. Employers allow at least 20 minutes for meal breaks, at times reasonably designated by the employer, for each employee who works six or more hours. This rule applies in all situations where employees are not afforded necessary breaks and/or permitted to eat lunch while working.[239] Break or meal time of 20 consecutive minutes or less is compensable time.[240] However, break or meal time that is typically 30 consecutive minutes or more may be treated as nonwork time and unpaid.[241]

The meal period statute only applies when employees are not afforded necessary breaks and/or permitted to eat lunch while working. Accordingly, if employees are provided these opportunities, the statute would not apply.[242]

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232 29 U.S.C. § 218d.

233 29 U.S.C. § 218d(b)(2).

234 29 U.S.C. § 218d(a).

235 29 U.S.C. § 218d(c), (d).

236 42 U.S.C. § 2000gg–1.

237 29 C.F.R. § 1636.3.

238 29 C.F.R. § 1636.3.

239 W. VA. CODE § 21-3-10a.

240 W. VA. CODE R. §§ 42-5-3.3, 42-8-11.3.1.

241 W. VA. CODE R. § 42-8-11.3.2.

242 W. VA. CODE § 21-3-10a.

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Exempt Employees. The meal period requirements apply to exempt employees. The meal period statute does not define the term *employee*. Moreover, there is no general definitions statute. Accordingly, in the absence of an express definition, coupled with the fact the law applies to "each of [an employer's] employees," the law should be interpreted to apply to exempt employees.[243]

Rest Periods. Although there is no rest period requirement, breaks of short duration, up to 20 minutes, must be counted as hours worked.[244]

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

Minors under age 16 may not work more than five continuous hours without a meal period of at least 30 minutes.[245]

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

There is no express meal period penalty. However, a catchall penalty provision provides that an employer that violates any provision of the labor laws for which no penalty has been specifically provided commits a misdemeanor. If convicted, violators will be fined between $10 and $50, imprisoned up to six months, or both.[246]

A violation of the meal period requirement for minor employees is a misdemeanor, which is punishable by a fine between $50 and $200 for the first offense and a fine between $200 and $1,000, imprisonment up to six months, or both for the second or subsequent offenses.[247]

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

A mother may breast feed her child in any location open to the public.[248] Although the law does not specifically mention employers, it can be construed to include places of employment.

3.5 Working Hours & Compensable Activities

3.5(a) *Federal Guidelines on Working Hours & Compensable Activities*

In contrast to some state laws that provide for mandatory days of rest, the FLSA does not limit the hours or days an employee can work and requires only that an employee be compensated for "all hours" worked in a workweek. Ironically, the FLSA does not define what constitutes hours of work.[249] 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."[250]

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[243] *See* W. VA. CODE § 21-3-10a.

[244] W.VA. CODE R. §§ 42-8-11.3.1, 42-5-3.3.

[245] W. VA. CODE § 21-6-7.

[246] W. VA. CODE § 21-3-14.

[247] W. VA. CODE § 21-6-10.

[248] W. VA. CODE § 16-1-19.

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

[250] *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

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

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

West Virginia law requires an employer to include all hours worked by an employee as compensable time, and accordingly permits an employer to exclude nonwork time from the calculation of hours worked.[251] State law expressly excludes from hours worked:

> any time spent changing clothes or washing at the beginning or end of each workday, time spent in walking, riding or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform and activities which are preliminary to or postliminary to said principal activity or activities, subject to such exceptions as the [state labor] commissioner may by rules and regulations define.[252]

For example, the regulations provide that time spent changing or washing clothes is compensable only when required by law or by the employer for safety, decontamination, or production reasons.[253]

There are a number of additional issues considered when determining whether particular activities constitute work. This publication looks more closely at pay requirements for reporting time, waiting or on-call time, and travel time. West Virginia law addresses the compensability of the last two—on-call time and travel time.

On-Call Time. Employees who are required to remain on call on the employer's premises, or so close by or at their home so that they cannot use the time effectively for their own purposes are considered to be working while on call. Employees who are not required to remain on the employer's premises but are merely required to leave word at their home or with their employer where they may be reached are not working while on call.[254]

If an employee has been engaged to wait, the employer must treat the time an employee spends engaged to wait as compensable time.[255]

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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").

[251] W. VA. CODE R. § 42-8-11.1.

[252] W. VA. CODE § 21-5C-1.

[253] W. VA. CODE R. § 42-8-11.1.

[254] W. VA. CODE R. § 42-8-9.10.

[255] W. VA. CODE R. § 42-8-11.6.

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Travel Time. Time spent in walking, riding, or traveling to and from the location of the employee's work (*i.e.*, commuting) is not compensable.[256]

If an employer requires an employee to travel for work and no overnight stay is required, the following time is compensable:

- the time the employee spends traveling away from and returning to the employee's assigned work location; and
- the time the employee spends traveling to perform their job assignments and responsibilities.[257]

If an employer requires an employee to travel when an overnight stay away from the employee's home is authorized, the following time is compensable:

- the time the employee spends traveling during the employee's normal work hours on any day of the week, including days when the employee is not normally scheduled to work, such as Saturday and Sunday; and
- the time the employee spends traveling either before or after the employee's normal work hours on any day of the week, including days when the employee is not normally scheduled to work, such as Saturday or Sunday, except for the time that the employee spends as a passenger on any mode of transportation. However, if the employee is performing work duties required by the employer when the employee is a passenger on any mode of transportation, the time is compensable.[258]

Travel to and from employer-required meetings is compensable regardless of whether overnight stay is required.[259]

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.[260] 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

[256] W. VA. CODE § 21-5C-1.

[257] W. VA. CODE R. § 42-8-11.8.

[258] W. VA. CODE R. § 42-8-11.9.

[259] W. VA. CODE R. § 42-8-11.7.1.

[260] 29 C.F.R. §§ 570.36, 570.50.

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employment or age certificate indicating an acceptable age for the occupation and hours worked.[261] 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*

West Virginia's child labor laws apply to minors under 18 years of age. The state has adopted the federal regulations governing child labor.[262]

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

General Restrictions. West Virginia's Child Labor Act restricts the employment of minors under age 18 by age and by type of occupation, as set forth in Table 9.

Table 9. State Restrictions on Type of Employment by Age

Age Range	Restrictions
Under Age 18	*Minors under age 18 cannot work in, about, or in connection with any of the following occupations:* • motor vehicle driver and outside helper whose work includes riding on a motor vehicle outside the cab for the purpose of assisting in transporting or delivery of goods; • manufacturing, storage, handling, or transportation of explosives or highly flammable substances; • ore reduction works, smelters, hot rolling mills, furnaces, foundries, forging shops, or in any place in which the heating, melting, or heat treatment of metals occurs; • logging and sawmilling; • operation of power-driven machinery or hoisting apparatus, subject to limited exceptions; • occupations involving exposure to radioactive substances or ionizing radiation; • mining; • occupations involving slaughtering, meat-packing, or processing or rendering; • wrecking, demolition, or ship-breaking; • brick, tile, and kindred product manufacturing; • roofing and excavation; • in a bar or selling, dispensing, or serving alcoholic beverages; or • any occupation prohibited by law or determined by the state labor department to be dangerous or injurious.[263]

[261] 29 C.F.R. § 570.6.

[262] W. VA. CODE R. § 42-9-4.

[263] W. VA. CODE § 21-6-2; W. VA. CODE R. § 42-9-3.10.

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Table 9. State Restrictions on Type of Employment by Age	
Age Range	**Restrictions**
	Minors aged 16 and 17 who have successfully completed the required training and have written authorization from a parent may engage in certain activities as a volunteer firefighter.[264]
Under Age 14	*Minors under age 14 may not be employed except in the following occupations:* • nonhazardous agricultural or horticultural activities; • domestic service within the employer's residence; • work for their parents or legal guardian in their solely owned business, subject to the prohibitions against certain occupations for minors under 18; • as actors or performers in motion pictures, theatrical, radio, or television productions; and • newspaper delivery.[265]

Restrictions on Selling or Serving Alcohol. In West Virginia, minors under age 18 cannot work in a bar and may not sell, dispense, or serve alcoholic beverages.[266]

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

In West Virginia, minors under age 16 cannot work:

- during school hours (unless part of an approved work experience or career exploration program);
- more than three hours a day when public schools are in session;
- more than eight hours a day when public schools are not in session;
- more than 18 hours a week when public schools are in session;
- more than 40 hours a week when public schools are not in session; or
- between 7:00 P.M. and 7:00 A.M., except that minors may work until 9:00 P.M. from June 1 through Labor Day.

Note that although the Child Labor Act places occupational restrictions on minors under age 18, the time and hour restrictions do not appear to apply to minors aged 16 and 17. Minors under age 14 cannot work, subject to limited exceptions.[267]

[264] W. VA. CODE § 21-6-2; W. VA. CODE R. § 42-9-12.

[265] W. VA. CODE § 21-6-1.

[266] W. VA. CODE § 21-6-2.

[267] W. VA. CODE § 21-6-1.

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

The hours of work provisions do not apply to minors working in agricultural and horticultural activities, domestic services, for certain parent-owned businesses, as actors or performers, or in newspaper delivery.[268]

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

An employer may require minors aged 16 and 17 to obtain from the county superintendent of schools an age certificate verifying their ages. The employer should retain on file the age certificates for minors in its employment.[269]

Minors aged 14 and 15 must have a work permit in order to be employed. Employers must obtain and keep on file a work permit issued by the superintendent of schools of the county in which the minor resides, or by another authorized person.[270] Special "supervision permits" may be granted to minors aged 14 and 15 to work longer hours or in occupations deemed hazardous.[271]

A minor under age 14 may only obtain a work permit to work in the school that the minor attends, and if the work will occur only during regular school hours.[272]

Blanket work permits are authorized when 25 or more minors are to be employed for a period of 90 days or less by an employer.[273]

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

The West Virginia Division of Labor enforces the Child Labor Act. The Division has the authority to enter and inspect any place where a minor may be employed and to access to the employer's work permits, age certificates, or other proof of age and time records.[274] A violation of the Child Labor Act is a misdemeanor, which is punishable by a fine between $50 and $200 for the first offense and a fine between $200 and $1,000, imprisonment up to six months, or both for the second or subsequent offenses.[275]

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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[268] W. VA. CODE §§ 21-6-1, 21-6-7.

[269] W. VA. CODE § 21-6-5; W. VA. CODE R. § 42-9-8.

[270] W. VA. CODE §§ 21-6-3, 21-6-4; W. VA. CODE R. § 42-9-5.

[271] W. VA. CODE § 21-6-3; W. VA. CODE R. §§ 42-9-2, 42-9-3, and 42-9-9.

[272] W. VA. CODE R. § 42-9-7.

[273] W. VA. CODE § 21-6-8a; W. VA. CODE R. § 42-9-10.

[274] W. VA. CODE § 21-6-9.

[275] W. VA. CODE § 21-6-10.

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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).[276]

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.[277]

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.[278]

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.[279] 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.[280]

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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[276] 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").

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

[278] 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.

[279] 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/.

[280] 12 C.F.R. § 1005.2(b)(3)(i)(A).

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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.[281] 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.[282]

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.[283]

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.[284]

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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[281] 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.

[282] 12 C.F.R. § 1005.18.

[283] *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.

[284] 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.

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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.[285] 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.[286] Accordingly, among other items, an employer may be required to reimburse an employee for expenses related to work uniforms,[287] tools and equipment,[288] and business transportation and travel.[289] 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.[290]

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;[291]
- 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);[292]
- 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);[293]

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[285] *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).

[286] 29 C.F.R. §§ 531.35, 531.36, and 531.37.

[287] 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.

[288] 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).

[289] 29 C.F.R. § 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c04.

[290] 29 C.F.R. § 778.217.

[291] 29 C.F.R. § 531.38.

[292] 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*.

[293] 29 C.F.R. § 531.40.

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- 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;[294]
- 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;[295] 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.[296]

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.[297]

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.[298] 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

[294] 29 C.F.R. § 531.40.

[295] 29 U.S.C. § 203. However, the cost cannot be treated as wages if prohibited under a collective bargaining agreement.

[296] 29 C.F.R. § 825.213.

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

[298] 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.

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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.[299]

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.[300]

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.[301]

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.[302]

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, money order, direct deposit, or payroll debit card. Paychecks must be drawn on banks convenient to the place of employment where suitable arrangements have been made for cashing the check for the full amount of wages.[303]

Direct Deposit. Mandatory direct deposit is not permitted in West Virginia. Wages paid by direct deposit do not require an agreement in writing by the employer and employee. Direct deposit may be used upon the employee's identification of their financial institution, the account type, and account number. If an employee does not provide the information necessary to enable direct deposit, then the employer may pay the employee by payroll card. An employer cannot require employees to use or accept direct deposit.[304]

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[299] 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.

[300] 29 C.F.R. § 531.36.

[301] 29 C.F.R. § 531.37.

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

[303] W. VA. CODE §§ 21-5-3, 21-5-4.

[304] W. VA. CODE § 21-5-3; West Virginia Div. of Labor, *Wage Payment & Collection (WPCA) Acceptable Methods for Meeting Payroll, available at* http://labor.wv.gov/Wage-

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Payroll Debit Card. An employer may pay employees by deposit or electronic transfer of immediately available funds into an employee's payroll card account in a federal insured depository institution. Wages paid by payroll card do not require an agreement in writing by the employer and employee. However, employers who choose to pay compensation using payroll cards must also give employees the option of being paid by direct deposit. If an employee does not provide the information necessary to enable direct deposit, then the employer may pay the employee by payroll card. If using payroll cards, the employer must provide full written disclosure of any applicable fees associated with the payroll card and ensure that employees can make at least one withdrawal or transfer from the payroll card per pay period without cost or fee for any amount contained on the card. Further, employers must ensure that the employee may make in-network withdrawals or transfers without cost or fees for any amount contained on the card.[305]

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

An employer must pay wages due at least twice every month with no more than 19 days separating paydays, unless the state labor department approves an employer's petition to establish different regular paydays.[306] Wages due must include all wages earned up to and including the twelfth day immediately preceding the regular payday.[307] If a regular payday is on specific dates of the month and the employer is closed for business on that date, wages must be paid on the day immediately preceding the regular payday that the employer is open for business.[308] The pay frequency requirement applies to all employees, including professional employees.[309] There are special rules for railroad employees.[310]

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

Discharge or Resignation. If an employee is fired, quits, or resigns, the employee's wages due must be paid on or before the next regular payday on which wages would otherwise be due and payable. If the employee requests payment by mail, payment is considered made on the date the mailed payment is postmarked.[311]

If fringe benefits (*e.g.*, vacation, production incentive bonuses, etc.) are provided and due under an agreement between an employee and employer but, per the agreement's terms, are to be paid at a future date or upon additional conditions which are ascertainable, they must be paid per the agreement's terms and are not subject to the final wages statute's timing requirements.[312]

Hour/Wage_Collection/Documents/Fact%20Sheet/WPCA%20FACT%20SHEET%204%20-%20ACCEPTABLE%20METHODS%20FOR%20MEETING%20PAYROLL%20UPDATED%20AFTER%20REVIEW.pdf.

[305] W. VA. CODE § 21-5-3.

[306] W. VA. CODE § 21-5-3; *see also* W. VA. CODE R. § 42-5-8 (petition for special agreement concerning payday schedule or frequency).

[307] W. VA. CODE § 21-5-1.

[308] W. VA. CODE R. § 42-5-7.4.

[309] *Shaffer v. Fort Henry Surgical Assocs., Inc.*, 599 S.E.2d 876, 882 (W. Va. 2004).

[310] W. VA. CODE § 21-5-2.

[311] W. VA. CODE § 21-5-4.

[312] W. VA. CODE § 21-5-4.

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Labor Dispute or Layoff. If work is suspended due to a labor dispute, or an employee for any reason whatsoever is laid off, the employee must be paid in full by the next regular payday. If the employee requests payment by mail, payment is considered made on the date the mailed payment is postmarked.[313]

Notice of Employer's Authorized Representative. West Virginia's wage payment statute establishes the state's requirements for accurate, timely payment of wages. The law creates a safe harbor for employers to correct underpayment or nonpayment of wages and benefits due to separated employees. The law requires an employee to make a written demand seeking payment of any alleged underpayment or nonpayment prior to seeking liquidated damages or attorney's fees in a civil action. It requires an employer to provide written notice to the employee of the identity of the employer's authorized representative plus the contact information for that person, via email and regular mail, at the time of separation. If the employer fails to provide the required written notice, the employee is not required to provide a demand letter. "Written demand" means any writing, including email, from or on behalf of an employee stating that the employer has not paid all of the wages or fringe benefits which the employee is owed.

Upon receiving a written demand, the employer has seven calendar days from receipt to correct the alleged underpayment or nonpayment of the wages and fringe benefits due. If, after seven days, the employer has not corrected the alleged underpayment or nonpayment, or paid all undisputed amounts due to the employee, the employee may seek liquidated damages and attorney's fees in a civil action for underpayment or nonpayment of wages.[314]

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

Employers must provide each employee with an itemized statement of deductions from wages for each pay period in which deductions are made. The itemized statement must include:

- rate of pay;
- overtime rate of pay if any;
- the units of time or rate used to calculate wages; and
- statement of deductions made from gross pay.[315]

Generally, the law requires the employer to furnish each employee a wage statement each pay period, but does not specify what form it must take. When wages are paid by direct deposit, a wage statement may be furnished electronically if the employee has direct, immediate, and convenient access to their wage statement.[316]

3.7(b)(v) *Wage Transparency*

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

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[313] W. VA. CODE §§ 21-5-1, 21-5-4.

[314] W. VA. CODE § 21-5-4a.

[315] W. VA. CODE R. § 42-8-9.

[316] W. VA. CODE § 21-5-9; W. VA. CODE R. § 42-5-7.3.

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

Changing Regular Paydays. Employers must give employees notice, in writing or through a posted notice maintained in a place accessible to employees, of a change to the day, hour, and place of payment, or pay period, at least one full pay period before a change occurs.[317] Note that the statute requires notice "prior to the time of changes," whereas the regulation requires notice "at least one full pay period prior to the effective date of the change."[318] The state labor department contends the latter standard applies.[319]

Changing Pay Rate. The same standards apply to changing an employee's rate of pay. Employers must give employees notice, in writing or through a posted notice maintained in a place accessible to employees, of pay rate changes at least one full pay period before a change occurs.[320] Again, the statute requires notice "prior to the time of changes," whereas the regulation requires notice "at least one full pay period prior to the effective date of the change."[321] The state labor department contends the latter standard applies.[322]

Other Changes. In addition to changes to pay rate, payday, and other wage payment requirements, the regulation requires advance notice of a change to "any other term of employment," which, based on its broad language and the statutory requirement that employers make available in writing or by posted notice practices and policies regarding vacation pay, sick leave, and comparable matters, could be interpreted to require notice of changes to these (or any) employment policies or practices.[323]

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

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

Travel. Though the statute is silent concerning whether an employer must reimburse an employee for travel expenses, for purposes of determining an employee's regular rate when calculating overtime wage, reimbursements to the employee traveling expenses, or other expenses incurred by an employee when furthering an employer's interest, are excluded from an employee's regular rate.[324]

Uniforms. The cost of uniforms and their laundering, when an employer requires an employee to wear a uniform, cannot be credited against an employee's wages.[325]

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[317] W. VA. CODE § 21-5-9; W. VA. CODE R. § 42-5-4.2.

[318] W. VA. CODE § 21-5-9; W. VA. CODE R. § 42-5-4.2.

[319] West Virginia Div. of Labor, *Wage & Hour Frequently Asked Questions*, *available at* http://labor.wv.gov/Wage-Hour/Minimum_Wage/Pages/Minimum-Wage-and-Maximum-Hour-FAQs.aspx.

[320] W. VA. CODE § 21-5-9; W. VA. CODE R. § 42-5-4.2; West Virginia Div. of Labor, *Wage & Hour Frequently Asked Questions*.

[321] W. VA. CODE § 21-5-9; W. VA. CODE R. § 42-5-4.2.

[322] West Virginia Div. of Labor, *Wage & Hour Frequently Asked Questions*.

[323] W. VA. CODE R. § 42-5-4.2.

[324] W. VA. CODE § 21-5C-3.

[325] W. VA. CODE R. § 42-8-12.4; West Virginia Div. of Labor, *Wage & Hour Frequently Asked Questions, available at* http://labor.wv.gov/Wage-Hour/Minimum_Wage/Pages/Minimum-Wage-and-Maximum-Hour-FAQs.aspx.

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

Permissible Deductions. Employees must be paid wages due, less "authorized deductions" or "authorized wage assignment."[326] *Deductions* include amounts:

- required by law to be withheld; and
- authorized for union, labor organization, or club dues or fees, pension plans, payroll savings plans, credit unions, charities and any form of insurance provided by an employer (with exceptions for public employees):
  - these deductions are not required to be in any prescribed form; and
  - concerning medical insurance, an insurance statute provides that an employer cannot deduct an employee's contribution without the employee's prior written consent.[327]

An employer may also be able to take a credit for meals made available to and eaten by employees, and living quarters provided to employees if a compulsory condition of employment (and other requirements are met).[328]

Prohibited Deductions. An illegal deduction is a deduction made by an employer from an employee's wages without a valid assignment of wages, without a valid wage garnishment order, or without an employee's written authorization for union or club dues, pension plans, a payroll savings plan, charitable contributions, insurance, a hospitalization plan, or plan of a similar kind. Moreover, if an employer deducts an authorized amount but fails to pay that amount to the designated entity, the deduction is illegal.[329]

An employer is also prohibited from taking a deduction from final wages for unreturned uniforms, equipment, or damaged property.[330]

Employers may, under certain circumstances, take deductions for unreturned property. If, at the time of discharge or resignation, an employee fails to return employer provided property, the employer may withhold, deduct, or divert the employee's final wages to recover the replacement cost of the property, subject to the following:

- the property was provided in the course of, and for use in, the employer's business;
- the property was valued at over $100; and
- the employee signed a written agreement contemporaneous with obtaining the property (or signed and ratified an agreement if property was provided prior to the effective date of the amended law) containing:
  - specific itemization of the property provided, including replacement cost;
  - clear statement that the property is to be returned immediately upon discharge or resignation; or

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[326] W. VA. CODE § 21-5-3.

[327] W. VA. CODE §§ 21-5-1, 21-5-3; W. VA. CODE R. §§ 42-5-9.4, 42-5-9.5.

[328] W. VA. CODE R. §§ 42-8-12.2, 42-8-12.3.

[329] W. VA. CODE §§ 21-5-1, 21-5-3, and 33-25-13; W. VA. CODE R. §§ 42-5-3.12, 42-5-9.4, and 42-5-9.5.

[330] West Virginia Div. of Labor, *Wage & Hour Frequently Asked Questions*.

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- clear statement, along with employee's acknowledgement and agreement, that should the employee fails to return the property, the replacement cost will be deducted from the employee's final wages.

At the time of discharge or resignation, the employer must notify the employee in writing by personal service (or as soon as practicable by personal service or via certified mail with return receipt requested) of the replacement cost of the property and must make a demand for the return of the property within a certain date, not to exceed 10 business days after the notification. If the employee objects to the cost in writing within the deadline, the employer must place the deducted amount into an interest bearing escrow account. If the employee does not bring a civil action or request equitable relief within three months, the employee forfeits the amount in escrow and it returns to the employer.

An employer must return the deducted wages to the employee if the employee returns the property in a suitable condition within the deadline. Uniforms returned within three years of their issuance are deemed to be acceptable in their current condition. Replacement tools, that is, equipment, other than uniforms, provided by the employer to the employee for use in the course of the employer's business to replace equipment provided by the employee that is lost, are deemed to be property of the employee and are not included within the law.

These requirements do not apply to employment relationships governed by a collective bargaining agreement.[331]

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

Orders of Support. When an employer receives a court-ordered notice to withhold income from an employee's wages for child support, the employer must implement the income withholding no later than the first pay period or first date for the payment of income which occurs after 14 days following the date the notice was mailed.[332] The employer must withhold as much of the employee's income as is necessary to comply with the order authorizing withholding, up to the maximum amount permitted under applicable law for both current support and for any arrearages which are due.[333] The maximum amount that may be withheld is as follows:

- 40% of the employee's weekly disposable earnings if the employee is supporting a spouse and other dependent children;
- 45% of weekly disposable earnings if the employee is supporting dependents and is at least 12 weeks late in making support payments;
- 50% of weekly disposable earnings if the employee is not supporting dependents; and
- 55% for arrearages in support.[334]

The employer may also deduct a fee of up to $1 for administrative costs incurred by the source of income for each withholding.[335] The employer must send the withheld amounts to the state child enforcement

[331] W. VA. CODE § 21-5-4.

[332] W. VA. CODE § 48-14-409.

[333] W. VA. CODE § 48-14-406.

[334] W. VA. CODE § 48-14-408.

[335] W. VA. CODE § 48-14-406.

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agency on the same day the employee is paid.[336] If the employee's employment terminates, the employer is required to notify the state child enforcement agency and provide the employee's last known address and identity of the new employer, if known.[337]

Employers are prohibited from discharging, refusing to employ, or taking disciplinary action against an employee because their income is subject to support withholding.[338]

Debt Collection. An employer must comply with a court-ordered execution of a creditor's judgment against an employee's wages.[339] Payments in satisfaction of the garnishment must be made once every 90 days.[340] The maximum amount that may be withheld in satisfaction of the garnishment is the lesser of:

- 20% of the employee's disposable earnings; or
- the amount by which the employee's earnings exceed 50 times the federal minimum wage in effect at the time of withholding.[341]

Employers are prohibited from discharging or taking other forms of reprisal against an employee because the employee's income is subject to garnishment.[342]

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

The West Virginia Division of Labor enforces the state's minimum wage, overtime, and wage payment laws, and has the power to investigate and resolve wage claims from employees asserting violations of these laws.[343] If the division issues a final order finding that the employer is in violation, the employer must pay unpaid wages as ordered.[344] The division may also institute a civil action on behalf of aggrieved employees.[345]

Alternatively, an employee may elect to file a civil action against an employer for unpaid minimum wages or overtime or for wage payment violations.[346] An action alleging unpaid minimum wages and/or overtime must be filed within two years of the alleged violation.[347] An action alleging wage payment violations must be filed within one year of the alleged violation.[348] In a minimum wage or overtime case, a prevailing employee may recover unpaid wages for up to two years prior to the date the lawsuit was filed, as well as

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[336] W. VA. CODE § 48-14-407.

[337] W. VA. CODE § 48-14-407.

[338] W. VA. CODE § 48-14-407.

[339] W. VA. CODE §§ 38-5A-3, 38-5A-4.

[340] W. VA. CODE § 38-5A-5.

[341] W. VA. CODE § 46A-2-130.

[342] W. VA. CODE § 46A-2-131.

[343] W. VA. CODE §§ 21-5-11, 21-5C-6; W. VA. CODE R. §§ 42-8-13, 42-5-10.

[344] W. VA. CODE R. §§ 42-8-14, 42-5-10.3.

[345] W. VA. CODE § 21-5C-6.

[346] W. VA. CODE §§ 21-5-12, 21-5C-8.

[347] W. VA. CODE § 21-5C-8.

[348] W. VA. CODE § 55-2-12. The West Virginia wage payment provisions afford a private right of action, but do not specify a statute of limitations. A general one-year statute of limitations applies.

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reasonable attorneys' fees and costs.[349] In a wage payment case, the employee may recover unpaid wages, reasonable attorneys' fees, and costs.[350]

Employers that violate the West Virginia wage and hour laws may also face criminal penalties. An employer that willfully violates the minimum wage and/or overtime provisions commits a misdemeanor, and upon conviction, will be fined up to $100.[351] Employers that violate any provision of the labor laws for which no penalty has been specifically provided—*e.g.*, payment of regular and final wages, record keeping, posting, wage notice, wage deductions—commit a misdemeanor. If convicted, violators will be fined between $10 and $50, imprisoned up to six months, or both.[352]

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).[353] 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.[354] 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.[355]

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

West Virginia 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. 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.

Guidance issued by the West Virginia Division of Labor expressly states that employers that do provide vacation and/or paid time off benefits "are responsible for establishing a written policy outlining how

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[349] W. VA. CODE § 21-5C-8.

[350] W. VA. CODE § 55-2-12.

[351] W. VA. CODE § 21-5C-7.

[352] W. VA. CODE § 21-3-14.

[353] 29 U.S.C. § 1002.

[354] 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/2004-10a; 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.

[355] 490 U.S. 107, 119 (1989).

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those benefits are earned and paid."[356] Moreover, employers must make available to employees, in writing or through a posted notice maintained in a place accessible to employees, employment practices and policies concerning vacation pay, sick leave, and comparable matters.[357] When an employer changes certain terms of employment, *e.g.*, fringe benefits, the employer must furnish a written notice to affected employees at least one full pay period before the change's effective date.[358]

In West Virginia, the definition of *wages* includes then-accrued fringe benefits capable of calculation and payable directly to an employee, provided that the law does not require fringe benefits to be calculated contrary to any agreement between an employer and employees which does not contradict the provisions of the wage payment laws.[359] *Fringe benefits* include any benefit provided an employee or group of employees by an employer, or which is required by law, and includes:

- regular vacation;
- graduated vacation;
- floating vacation;
- holidays;
- sick leave; and
- personal leave.[360]

Wages due or *wages earned* means and includes all wages and fringe benefits accrued, if any, that are owed to an employee for all hours the employee is permitted, required, or suffered to work, up to and including the twelfth day immediately preceding the employer's regular pay day.[361]

Accordingly, once an employee has earned vacation time pursuant to an employer's policy, the earned vacation is deemed vested, and a change to the employer's policy cannot require an employee to lose vested vacation benefits:

> Although the employer may change their policy at any time to reduce or stop existing benefits, they cannot take back those benefits already earned under the previous policy. For example, an employer has the option to discontinue providing vacation benefits; however, they must allow their employees to use the vacation hours they've already earned.[362]

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[356] West Virginia Div. of Labor, *Wage & Hour Frequently Asked Questions*, *available at* http://labor.wv.gov/Wage-Hour/Minimum_Wage/Pages/Minimum-Wage-and-Maximum-Hour-FAQs.aspx.

[357] W. VA. CODE § 21-5-9.

[358] W. VA. CODE R. § 42-5-4.2.

[359] W. VA. CODE § 21-5-1.

[360] W. VA. CODE § 21-5-1.

[361] W. VA. CODE § 21-5-1.

[362] West Virginia Div. of Labor, *Wage & Hour Frequently Asked Questions*, *available at* http://labor.wv.gov/Wage-Hour/Minimum_Wage/Pages/Minimum-Wage-and-Maximum-Hour-FAQs.aspx.

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Nonetheless, because the provisions of an employer's vacation policy control the terms and conditions of vacation benefits,[363] employers may implement limits on accrual and use of vacation time.[364] For example, an employer may elect to cap vacation accrual or require vacation to be used within a certain period of time via a "use-it-or-lose-it" clause. Further, an employer's vacation policy may require forfeiture of accrued, unused vacation time upon termination. If fringe benefits are provided and due under an agreement between an employee and employer but, per the agreement's terms, are to be paid at a future date or upon additional conditions which are ascertainable, they must be paid per the agreement's terms and are not subject to the final wages statute's timing requirements.[365]

Notably, the Virginia Supreme Court has held that employees may not be entitled to payout of accrued, unused paid time off upon termination even in the absence of an agreement to do so. The court held "there must be an 'express agreement' between employer and employee that the employee is entitled to payment of a fringe benefit upon separation from employment."[366] Accordingly, if there is no employer policy granting employees "payment for unused, accumulated sick leave upon termination from employment, the unused, accumulated sick leave, upon termination from employment, is not a vested, nonforfeitable fringe benefit under the West Virginia Wage Payment and Collection Act and is not payable to the employees."[367]

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*

West Virginia 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.

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[363] *Meadows v. Wal-Mart Stores, Inc.*, 530 S.E.2d 676, 690 (W. Va. 1999).

[364] *See, e.g.*, *Miller v. St. Joseph Recovery Ctr,* 874 S.E.2d 345 (W. Va. 2022) (reversing and remanding trial court orders to determine whether former employee qualified for payment of PTO when employment ended; handbook provided circumstances when payout may occur).

[365] W. VA. CODE § 21-5-4; *see also Meadows*, 530 S.E.2d at 690; *Gress v. Petersburg Foods, L.L.C.*, 592 S.E.2d 811 (W. Va. 2003).

[366] *Wolfe v. Adkins*, 725 S.E.2d 200, 207 (W. Va. 2011).

[367] 725 S.E.2d at 207.

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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.[368] ERISA does not preempt state laws that regulate insurance, so employer health benefit plans that provide benefits pursuant to an insurance contract are subject to state laws requiring coverage for domestic partners or civil union partners.

The federal Comprehensive Omnibus Budget Reconciliation Act (COBRA) requires group health plans to provide continuation coverage under the plan for a specified period of time to each qualified beneficiary who would lose coverage under the plan as a result of a qualifying event (*e.g.*, the employee's death or termination from employment).[369] However, under COBRA, only an employee and the employee's spouse and dependent children are considered "qualified beneficiaries."[370] 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*

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

3.9 Leaves of Absence

3.9(a) *Family & Medical Leave*

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

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

- for the birth or placement of a child for adoption or foster care;[371]
- to care for an immediate family member (spouse, child, or parent) with a serious health condition;[372]
- to take medical leave when the employee is unable to work because of a serious health condition;[373]

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[368] 29 U.S.C. § 1144.

[369] 29 U.S.C. § 1161.

[370] 29 U.S.C. § 1167(3).

[371] 29 C.F.R. §§ 825.102, 825.112, 825.113, 825.120, and 826.121.

[372] 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).

[373] 29 C.F.R. §§ 825.112, 825.113.

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- 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.[374] 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.[375] 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*

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

3.9(b) *Paid Sick Leave*

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

Federal law does not require private employers (that are not government contractors) to provide employees paid sick leave. Executive Order No. 13706 requires certain federal contractors and subcontractors to provide employees with a minimum of 56 hours of paid sick leave annually, to be accrued at a rate of at least one hour of paid sick leave for every 30 hours worked.[376] 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*

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

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.[377] Policies and practices involving

[374] 29 U.S.C. § 2611(4); 29 C.F.R. §§ 825.104 to 825.109.

[375] 29 U.S.C. § 2611(2); 29 C.F.R. §§ 825.110 to 825.111.

[376] 80 Fed. Reg. 54,697-54,700 (Sept. 10, 2015).

[377] 42 U.S.C. § 2000e(k); *see also* 29 C.F.R. § 1604.10.

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such matters as the commencement and duration of leave, the availability of extensions, reinstatement, and payment under any health or disability insurance or sick leave plan must be applied to disability due to pregnancy, childbirth, or related medical conditions on the same terms as they are applied to other disabilities.

An employer must allow individuals with physical limitations resulting from pregnancy to take leave on the same terms and conditions as others who are similar in their ability or inability to work. However, an employer may not compel an employee to take leave because the employee is pregnant, as long as the employee is able to perform their job. Moreover, an employer may not prohibit employees from returning to work for a set length of time after childbirth. Thus, employers must hold open a job for a pregnancy-related absence for the same length of time as jobs are held open for employees on sick or disability leave.

Family and Medical Leave Act (FMLA). A pregnant employee may take FMLA leave intermittently for prenatal examinations or for the employee's own serious health condition, such as severe morning sickness.[378] FMLA leave may also be used for the birth or placement of a child; however, the use of intermittent leave (as opposed to leave taken on an intermittent or reduced schedule) is subject to the employer's approval.

Americans with Disabilities Act (ADA). Pregnancy-related impairments may constitute disabilities for purposes of the ADA. The federal Equal Employment Opportunity Commission (EEOC) takes the position that leave is a reasonable accommodation for pregnancy-related impairments, and may be granted in addition to what an employer would normally provide under a sick leave policy for reasons related to the impairment.[379] 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*

As discussed in **3.11(c)(ii)**, West Virginia requires employers of 12 or more employees to make reasonable accommodations for applicants and employees who have limitations documented by a health care provider that stem from pregnancy, childbirth, or related medical conditions. Specific to leave, an employer is prohibited from requiring an employee to take leave under any leave law or policy if another reasonable accommodation can be provided.[380]

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[378] 29 C.F.R. § 825.202.

[379] 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.

[380] W. VA. CODE §§ 16B-17-3, 16B-19-2; W. VA. CODE R. § 77-10-3.

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3.9(d) *Adoptive Parents Leave*

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

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

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

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

3.9(e) *School Activities Leave*

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

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

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

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

3.9(f) *Blood, Organ, or Bone Marrow Donation Leave*

3.9(f)(i) *Federal Guidelines on Blood, Organ, or Bone Marrow Donation*

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

3.9(f)(ii) *State Guidelines on Blood, Organ, or Bone Marrow Donation*

West Virginia 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*

An employee who is entitled to vote and who does not have three or more hours off work to vote is eligible for up to three hours of paid time off to vote. An employer may not penalize an employee, nor take deductions from an employee's usual salary or wages, for taking such leave. However, if an employee with three or more hours off work to vote fails to vote during that time and requests and takes leave during work hours, time spent taking leave may be deducted from their wages or salary.

In essential government, health, hospital, transportation, and communications services, and in production, manufacturing, and processing works requiring continuity of operations, an employer may, after receiving a written demand for time off to vote, specify when leave may be taken, but leave must provide ample and convenient time and opportunity to vote.

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An employee must provide written notice to take time off to vote at least three days before election day.[381]

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

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

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

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

Public Office. An individual elected or appointed to a part-time public office is entitled to a leave of absence from the individual's private employment to perform the duties of the public office. The employer is prohibited from imposing any penalty on the employee for taking such leave. Leave may be unpaid. The law does not apply to employers with five or fewer full-time employees on the days or portion of any day during which the employee in question is engaged in performing the duties of the public office.[382]

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.[383] Employers are under no federal statutory obligation to pay employees while serving on a jury.

Employers may verify that an employee's request for civic duty is legally obligated by requiring the employee to produce a copy of the summons, subpoena, or other documentation. Also, an employer can set reasonable advance notice requirements for jury duty leave. Upon completion of jury duty, an employee is entitled to reinstatement.

An employer also may be required to grant leave to employees who are summoned to testify, to assist, or to participate in hearings conducted by federal administrative agencies, as required by a variety of additional federal statutes.[384] 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*

West Virginia employers may not discriminate against an employee by reducing compensation, terminating, or threatening to terminate the employee because the employee is absent from work due to a jury duty summons. However, an employer is not required to compensate an employee for time spent on jury service in the absence of a collective bargaining agreement or employment agreement requiring such payment.[385]

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[381] W. VA. CODE § 3-1-42.

[382] W. VA. CODE § 6-5-12.

[383] 28 U.S.C. § 1875.

[384] *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).

[385] W. VA. CODE §§ 52-3-1, 61-5-25a; 61 W. Va. Op. Att'y Gen. 104 (1986).

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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*

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

3.9(k) *Military-Related Leave*

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

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

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

Some states provide greater protections for employees with respect to military leave. USERRA, however, establishes a "floor" with respect to the rights and benefits an employer is required to provide to an employee to take leave, return from leave, and be free from discrimination. Any state law that seeks to supersede, nullify, or diminish these rights is void under USERRA.[386]

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

[386] 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)).

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member of the National Guard who faces recall to active duty if a qualifying exigency exists.[387] 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.388 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*

Members of the organized militia in the active service of West Virginia are entitled to the same reemployment rights under USERRA granted to members of the reserve components of the U.S. armed forces.[389] *Organized militia* means the West Virginia National Guard, the National Guard of another state, Army and Air National Guard, and the inactive National Guard, including a member, unit, component, element, headquarters, staff, or cadre thereof.[390]

Civil Air Patrol Leave. West Virginia employers of 15 or more employees must provide employees who are members of the Civil Air Patrol with a leave of absence:

- up to a maximum of 10 days per calendar year for training for an emergency mission of the West Virginia wing of the Civil Air Patrol; and
- up to a maximum of 30 days per calendar year for responding to an emergency mission of the West Virginia wing of the Civil Air Patrol.[391]

An employee is not required to exhaust all available leave or time off benefits before using Civil Air Patrol leave.[392]

To request Civil Air Patrol leave, the employee must give the employer:

- at least 14 days' notice of the intended dates of the beginning and end of leave together with an estimate of the amount of time needed to complete training; and
- as much notice as possible of the intended dates of the beginning and end of leave together with an estimate of the amount of time needed to complete an emergency mission.[393]

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[387] 29 C.F.R. § 825.126(a).

[388] 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).

[389] W. VA. CODE § 15-1F-8.

[390] W. VA. CODE § 15-1-1(b).

[391] W. VA. CODE §§ 15-1K-2, 15-1K-4, 15-1K-5.

[392] W. VA. CODE § 15-1K-4.

[393] W. VA. CODE § 15-1K-5.

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The employee must report necessary changes in the time required to complete the training or mission to the employer.[394]

The employer may require verification of the employee's eligibility for the Civil Air Patrol leave requested or taken. If the employee fails to provide the required verification, the employer may deny the Civil Air Patrol leave.[395]

Leave is unpaid. However, the statute does not prevent an employer from electing to provide paid leave.[396]

The use of Civil Air Patrol leave may not result in the loss of an employee benefit accrued before the first date of leave.[397] An employer and an employee may negotiate for the employer to pay for the benefits of the employee during the leave, but the employer is not required to continue or maintain employee benefits for any employee eligible for Civil Air Patrol leave if the employee would not be otherwise eligible for any benefit under the employer's policies or the content of any employee benefit plan that regulates eligibility for benefits.[398]

When the employee returns to work, the employer must restore the employee to the position s/he held when the leave began or to a position with equivalent seniority status, benefits, pay and conditions of employment. An employer may decline to restore an employee as required under the statute because of circumstances unrelated to the use of Civil Air Patrol leave.[399]

The statute also prohibits discrimination on the basis of an employee's Civil Air Patrol membership. Employers are prohibited from discriminating against or discharging an employee who has been employed for a minimum of 90 days and is a member of the Civil Air Patrol because of the employee's membership in the Civil Air Patrol.[400] An employer may not discharge, fine, suspend, expel, discipline or in any other manner discriminate against an employee who is a member of the Civil Air Patrol because that employee complies with the provisions of the statute or opposes a practice not in compliance with the statute.[401]

Other Military-Related Protections: Spousal Unemployment. An individual who has voluntarily quit employment to accompany a spouse serving in active military service who has been reassigned from one military assignment to another is not disqualified for benefits due to voluntarily quitting. The account of the employer of such an individual may not be charged.[402]

394 W. VA. CODE § 15-1K-5.

395 W. VA. CODE § 15-1K-5.

396 W. VA. CODE § 15-1K-5.

397 W. VA. CODE § 15-1K-7.

398 W. VA. CODE § 15-1K-6.

399 W. VA. CODE § 15-1K-6.

400 W. VA. CODE § 15-1K-4.

401 W. VA. CODE § 15-1K-8.

402 W. VA. CODE § 21A-6-3(6).

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3.9(l) *Other Leaves*

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

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

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

Volunteer Emergency Responder Leave. An employer may not terminate or otherwise discriminate against an employee who is a volunteer firefighter or member of a volunteer emergency medical services and who is late or absent from work to respond to an emergency. The leave may be unpaid, but the employee must provide upon request a statement from a supervisor of the time, date, and employee's response to the emergency.

An emergency includes going to, attending, or coming from:

- a fire call;
- a hazardous or toxic materials spill and cleanup;
- a motor vehicle accident; or
- any other situation to which their fire department or emergency medical service entity has been or later could be dispatched.[403]

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.[404] Employers are also required to comply with all applicable occupational safety and health standards.[405] 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

[403] W. VA. CODE §§ 21-5-17, 21-5-18.

[404] 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.

[405] 29 U.S.C. § 654(a)(2).

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comparable standards under the federal law.[406] Some state plans, however, are more comprehensive than the federal program or otherwise differ from the Fed-OSH Act.

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

West Virginia, under agreement with Fed-OSHA, operates its own state occupational safety and health program in accordance with section 18 of the Fed-OSH Act.[407] Thus, West Virginia 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. However, West Virginia's plan applies only to public-sector employees.[408] West Virginia does not have an approved state plan directed to private-sector employees. Accordingly, private employers must abide by the Fed-OSH Act.

3.10(b) *Cell Phone & Texting While Driving Prohibitions*

3.10(b)(i) *Federal Guidelines on Cell Phone & Texting While Driving*

Federal law does not address cell phone use or texting while driving.

3.10(b)(ii) *State Guidelines on Cell Phone & Texting While Driving*

In West Virginia, drivers are prohibited from using stand-alone electronic devices and wireless telecommunications devices. A *stand-alone electronic device* means portable device other than a wireless telecommunications device which stores audio or video data files to be retrieved on demand by a user. A *wireless telecommunications device* means any of the following:

- cellular phone;
- portable telephone;
- text messaging device;
- personal digital assistant;
- stand-alone computer, tablet, laptop, or notebook computer;
- global positioning receiver;
- device used to display a video, movie, broadcast television image, or visual image; or
- substantially similar communication device used to initiate or receive communication, information, or data.

It does not include a radio, citizens band radio, citizens band radio hybrid, commercial two-way radio communication device or its functional equivalent, subscription-based emergency communication device, prescribed medical device, amateur or ham radio device, or in-vehicle security, navigation, communications or remote diagnostics system, nor a variety of radios.

Under the law, an individual is prohibited from doing the following while operating a motor vehicle:

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[406] 29 U.S.C. § 667(c)(2).

[407] 29 U.S.C. § 667.

[408] W. VA. CODE § 21-3A-2.

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- holding or supporting, with any part of their body, a wireless communication device or stand-alone communication device;
- writing, sending, or reading any text-based communication, including, but not limited to, a text message, instant message, e-mail, or social media interaction on a wireless telecommunications device or stand-alone electronic device;
- making any communication, including a phone call, voice message, or one-way voice communication;
- engaging in any form of electronic data retrieval or electronic data communication on a wireless telecommunications device or stand-alone electronic device;
- manually entering letters, numbers, or symbols into any website, search engine, or application on a wireless telecommunications device or stand-alone electronic device;
- watching a video or movie on a wireless telecommunications device or standalone electronic device other than watching data related to the navigation of such vehicle;
- recording, posting, sending, or broadcasting video, including a video conference on a wireless telecommunications device or stand-alone electronic device; and
- playing any game on a wireless telecommunications device or standalone electronic device.

The law does not prohibit writing, sending, or reading any text-based communication, including text messages, instant messages, e-mails, or social media interactions, if it is done by a voice-operated or hands-free communication feature that is automatically converted by such device to be sent as a message in a written form. In addition, individuals may make communications, including a phone call, voice message, or one-way voice communication if they use a voice operated or hands-free communication feature or function. Additional exceptions apply.[409]

These prohibitions apply to employees driving for work purposes and could expose an employer to liability. Employers therefore should be cognizant of, and encourage compliance with, state law.

3.10(c) *Firearms in the Workplace*

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

Federal law does not address firearms in the workplace.

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

In West Virginia, an employer may prohibit open or concealed carry of any firearm or deadly weapon on property under the employer's control.[410] Nonetheless, an employer cannot prohibit any customer, employee, or invitee from possessing any legally owned firearm, when the firearm is:

- lawfully possessed;
- out of view;
- locked inside or locked to a motor vehicle in a parking lot; and

[409] W. VA. CODE § 17C-14-15.

[410] W. VA. CODE § 61-7-14(b).

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- when the customer, employee, or invitee is lawfully allowed to be present in that area.[411]

Locked inside or locked to means:

- the vehicle is locked;
- the firearm is in a locked trunk, glove box, or other interior compartment;
- the firearm is in a locked container securely fixed to the vehicle; or
- the firearm is secured and locked to the vehicle itself by the use of some form of attachment and lock.[412]

Motor vehicle does not include vehicles owned, rented, or leased by an employer and used by the employee in the course of employment.[413]

An employer cannot violate the privacy rights of a customer, employee, or invitee either by:

- verbal or written inquiry, regarding the presence or absence of a firearm locked inside or locked to a motor vehicle in a parking lot (note: this provision is repealed effective June 6, 2024)[414]; or
- conducting an actual search of a motor vehicle in a parking lot to ascertain the presence of a firearm within the vehicle.

However, on-duty law enforcement personnel may conduct a search of a motor vehicle in a parking lot to ascertain the presence of a firearm within the vehicle in accordance with statutory and constitutional protections.[415]

The law also prohibits retaliation for carrying or storing a firearm within the parameters of state law. An employer cannot remove a customer, employee, or invitee because the person stored a firearm inside a motor vehicle in a parking lot, nor may an employer terminate an employee or take other adverse employment action against an employee for such storage, except in cases of threats of unlawful action.[416]

An employer cannot condition employment upon either:

- the fact that an employee or prospective employee holds or does not hold a West Virginia firearm license; or
- an agreement with an employee or a prospective employee prohibiting that natural person from keeping a legal firearm locked inside or locked to a motor vehicle in a parking lot when the firearm is kept for lawful purposes.[417]

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411 W. VA. CODE § 61-7-14(d)(1).

412 W. VA. CODE § 61-7-14(a)(6).

413 W. VA. CODE § 61-7-14(a)(2).

414 W. VA. H.B. 5232 (2024).

415 W. VA. CODE § 61-7-14(d)(2).

416 W. VA. CODE § 61-7-14(d)(3).

417 W. VA. CODE § 61-7-14(d)(4).

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An employer cannot prohibit or attempt to prevent any customer, employee, or invitee from entering the parking lot of the place of business because the customer's, employee's, or invitee's motor vehicle contains a legal firearm being carried for lawful purposes that is out of view within the customer's, employee's, or invitee's motor vehicle.[418]

The law also creates immunity from liability related to the presence of firearms on a business premises. An employer has no duty of care relative to the above provisions related to firearms stored in vehicles in the employer's parking lot, and is not liable in a civil action for money damages based upon any actions or inactions taken in compliance with those provisions.[419]

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 may be prohibited in West Virginian factories, mercantile establishments, mills, or workshops where a no smoking sign is posted.[420] "No smoking" sign must be posted in order to prohibit smoking in such establishments.

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*

West Virginia is one of the few remaining states with a suitable seating law. In West Virginia, employers that employ females in any factory, mercantile establishment, mill, or workshop must provide a reasonable number of suitable seats for said employees to use. Employers must permit the use of seats when employees are not necessarily engaged in active duties of employment. Employers must permit the use of seats at all times when such use would not actually and necessarily interfere with the proper discharge of the employee's duties. If practicable, seats must be made permanent fixtures and may be so constructed or adjusted that, when not in use, they will not obstruct female employees when engaged in the performance of their duties.[421]

3.10(f) *Workplace Violence Protection Orders*

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

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

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[418] W. VA. CODE § 61-7-14(d)(5).

[419] W. VA. CODE § 61-7-14(e).

[420] W. VA. CODE § 21-3-8.

[421] W. VA. CODE § 21-3-11.

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

West Virginia 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");[422] (2) the Americans with Disabilities Act (ADA);[423] (3) the Age Discrimination in Employment Act (ADEA);[424] (4) the Equal Pay Act;[425] (5) the Genetic Information Nondiscrimination Act of 2009 (GINA);[426] (6) the Civil Rights Acts of 1866 and 1871;[427] 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);[428]
- 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.[429] Employees must first exhaust their administrative remedies by filing a

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[422] 42 U.S.C. §§ 2000e *et seq.* Title VII applies to employers with 15 or more employees. 42 U.S.C. § 2000e(b).

[423] 42 U.S.C. §§ 12101 *et seq.* The ADA applies to employers with 15 or more employees. 42 U.S.C. § 12111(5).

[424] 29 U.S.C. §§ 621 *et seq*. The ADEA applies to employers with 20 or more employees. 29 U.S.C. § 630.

[425] 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.

[426] 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)).

[427] 42 U.S.C. §§ 1981, 1983.

[428] 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.

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

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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.[430]

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

West Virginia law prohibits an employer from discriminating against an individual on the basis of:

- race;
- religion;
- color;
- national origin;
- ancestry;
- sex;
- age (40+);
- blindness;
- disability;
- familial status;[431] and
- pregnancy.[432]

Employers with 12 or more persons within the state for 20 or more calendar weeks in the calendar year in which the act of discrimination allegedly took place or in the preceding calendar year covered under the law. However, private clubs are not included.[433]

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

West Virginia's Human Rights Commission enforces the state's discrimination laws. Employees have 365 days from the date of the discriminatory act to file a verified complaint with the Commission.[434] The respondent has 10 days to reply to the complaint.[435] The Commission will then investigate the complaint. If it determines that no probable cause exists, it will notify the complainant, who may then request to meet with the Commission to show probable cause. If the Commission determines that probable cause exists, it will confer with the parties to try to eliminate the discriminatory practice through conference, conciliation, and persuasion. If the Commission is not satisfied that the practice has been eliminated, it can require the employer to appear at a hearing.[436] At the hearing, the Commission may order the

[430] 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.

[431] To be codified at W. VA. CODE §§ 16B-17-9; 16B-17-2, 16B-17-8.

[432] To be codified at W. VA. CODE §§ 16B-19-2*et seq*.

[433] W. VA. CODE § 16B-17-3(d).

[434] W. VA. CODE § 16B-17-10; W. VA. CODE R. § 77-2-3.

[435] W. VA. CODE R. § 77-2-4.

[436] W. VA. CODE R. § 77-2-5.

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employer to perform a variety of remedies, or may dismiss the complaint.[437] Either party may appeal the Commission's findings.[438]

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

Tobacco Products. An employer may not discharge or refuse to hire an employee, or otherwise discriminate against an employee solely because the individual uses tobacco products off the employer's premises during nonworking hours. Employers may offer smokers and other tobacco users programs free of charge or at reduced rates, which encourage the reduction or cessation of smoking or tobacco use.

This provision does not prohibit an employer from offering a health, disability, or life insurance policy which makes distinctions between employees as to type or price of coverage based upon the employee's use of tobacco products. However, any differential premium rates charged to employees must reflect the differential cost to the employer. Moreover, the employer must provide employees with a statement stating the differential rates used by its insurance carriers.[439]

All employers are covered under the statute except nonprofit organizations that discourage the use of one or more tobacco products by the public as one of their primary purposes or objectives.[440]

An employer may not discharge, fine, suspend, expel, discipline or in any other manner discriminate against a member of the Civil Air Patrol because of their compliance with the provisions of the act or opposes a practice not in compliance with the act.[441]

Protections for Vaccine Exemptions. West Virginia law protects employees and prospective employees from discrimination in employment for exercising either a medical or religious exemption to a COVID-19 vaccine mandate. The law is applicable to any business entity engaged in business in West Virginia.[442]

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

In addition to the federal and state laws, employers with operations in Charleston are subject to the local fair employment practices ordinance.

Charleston. Protected classifications include: race, including discrimination based on hair texture or protective hairstyle; religion; color; national origin; ancestry; sex; age; blindness; handicap; familial status; and sexual orientation.[443] The antidiscrimination protections apply to employers with12 or more employees within the city.[444] Any individual that has been aggrieved by an alleged unlawful discriminatory practice can file a complaint with the commission within 365 days after the alleged act of discrimination.[445]

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[437] W. VA. CODE § 16B-17-10; W. VA. CODE R. § 77-2-9.

[438] W. VA. CODE § 16B-17-8; W. VA. CODE R. § 77-2-11.

[439] W. VA. CODE § 21-3-19.

[440] W. VA. CODE § 21-3-19.

[441] W. VA. CODE § 15-1k-8.

[442] W. VA. CODE § 16-3-4b.

[443] CHARLESTON, W.VA., MUN. CODE § 62-81.

[444] CHARLESTON, W.VA., MUN. CODE § 62-3.

[445] CHARLESTON, W.VA., MUN. CODE § 62-82.

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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."[446] 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.[447]

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

West Virginia law prohibits employers from discriminating in any manner between the sexes in the payment of wages for comparable work which requires comparable skills or paying employees of one sex at a lesser rate than employees of the opposite sex for comparable work which requires comparable skills.[448] However, differences in pay are permitted where the difference is based on: (1) a seniority or merit system that does not discriminate on the basis of sex; or (2) a differential based on good faith factors other than sex. An employer cannot reduce an employee's wages in order to eliminate an existing, past, or future wage discrimination or to effectuate wage equalization.

Notably, this law does not apply to employers whose operations are subject to any federal law related to equal wages for equal work, regardless of sex.

An employee alleging a violation may file a civil action within one year of the alleged violation.[449]

3.11(c) *Pregnancy Accommodation*

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

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

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[446] 29 U.S.C. § 206(d)(1).

[447] 42 U.S.C. § 2000e-5.

[448] W. VA. CODE §§ 21-5B-1, 21-5B-3.

[449] W. VA. CODE §§ 21-5B-4, 55-2-12.

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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.[450]

A *reasonable accommodation* is any change or adjustment to a job, work environment, or the way things are usually done that would allow an individual with a disability to apply for a job, perform job functions, or enjoy equal access to benefits available to other employees. Reasonable accommodation includes:

- modifications to the job application process that allow a qualified applicant with a known limitation under the PWFA to be considered for the position;
- modifications to the work environment, or to the circumstances under which the position is customarily performed;
- modifications that enable an employee to enjoy equal benefits and privileges of employment as are enjoyed by other similarly situated employees without known limitations; or
- temporary suspension of an employee's essential job function(s).[451]

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.[452] 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.[453] 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

[450] 42 U.S.C. § 2000gg-1. The regulations provide definitions of *pregnancy*, *childbirth*, and *related medical conditions*. 29 C.F.R. § 1636.3.

[451] 29 C.F.R. § 1636.3.

[452] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1636.3.

[453] 29 C.F.R. § 1636.3.

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perform (or apply to perform) an essential function of the position, the employee will not be considered "qualified."[454]

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

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

- the nature and net cost of the accommodation;
- the overall financial resources of the employer;
- the number of employees employed by the employer;
- the number, type, and location of the employer's facilities; and
- the employer's operations, including:
  - the composition, structure, and functions of the workforce; and
  - the geographic separateness and administrative or fiscal relationship of the facility where the accommodation will be provided.[455]

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.[456]

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**.

[454] 29 C.F.R. § 1636.4.

[455] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1630.2(p).

[456] 29 C.F.R. § 1636.3.

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

Under West Virginia's Pregnant Workers Fairness Act, employers of 12 or more employees must make reasonable accommodations for applicants and employees who have limitations documented by a health care provider that stem from pregnancy, childbirth, or related medical conditions. *Reasonable accommodations* include:

- making facilities readily accessible to and usable by employees;
- job restructuring;
- part-time or modified work schedules;
- reassignment to a vacant position;
- modified work policies or procedures;
- bathroom breaks;
- breaks for increased water intake;
- periodic rest;
- assistance with manual labor;
- providing time off for prenatal appointments;
- temporary transfer to a less strenuous or hazardous position;
- allowing for more time or more frequent eating; and
- allowing time for taking prescribed medications.[457]

An employer must provide reasonable accommodation unless the accommodation would impose an undue hardship on the employer's business operations.

The applicant or employee must provide written documentation from a health care provider that specifies the applicant's or employee's limitations and suggesting what accommodations would address those limitations.[458] Under the Act, an employer cannot:

- deny employment opportunities to an applicant or employee, if the denial is based on the employer's refusal to make reasonable accommodations to the known limitations related to an employee's pregnancy, childbirth, or related medical conditions;
- require an applicant or employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation that she chooses not to accept; or
- require an employee to take leave under any leave law or policy of the covered entity if another reasonable accommodation can be provided.[459]

[457] W. VA. CODE R. § 77-10-3.1.

[458] W. VA. CODE § 16B-19-2.

[459] W. VA. CODE § 16B-19-2.

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3.11(d) *Harassment Prevention Training & Education Requirements*

3.11(d)(i) *Federal Guidelines on Antiharassment Training*

While not expressly mandated by federal statute or regulation, training on equal employment opportunity topics—*i.e.*, discrimination, harassment, and retaliation—has become *de facto* mandatory for employers.[460] Multiple decisions of the U.S. Supreme Court[461] 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.[462] 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*

While there are no state law requirements, West Virginia law encourages employers to take all steps necessary to prevent sexual harassment from occurring by taking preventative measures such as (but not limited to):

- expressing strong disapproval of sexual harassment;
- developing and implementing appropriate sanctions;
- informing employees of their right to be free from harassment and the appropriate steps to take if harassment occurs; and
- developing methods to sensitize all employees regarding appropriate behavior in the workplace.[463]

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

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

[461] *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).

[462] 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.

[463] W. VA. CODE R. § 77-4-3.5.

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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*

West Virginia does not have a general whistleblower law providing protections for private-sector whistleblowers, although there are whistleblower protections for public employees.[464]

Like many states, West Virginia law makes it unlawful for an employer to discriminate against any individual because the individual has opposed any practices or acts or has filed a complaint, testified, or assisted in proceedings under the state's fair employment practices law.[465] Likewise, West Virginia law protects employees that make a complaint to an employer or to the Commissioner of Labor, institute a civil action, or testify in a proceeding under the state's minimum wage and maximum hours laws.[466]

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)[467] and the Railway Labor Act (RLA)[468] are the two main federal laws governing employer relations with unions in the private sector. The NLRA regulates labor relations for virtually all private-sector employers and employees, other than rail and air carriers and certain enterprises owned or controlled by such carriers, which are covered by the RLA. The NLRA's main purpose is to: (1) protect employees' right to engage in or refrain from *concerted activity* (*i.e.*, group activities attempting to improve working conditions) through representation by labor unions; and (2) regulate the collective bargaining process by which employers and unions negotiate the terms and conditions of union members' employment. The National Labor Relations Board (NLRB or "Board") enforces the NLRA and is responsible for conducting union elections and enforcing the NLRA's prohibitions against "unfair" conduct by employers and unions (referred to as *unfair labor practices*). For more information on union organizing and collective bargaining rights under the NLRA, see LITTLER ON UNION ORGANIZING and LITTLER ON COLLECTIVE BARGAINING.

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

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

West Virginia is a right-to-work state. Employees may not be required to become or remain a member of a union, pay dues of any kind, or pay any third party or charity in lieu of those payments.[469]

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[464] W. VA. CODE § 6C-2-2.

[465] W. VA. CODE § 16B-17-9.

[466] W. VA. CODE § 21-5C-7.

[467] 29 U.S.C. §§ 151 to 169.

[468] 45 U.S.C. §§ 151 *et seq*.

[469] W. VA. CODE §§ 21-1A-3, 21-1A-4, and 21-5G-1 *et seq.*

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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).[470] 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.[471] 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*

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

4.1(c) *State Mass Layoff Notification Requirements*

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

4.2 Documentation to Provide When Employment Ends

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

Table 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.[472] 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

[470] 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.

[471] 20 C.F.R. §§ 639.4, 639.6.

[472] 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.

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Table 10. Federal Documents to Provide at End of Employment	
Category	**Notes**
	• the first date on which the administrator is required to furnish the covered employee, spouse, or dependent child of such employee notice of a qualified beneficiary's right to elect continuation coverage.
Retirement Benefits	The Internal Revenue Service requires the administrator of a retirement plan to provide notice to terminating employees within certain time frames that describe their retirement benefits and the procedures necessary to obtain them.[473]

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.	West Virginia state law requires employers to provide post-termination continued coverage for up to 18 months. However, the law does not require such employers to provide notification of continued coverage to an employee upon termination.[474]
Unemployment Notice	**Generally.** West Virginia requires that employees be provided notice about unemployment benefits when employment ends. Additionally, the employer generally must post and maintain notice (Form WVUC-B-59) for employees about unemployment compensation, which describes eligibility requirements, includes a benefits rate table, and indicates how to apply for benefits.[475]
Wage Payment: Notice of Employer's Authorized Representative	Upon separation or with the issuance of the final paycheck, the employer must notify the employee in writing who the employer's authorized representative is and where to send a written demand for underpayment or nonpayment of wages and fringe benefits due upon separation, by both email and regular mail.[476]

[473] 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.

[474] W. VA. CODE § 33-16-3(e); W. VA. CODE R. § 114-93-3.

[475] W. VA. CODE § 21A-7-2. This poster is available at https://workforcewv.org/wp-content/uploads/2024/07/UC-Benefit-Rate-Poster-Updated-7.23.pdf.

[476] W. VA. CODE § 21-5-4a.

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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*

West Virginia law presumes that any employer that discloses job-related information that may be reasonably considered to be adverse about a former or current employee to a prospective employer is acting in good faith. *Job-related information* means information about a person's education, training, experience, qualifications, conduct, and job performance offered to provide criteria to evaluate the person's suitability for employment.[477]

Employers are therefore immune from civil liability for the disclosure or consequences of the disclosure. Employers must provide any such disclosure in writing and must give a copy of the disclosure to the current or former employee at the time of disclosure.[478]

[477] W. VA. CODE § 55-7-18a.

[478] W. VA. CODE § 55-7-18a.

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