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What Every Business Manager
and HR Professional Should Know About ...

Federal Labor and Employment Laws

A complete guide written in plain English
that explains how the laws affect your business

7th
Edition



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USA

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Getting the Most Out of This Book

We've provided several ways for you to access the material in this book. A detailed Table of Contents that starts on the next page. There is an Index at the back. Along the way, you'll find many tables, checklists, FAQs, and practical tips. To help you find these items quickly, we've set them off in boxes and tagged them with the following icons:



– Checklists to help you keep track of important items.



– Noteworthy Items with important rules, tips, or guidelines.



– “Dos and Don'ts” listing actions to take and those to avoid.



– Frequently Asked Questions ... *and Answers!*

Online Resources

For the latest news, updates, links, and lively discussion, visit us on our Blog:

www.LaborAndEmploymentLawBlog.com

We're planning to provide a variety of free online resources that will be accessible through the blog. The publisher will host the blog so that the authors, teachers, students, managers, and professionals can connect with each other and share ideas and information.

We invite you to ask questions, challenge us, share your insights, examples, and “war stories” – all of which will make this book more valuable to you.

We'll do our best to keep up with you, offer answers to your questions, find new material to post, and connect you with others in the field.

The blog will grow and evolve (as blogs tend to do), so we suggest you come back regularly. Or, better yet, subscribe to the free email or RSS feeds.

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Introduction

In 1978 Mr. Sheldon London, an attorney in Washington, D.C., wrote a book entitled *How To Comply With Federal Employee Laws*. He created it primarily for his clients to help them better understand the complex issues that surround federal employment laws. The guidebook was to become a national best seller in the business marketplace.

I met Shelly some 19 years later. When the human resource manager in our publishing company acquired a later edition of the book, she found it to be invaluable in helping her establish company policies and best practices programs for our employees. Prompted by her enthusiasm, we thought it might be something that we could publish and market nationally. We met with Shelly who enthusiastically embraced our idea. In 1998, a new edition of *How To Comply With Federal Employee Laws* was released.

The book was highly acclaimed. Over the next two and one-half years, over 85 national and regional professional business associations would endorse and promote the guidebook to its memberships. The Society for Human Resource Management listed it as one of its “best sellers” for three consecutive years. Fifty professors at 45 prominent business schools throughout the country incorporated the guidebook into their human resource management curricula, using it as a course reference for employment laws. Business managers and human resource professionals from both large and small companies throughout the country discovered the reference book they needed. In 1999, the prestigious *Washington Kiplinger Letter* proclaimed it to be an outstanding employment law reference for business.

I was given the task of directing the national marketing for the 1998 edition. Perhaps two stories best describe my experience.

One afternoon I received a call from the HR Director of a heating and cooling company in Ohio. His company had just acquired 11 small companies, and it was his job to consolidate the employment programs and culture of each subsidiary into one homogeneous organization. “I have just visited your Website,” he said. “I wish I had found it earlier. It would have saved me over four hours of searching the Internet to find an employment law reference book I could use. How quickly can you send me a copy of *How To Comply With Federal Employee Laws*?” One week later he called again and ordered 11 more copies.

At a national tradeshow, a number of people stopped by our booth to look at our new publication. As they were reviewing the book, a bystander proclaimed, “I have a copy of that book, and it is the best book ever written about federal employment laws.” I said nothing, because there was nothing more to say.

While working as the Marketing Advisor for Windsor Media Enterprises (WMEBooks), I had the opportunity to meet Mr. Louis DiLorenzo during the summer of 2005. An extremely talented lawyer, counselor and public speaker, Lou directs a 53-person employment law division of the New York law firm, Bond Schoeneck & King.

In early 2006, I posed the idea to both Shelly and Lou about co-authoring a new edition of Shelly's book. Within a month, the three of us met to discuss the possibilities. The result is what you now hold in your hands, ***What Every Business Manager And HR Professional Needs To Know About... Federal Labor And Employment Laws***. Keeping that earlier experience in mind, we are confident that readers will consider this edition "the best guidebook ever written on federal employment laws."

You will find this guide easy to read and easy to understand. The authors have included checklists to help you organize your programs and have provided numerous questions and answers that offer sound guidance. It's not meant to replace a lawyer, but rather to provide you with information to help you better interact with your outside counsel and build a positive work environment.

Two friends of mine, Mr. Shelly London and Mr. Lou DiLorenzo are businessmen that just happen to be attorneys. They have co-authored an extraordinary business reference that will help thousands of businesses and organizations in the months to come.

George Kittredge, Marketing Advisor
Windsor Media Enterprises, LLC (WMEBooks)
Rochester, NY
July 2006

Fair Labor Standards Act– Minimum Wage/Overtime

2

Legislative Purpose

In 1938, Congress enacted the Fair Labor Standards Act (FLSA). For the first time, it was the law of the land to permit Congress to regulate the minimum standards for hours and wages of covered employees. The legislative history reveals a congressional intent to lessen the historic high unemployment of the depression years by shortening workweek hours and spreading available work among a greater number of workers. The principle was simple: a fair day's pay for a fair day's work. Congress wanted to discourage, if not eliminate, substandard wages by establishing a minimum wage and a premium for overtime.

In its nearly seven-decade existence, the FLSA has been amended numerous times by Congress, reflecting ever-expanding coverage of the work force to the extent it is estimated that well over 90 percent of the full-time and part-time nonsupervisory workers in the private sector are now covered by the law. The Wage and Hour Division, an integral part of the Employment Standards Administration of the U.S. Department of Labor, is responsible for the administration of the FLSA.

Coverage

The FLSA defines employee coverage by reference to three basic tests. Meeting any one of the following tests is sufficient for coverage.

1. Any employee engaged in interstate or foreign commerce is covered.
2. Any employee producing goods for interstate commerce is covered. By later amendment, the law specifically includes those nonproduction workers whose activities are closely related or directly essential to production (e.g., maintenance, custodial, and clerical workers). Thus, FLSA coverage would ensue in virtually all interstate manufacturing businesses, regardless of size or sales volume.
3. Any employee of an "enterprise," which is defined as an entity with a common business purpose, engaged in commerce or in the production of goods, or which has employees handling, selling, or otherwise working on goods or materials, is covered so long as the enterprise has annual gross sales of \$500,000. [Note that tests (1) and (2) predicate coverage on the activities of the individual employee, but in test (3) employer coverage of the employees is determined by what the enterprise does; once an enterprise is covered, all employees, regardless of position, are subject to the FLSA.]

It is this "enterprise" standard that is used to cover retail and wholesale businesses. Additionally, employees of hospitals, schools, and institutional care facilities are considered to be employees of an enterprise, for which there is no sales dollar volume threshold for coverage.

Some FLSA “Coverage” Issues and Answers

1. A domestic service worker (any employee in a private home) is covered if that employee receives wages from one employer of \$50 or more in a calendar quarter, or if that employee is employed for more than eight aggregate hours in a workweek in one or more households.
2. Both casual babysitting (less than 20 hours per week) and companionship services (not including the services of trained personnel like registered nurses) in the case of the aged or infirm are not covered.
3. To determine the applicability of the \$500,000 sales volume test for a retail business, the gross receipts from all sales (excluding excise and sales tax) during a 12-month period immediately preceding the calendar quarter in question will be counted. At the beginning of each calendar quarter, volume for the preceding 12 months is determined. This is known as the “rolling quarter” method. When the statutory dollar volume levels are met, enterprise coverage applies from that time on or until such time as the dollar volume tests are not met. A new business would project annual sales based on its first quarter sales to determine whether it is covered.
4. The “enterprise” test includes all of the related activities of the employer achieved by unified operations or common control for a common business purpose. If this relationship exists, then all facets of an employer’s business would be taken in aggregate to determine if the threshold dollar sales volume has been reached.
5. While courts have liberally interpreted the coverage provisions of the FLSA, the burden of proving that coverage is placed on the employee in wage law suits

and on the Secretary of Labor in wage recovery litigation.

6. Where there is a bona fide desire by individuals to volunteer and donate their time for public, charitable, religious, or humanitarian service without the expectation of compensation, there would not be an employment relationship.
7. A true, unincorporated family business which employs only family members (parent, spouse, child, or other member of the immediate family) is not a covered enterprise.



Federal Minimum Wage Rate Changes

(1938-2006)

1938	\$0.25/Hour
1939	\$0.30/Hour
1945	\$0.45/Hour
1950	\$0.75/Hour
1956	\$1.00/Hour
1961	\$1.15/Hour
1962	\$1.25/Hour
1967	\$1.40/Hour
1968	\$1.60/Hour
1974	\$2.00/Hour
1975	\$2.10/Hour
1976	\$2.30/Hour
1978	\$2.65/Hour
1979	\$2.90/Hour
1980	\$3.10/Hour
1981	\$3.35/Hour
1990	\$3.80/Hour
1991	\$4.25/Hour
1996	\$4.75/Hour
1997	\$5.15/Hour*

*Note: the scope of this book is limited to federal law. Federal requirements are considered a floor. If state laws impose greater requirements, the more stringent state law requirements must be met. Therefore, a review of applicable state minimum wage, overtime, child labor and other wage and hour requirements is essential.

The *U.S. Dept. of Labor in the 21st Century* website provides links to current state law rates at:
www.dol.gov/dol/topic/wages/minimumwage.htm

Opportunity Wage

The 1996 amendments to the Fair Labor Standards Act provided for an “Opportunity Wage.” Employees under 20 years of age may be paid \$4.25 per hour during their first 90 consecutive calendar days of employment as long as their work does not displace other workers. An employer is subject to sanctions if an opportunity wage is used to displace employees or otherwise reduce hours, wages or employment benefits. After 90 consecutive days of employment or the employee reaches 20 years of age, whichever comes first, the employee must receive a minimum wage of \$5.15 per hour.



What the FLSA Does Not Regulate

While the Fair Labor Standards Act does set basic minimum wage and overtime pay standards and regulates the employment of minors, there are a number of employment practices which the Act does not regulate. For example, the Act does not require:

- vacation, holiday, severance, or sick pay;
- meal or rest periods, holidays off, or vacations;
- premium pay for weekend or holiday work;
- pay raises or fringe benefits;
- a discharge notice, reason for discharge, or immediate payment of final wages to terminated employees; and
- any limit on the number of hours of work for persons 16 years of age and over.

Hours Worked

The original FLSA contained no definition of “working time” for the purpose of computing the minimum wage. The U.S. Supreme Court has set down a rule to the effect that working hours include all time during which an employee is engaged in physical or mental effort controlled

or required by his or her employer and pursued primarily for the benefit of the employer and the business. If the employer “suffers or permits” the employee to perform services on its behalf, the time is considered “working time”. The Supreme Court also ruled that any time an employee spent at a plant, after punching in, to get to the job and to get ready, was a part of the hours worked, but time which the employee merely spent waiting because he or she arrived early was not compensable.

After these two decisions, many workers pressed to recover overtime pay to cover the time spent from the moment one arrived on the plant premises to the time one left. Known as the “portal-to-portal” pay litigation, the intense controversy led to congressional enactment of the Portal-to-Portal Act (1947). This law, in part, was designed to prevent legal actions by employees to recover pay for non-productive time. The law established the guideposts to determine what constitutes the “workday.” This Act confined the employer’s obligation to pay wages for the employee’s principal activity, unless there is a contract, custom, or practice requiring pay for these peripheral activities. For example, the time employees spent “donning and doffing” safety equipment and clothing was considered working time. In addition, the Supreme Court recently ruled that where workers have to don and doff protective gear in order to do their work, the time that they have to spend walking from the changing room to their work stations is compensable work.

A 1996 amendment to the Portal-to-Portal Act allows employers and employees to agree on the use of employer-provided vehicles to commute to and from work at the end of the workday, without the commuting time being treated as hours of work.

In general, all the time an employee is actually at work, or required to be on duty and not use the time for his or her own purposes, is compensable. A Circuit Court of Appeals has ruled that the

Department of Labor’s regulation requiring compensation for meal breaks “during which a worker performs activities predominantly for the benefit of the employer” is valid even when the workers provide a passive service (e.g., security). In the court’s view, being present and watchful is an “indispensable” service to the employer. Travel away from home is clearly work time when it cuts across the employee’s work day. The employee is simply substituting travel for other duties. The table below illustrates how Department of Labor interpretations, court rulings, and legislative history have determined the status of some common workplace activities and whether they count as “hours worked.” However, as with any generalization, there are exceptions. The determinations represent the prevailing rule.

Defining the “Workweek”

The workweek – seven consecutive, regular, recurring, 24-hour periods totaling 168 hours – is the unit of time used for determining compliance with the minimum wage. The computation and recording of hours worked is to be done on a workweek basis, and the employee must be paid, free and clear, compensation equal to at least the minimum wage for each hour worked in the workweek. It may begin on any day of the week and any hour of the day established by the employer. As long as the average hourly earnings for non-overtime hours in each workweek equal the minimum wage, the requirement is considered satisfied for that week. Average hourly earnings above the minimum in one workweek may not be used to offset earnings below the minimum wage in another workweek.

An employer can change the payday of its employees so long as the change is intended to be permanent, is done for legitimate business purposes, does not evade minimum wage and overtime requirements, and does not cause an unreasonable delay in payment of wages.



Official Rulings on “Hours Worked” for Compensation

Activity	Compensable Hours Worked	Noncompensable Hours Worked
Washing up after work		✓
Changing clothes		✓
Coffee break (less than 20 minutes)	✓	
Putting on Safety Equipment	✓	
Meal period*		✓
Staff training/meeting	✓	
Voting time		✓

*Any time the employee is required or permitted to perform any duties while eating, the time will be compensable.

Minimum Wage Compliance

Let’s examine some typical wage computations in which the minimum wage payment is the issue:

1. In the case of an employee hired on an hourly rate basis, it is required that the rate equal the statutory minimum.
2. In the case of a commission employee (e.g., commissions are the sole basis of compensation), the individual’s earnings must be at least equal to the minimum wage rate for each of the hours worked, exclusive of overtime.
3. In the case of an employee who is paid an hourly rate for a portion of the workweek and a commission for the balance, earnings at the hourly rate which exceed the minimum may not be applied to make up differences

in the commission earnings during the other part of the week.

4. In the case of a piece-rate worker, earnings must equal at least the legal hourly minimum over the course of the workweek.

Deductions From Wages

While it is true the FLSA provides for the “free and clear” payment of the minimum wage for each workweek in cash or its equivalent each payday, the law does recognize one specific exception. Deductions are permitted for “reasonable cost” or “fair value” of “board, lodging, or other facilities.” The FLSA has been interpreted to mean that “reasonable costs” of furnishing board, lodging, or other facilities may not include any profit to the employer.

Compensation for overtime hours is disregarded in determining whether the deductions made by the employer are legal. Thus, deductions for “board, lodging, or other facilities” are legal, and so long as the cash wage and the “reasonable cost” equal the minimum wage, there is no violation. Certain taxes assessed against the employee and collected by means of a wage deduction are not “wages” under FLSA. Included in this category are an employee’s contribution to Social Security (FICA), federal and state unemployment insurance, and other state and local taxes. An employee may authorize the employer to make deductions to turn over to some third party; when voluntarily assigned, these deductions are not violations of the law (e.g., union dues, purchase of savings bonds, and insurance premiums).

Deductions from an employee’s wages for cash shortages are considered illegal to the extent that they reduce the wages of the employees below the required minimum or reduce the overtime compensation due under FLSA. There has been a court ruling involving deliberately misappropriated monies in the case

of repayment of these funds by an employee. There is no violation of FLSA rules as long as the criminal action has been determined in court.¹

In circumstances where an employee must wear a uniform, the financial burden of furnishing and maintaining (including laundry and repairing) the uniform may not be imposed upon the employee if the result would be to lower wages to below the minimum wage or overtime compensation required by FLSA. In cases where the employer merely prescribes a general type of ordinary basic clothing and permits some diversity in details of dress, the clothing is not considered a uniform. The Wage and Hour Division has ruled that when an employee is required to purchase a uniform, that individual must be reimbursed for the cost of the uniform to the extent that the expense cuts into the required minimum wage or overtime compensation. This reimbursement must be made promptly on the next immediate payday, and may not be spread over the life of the uniform.

Tip Credit

The cash wages paid a “tipped” employee by an employer must be at least \$2.13 per hour, if the employer claims a tip credit against one’s minimum wage obligation. The employer, however, would be required to make up any difference between the minimum wage and the combination of \$2.13 plus tips to ensure that each employee makes at least the minimum wage.

A “tipped employee” is any employee engaged in an occupation in which he or she customarily and regularly receives more than \$30 a month

1. There are a number of state labor statutes prohibiting any deduction from an employee’s paycheck unless authorized in writing and for the benefit of the employee.

in tips. The law requires that (1) the employer must inform tipped employees about this tip credit allowance before the credit is utilized; (2) the employees must be allowed to retain all tips (individually or through a pooling arrangement), and this is so regardless of whether the employer elects to take a credit for tips received; and (3) the employer must be able to show that the employee receives at least the minimum wage in the combination of direct wages and the tip credit. An employer may not take a greater tip credit in overtime hours than in straight time hours.

A compulsory charge for service – for example, 15 percent of the bill – is not a tip. Such charges are part of the employer’s gross receipts, and where service charges are imposed and the employees receive no tips, the employer must pay the entire minimum wage and overtime as required by the Act.

Learners, Apprentices, and Handicapped Workers

The FLSA provides discretion to the Wage and Hour Administration to permit the employment of learners, apprentices, and handicapped workers at hourly wages lower than the prevailing minimum wage. There is no exemption from the overtime pay provision for these workers.

The Administration must issue a certificate to the employer before that employer can make use of the exemption. An “apprentice” is a person at least sixteen years of age who is employed to learn a skilled trade through a registered apprenticeship program. Training is provided through structured on-the-job training combined with supplemental related theoretical and technical instruction.

A “handicapped worker” is one whose earning capacity is impaired by age, physical or mental deficiency, or injury. The learning period

will normally not exceed 240 hours for any qualifying occupation. The subminimum wage rate is 95 percent of the prevailing minimum wage. These workers may be engaged by commercial establishments or by “sheltered workshops.” The FLSA allows for a subminimum no less than 50 percent of the minimum wage, but the Act requires an employer to pay wages commensurate with those paid nonhandicapped workers in the area, taking into consideration the type, quality, and quantity of work produced.

The “learner” is a beginner at a skilled occupation. In order for a certificate to be issued, there must be a showing that the lower wage is necessary to prevent the loss of employment opportunities. It was not the purpose of the FLSA to make the employment of learners more advantageous to the employer than the employment of experienced workers.

Trainees

To answer the question, “When are trainees considered ‘employees’ under FLSA?” it is necessary to examine all of their activities. If all of the following elements are present, then the trainees would not be considered “employees.” The tests are derived from two U.S. Supreme Court cases involving the status of trainees:

1. Both the employer and trainees understand that the trainees are not entitled to compensation during the time spent for training.
2. The trainees are not necessarily entitled to a job at the conclusion of the training period.
3. The training is not unique and is merely like a vocational school’s work experience period.
4. The training is primarily for the benefit of the trainee.

5. The employer derives no obvious advantage from the activities of the trainees; indeed, operations may be impeded by them.
6. The trainees neither replace regular employees nor work under their supervision.

Full-Time Students and Subminimum Wage

The FLSA provides for a minimum wage of 85 percent of the prevailing minimum for full-time students engaged in work at retail-service establishments, on farms, and at higher educational institutions. Certificates will be issued to employers applying for this preferential treatment so long as there is no lessening of opportunities for employment among full-time workers.

To minimize paperwork and to encourage small retail and service business, the FLSA allows these employers to engage up to six full-time students by merely notifying the Department of Labor. In this instance, only the following steps would be necessary:

1. Complete a simple application and send it to a Regional Office of the Wage Hour Division of the Department of Labor. It must contain the employer's name, address, type of business, and date the business began;
2. Affirm that no more than six full-time students will be employed on any workday, and that student employment will not reduce the full-time employment opportunities of other individuals; and
3. Post a copy of the application where employees can see it.

A full-time student must be enrolled at a bona fide educational institution. The student permitted to work at subminimum wage may not work more than five hours a day, nor for more than 40 hours a week when school is not

in session. When school is in session, there is a 20-hour-a-week limit. An exception is when there is a school holiday and the business is open, in which case the student may work an additional eight hours.

If more than six full-time students will be employed, then it is necessary to obtain prior approval by the Wage Hour Administration. The certification process requires an inordinate amount of paperwork. A separate application is required for each business location. Certificates are issued for periods up to one year and must be renewed annually. For these large business users of full-time students, the law will allow up to 10 percent of the total hours of all employees. Some allowance in the summer is given for seasonal business and for firms which compete with those that employ full-time students at subminimum wage rates.

There are some special recordkeeping requirements for employers using this subminimum rate. The employee's records should contain school information, and, upon graduation, a certificate from the next school to be attended stating that the student has been accepted as a full-time student. The monthly hours of full-time students at subminimum wage and the total hours of all employees during the month should be kept for three years.

Child Labor

Congress wanted to keep the channels of commerce free from child labor, and it accomplished this with a child labor provision in the Fair Labor Standards Act. The coverage of the child labor rules embraces business involved in producing, manufacturing, mining, handling, transporting, or in any other manner working on goods shipped in commerce. The penalty for child labor violations allows up to an \$11,000 civil penalty for each employee who was the subject of such a violation.

The provisions include lists of hazardous occupation orders for both farm and nonfarm jobs declared by the Secretary of Labor as being too dangerous for minors to perform. Regulations governing youth employment in nonfarm jobs are set out in the chart below.

An employer wanting to protect against unintentional violations of the child labor requirements should obtain a certificate of age for each minor employed. Age or employment certificates (work permits) are accepted as proof of age in most states and are available from state labor offices.

Overtime Pay

Compared to the relatively straightforward rules governing minimum wage, the rules governing overtime pay are complicated and confusing. The overtime pay premium (one and one-half times the regular rate) applies to all hours worked above 40 in a workweek. Each workweek is a separate unit for overtime purposes; with very few exceptions, hours may not be averaged over two or more weeks. There is no absolute limit on the number of hours an employee may work in any workweek. The FLSA does not require that an employee be paid



Permissible Nonfarm Work

AGE	JOB	HOURS OF WORK
18 years or older	Any job, hazardous or not	Unlimited
16-17 years old	Any nonhazardous job	Unlimited
14-15 years old*	Outside of school hours in various nonmanufacturing, nonmining, nonhazardous jobs	No more than 3 hours on a school day, 18 hours in a week, 8 hours on a non-school day, or 40 hours on a non-school week. Work may not begin before 7 a.m. nor end after 7 p.m., except from June 1st through Labor Day, when evening hours extend until 9 p.m.

* Under a special provision, 14- and 15-year-olds enrolled in an approved Work Experience and Career Exploration Program may be employed for up to 23 hours in school weeks and 3 hours on school days (including work during school hours).

Fourteen is the minimum age for most nonfarm work. However, at any age, youths may deliver newspapers; perform in radio, television, movie, or theatrical productions; or work for parents in their solely owned nonfarm business (except in manufacturing or hazardous jobs).

NOTE:

The Drive for Teen Employment Act, allows 17-year-olds to operate an auto or truck (under 6,000 pounds) on public roadways so long as such driving is occasional and incidental to the employee's employment. This exception to what the Department had considered a prohibited activity has numerous conditions (i.e., daylight driving, no more than 20 percent of workweek, and limits on length of trips); accordingly, checking with the U.S. Department of Labor regulations, and any applicable state law requirements, would be appropriate.

Anti-Discrimination Laws and the Equal Employment Opportunity Commission

4

Legislative Purpose

With the historic passage of the Civil Rights Act of 1964, which contains Title VII – Equal Employment Opportunity – the law of the land became equal opportunity for all in the crucial area of employment rights. Congress had found a historical pattern of restriction, exclusion, discrimination, segregation, and inferior treatment of minorities and women in many employment areas. There was clear evidence that denial of equal rights in employment had led to higher unemployment, lesser occupational status, and the consequent of lower income levels for minorities and women. Title VII of the Civil Rights Act provides, therefore, the legal basis for individuals to pursue the work of their own choice and to advance in that work, subject only to consideration of their individual qualifications, talents and energies.

Congress developed a new national policy which made it an unlawful employment practice for an employer, labor organization or placement agency:

1. To fail or refuse to hire or to discharge any individual, or to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin; or
2. To limit, segregate, or classify employees or applicants for employment in any way

which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his or her status as an employee, because of such individual's race, color, religion, sex, or national origin.

To enforce this anti-discrimination law, the Equal Employment Opportunity Commission was created. There are five bipartisan Commissioners, appointed by the President and confirmed by the Senate for a fixed term of five years, responsible for overseeing the Commission.

Coverage

Title VII of the Civil Rights Act applies to any employer engaged "in an industry affecting commerce" who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year. In 1972, Title VII was amended to include federal, state, and local public employers and educational institutions.

In 1997, a unanimous U.S. Supreme Court decision allowed an individual who was given a negative job reference the right to sue his former employer under Title VII. The Court, in interpreting what it termed the ambiguous classification of "employee," decided that it included former employees. To do otherwise would "undermine the effectiveness of Title VII by allowing the threat of post-employment

retaliation to deter victims of discrimination from complaining to EEOC, and would provide a perverse incentive for employers to fire employees who might bring Title VII claims.”

The Supreme Court also decided in 1997 the method for determining whether there are a sufficient number of employees to trigger Title VII coverage. The Court decided that all employees should be counted using the payroll method. A company’s list of workers includes anyone the company has an “employment relationship” with, whether or not that person is at work on a given day. “What is ultimately critical is the existence of an employment relationship.” The employee need not actually receive compensation. While this ruling affects only the smaller employers who are close to the threshold for coverage, it does have ramifications for other laws (e.g., Age Discrimination, Americans with Disabilities Act, etc.) having similar threshold provisions.

Types of Discrimination — An Overview

The original impetus for the ban on racial discrimination was to protect the minority race. However, the U.S. Supreme Court has held that the protection extends to all individuals, including Caucasians, when race is used as a criterion in an employment decision. Thus, reverse discrimination suits brought by non-minorities are recognized by Title VII.

The prohibition against discrimination based on color would include an employment decision made among minority candidates based on possession of the lightest complexion and the most Caucasian-like features. Distinctions in employment practices based on sex, male or female, are illegal unless the job requires specific physical characteristics necessarily possessed by only one sex. The law recognizes a very narrow exception for a “bona fide occupational requirement” such as employment

of a wet nurse. In 1978, Congress enacted the Pregnancy Disability Amendment to Title VII, which further defined sex discrimination to include disparate treatment of pregnant women for all employment-related purposes. (The Pregnancy Disability Amendment is discussed in greater detail later in this chapter.)

The fastest growing area of sex discrimination cases involve sexual harassment. Though not mentioned specifically or defined in Title VII, the Supreme Court in 1986 identified and defined this activity as a form of sex discrimination prohibited by Title VII. The Court identified two types of sexual harassment; quid pro quo, and hostile environment. For a more detailed discussion of this form of sex discrimination, please refer to Chapter 6.

The prohibition against basing an employment decision on one’s religious beliefs or practices is broad in scope. In this instance, neutrality or non-discrimination is not enough; there must be an accommodation of the religious needs of employees and job applicants. The prohibition against employment discrimination based upon national origin prohibits discrimination based on ethnicity or ancestry for all persons residing in the United States – citizens and non-citizens. An employer may deny employment for lack of citizenship, but only to the extent that the refusal does not have the effect of discrimination on the basis of national origin.

The U.S. Supreme Court has held that workplace harassment is merely a form of discrimination. Therefore, a “hostile environment” based on a person’s gender, race, religion, national origin, age, or disability is as illegal under Title VII as sexual harassment.

No single factor is essential to establishing hostile environment harassment. The record as a whole and the totality of the circumstances will be examined. Among the elements considered will be the frequency of the discriminatory conduct, its severity, whether it is physically threatening

or humiliating, and whether it unreasonably interferes with an employee's work.

Burden of Proof and Theories of Discrimination

There are basically two theories available to prove discrimination, disparate treatment and disparate (or adverse) impact. Disparate treatment involves an allegation of discriminatory treatment due to a protected characteristic. A claim that termination occurred because the employee was Italian or Jewish would be a claim of disparate treatment – the employee was treated disparately, or differently, because of ethnicity or religion. It is proven by direct or circumstantial evidence.

In order to establish a prima facie case of disparate treatment, a plaintiff has the burden to prove:

1. Membership in a protected class;
2. Application and qualification for a job for which the employer was seeking applicants;
3. Rejection, despite the applicant's qualifications; and
4. The employer's continued solicitation of applicants with qualifications equal to the plaintiff's.

Of course, the courts consider these elements to be flexible and modify them, on a case-by-case basis, to differing factual situations. For example, in a layoff situation, the issue is whether plaintiff was selected despite having qualifications equal to those retained.

If this low threshold is met, the burden shifts to the employer to articulate a legitimate reason for the adverse employment action. If the employer articulates a non-discriminatory reason for the action taken, the plaintiff is given the opportunity to prove the stated reason is not the true reason for the action. This

final opportunity has been described as the opportunity to prove that the stated reason is, in fact, a pretext for discrimination. Although there is a shifting burden analysis, the ultimate burden of proving discrimination remains on the plaintiff.

Disparate (or adverse) impact involves a policy or practice which, although neutral on its face, adversely affects members of a protected group. Such a case is established through the use of statistics. EEOC uses a four-fifths rule of thumb, the courts recognize more sophisticated inferential statistical models. Examples of policies neutral on their face but having adverse impact include layoff policies based upon selection of the highest paid, high school degrees, test scores, etc. If the disparate impact is established, the burden shifts to the employee to prove the business necessity of the policy.

Race Discrimination

Race discrimination, like all employment discrimination, requires a showing that an employee was discriminated against because of his or her race. While there is nothing wrong with firing an employee who is a sub-standard performer or engages in misconduct, there is everything wrong with firing an employee because he or she is of a certain race. Racial discrimination protection is given to persons of all races. That is, a black manager can be charged with racial discrimination against a white employee in the same manner that a white manager can be charged with discriminating against a black employee.

Sex Discrimination

The sex discrimination prohibition in Title VII is much broader than the Equal Pay Act protections. Under Title VII, there are no strict requirements that the equal work be in the same

establishment and require the same skill, effort and responsibility under the same working conditions. Further, the non-discrimination prohibition covers all employment related practices, not just pay.

The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the members of a group. For example, the refusal to hire a woman based on the assumption that the turnover rate among them is higher than men is illegal. It is illegal to make employment decisions in reliance upon stereotype concerning someone's sex (or other statutorily protected characteristic).

State laws preferential to one sex over the other are superseded by Title VII and are, therefore, unlawful. Further, it is illegal to have separate lines of progression or a seniority system based on sex just as it is illegal to discriminate between men and women with regard to fringe benefits.

Favoritism, unfair treatment and unwise business decisions do not violate Title VII unless based on prohibited discrimination. Thus, where a male supervisor selects a female employee for a promotion because of his romantic involvement with her, these circumstances do not create liability to other, more qualified females, who are not subjected to a sexually hostile work environment. A consensual romantic relationship between a supervisor and an employee, while not a good idea for a number of reasons, is not prohibited under Title VII.

Hostile Environment Discrimination

The 1993 Supreme Court decision alluded to above expanded hostile environment harassment beyond sexual to embrace gender, race, religion, national origin, age, and

disability. Note, however, that welcomeness of conduct is usually not an issue in situations of harassment that is not sexual in nature, such as harassment due to ethnicity or religion; in such situations, it is usually clear that the comments are perceived as abusive. While no single factor is essential to establish hostile environment harassment, violations are established by examining the record as a whole and the totality of the circumstances. Among the elements reviewed are the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance. Harassment is merely considered a method or means by which discrimination is carried out. Therefore, hostile environment harassment based on any protected characteristics such as race, color, sex (whether or not of a sexual nature), religion, national origin, protected activity, age, or disability is illegal. If the harassment is committed by non-supervisory personnel (such as co-workers, third parties, contractors, etc.) the employer, once the employer learns of the harassment, must promptly investigate the allegations and, if harassment exists, take appropriate action to eliminate it. In non-supervisory harassment, the obligations are triggered when the employee knows or should know the harassment exists. In harassment committed by supervisors, employers are generally vicariously liable for the conduct.

Religious Discrimination Guidelines

Denying or limiting equal opportunities to individuals without reasonable effort to accommodate their religious beliefs or practices is a violation of Title VII. Section 701(j) of Title VII established an obligation by employers to reasonably accommodate the religious practices of an employee or prospective employee unless

doing so would create an undue hardship upon the employer. In the U.S. Supreme Court's decision in *Trans World Airlines, Inc. v. Hardison* (1977), the Court ruled against a religious observer who could not work on the sabbath because the required accommodation would have involved violating the seniority rights of other workers and the regular payment of overtime pay to the replacement workers. Although the *Hardison* decision reaffirmed the employer's responsibility to accommodate, the extent of the duty was unclear. To help explain the extent of the duty, the EEOC has published revised Guidelines on Discrimination Because of Religion; the major elements of which are summarized below:

Accommodations – The employer is obligated to accommodate an employee's or prospective employee's religious practices once the employer has been notified of the need. The employer must offer the alternative which would least disadvantage the employment opportunities of the religious observant and not cause undue hardship to the employer.

In a religious discrimination case involving an interpretation of "reasonable accommodation," the Supreme Court ruled that an employer must make a "reasonable" effort to accommodate a worker's religion, but need not adopt the employee's suggested accommodation. In that case, the employer provided for three religious holidays and three days of personal leave, all with pay. The employee, who celebrated six religious holidays a year, argued that he wanted to take three personal days instead of unpaid leave for the remaining three religious holidays. The employer's policy was that personal days could not be used for religious holidays. The Court ruled that an employer's duty to accommodate the employee's religious belief under Title VII of the 1964 Civil Rights Act does not require the employer to accept the accommodation preferred by the employee. In another case, the Court struck down a

Connecticut law that required employers to give employees their sabbath day off. The Court found that the law unconstitutionally promoted religious worship.

Alternatives – Examples of scheduling alternatives specified by the guidelines include the use of voluntary substitutions and swaps, flexible schedules, lateral transfers, and change of job assignments.

Union Dues – When an employee's religious practices prohibit payment of union dues to a labor organization, the employee must not be made to pay union dues but may be permitted to pay a sum equivalent to the dues to a charitable organization.

Undue Hardship – Under the guidelines, an employer may assert undue hardship to justify a refusal to accommodate an employee's need to be absent from his or her scheduled duty hours if the employer can demonstrate that the accommodation would require more than a minimal cost. This would be determined by an examination of all the facts and must be in accordance with the *Hardison* decision. Also, undue hardship may be shown where the accommodation would require a variance from a bona fide seniority system in order to accommodate an employee's religious practices.

Selection Practices – The guidelines address selection practices which tend to exclude individuals because of their religious beliefs. Under the guidelines, unlawful practices by employers include scheduling of examinations and other selection activities during a period which conflicts with an individual's religious practices (or beliefs), and pre-employment inquiries which ascertain an applicant's availability to work during certain time periods.

National Origin Discrimination Guidelines

The Commission broadly defines national origin discrimination as including, but not limited to, the denial of equal employment opportunity because of an individual's place of origin; or because an individual has the physical, cultural, or linguistic characteristics of a national origin group. The Commission will examine, with particular concern, charges alleging that individuals have been denied equal employment opportunity for reasons which are grounded in national origin considerations, such as: (a) marriage to, or association with, persons of a national origin group; (b) membership in or association with an organization identified with, or seeking to promote the interests of, national origin groups; (c) attendance or participation in schools, churches, temples, or mosques generally used by persons of a national origin group; or (d) because an individual's name or spouse's name is associated with a national origin group.

The “Speak English Only” Rule – The Commission will presume that a rule requiring employees to speak only English at all times in the workplace may violate Title VII as a burdensome term and condition of employment. Requiring employees to speak only in English at certain times would not be discriminatory if the employer shows that the rule is justified by business necessity. When the employer believes that the rule is justified by business necessity, the employer should clearly inform employees of the circumstance in which they are required to speak only in English and the consequences of violating the rule. Notice of such a rule is necessary because it is common for individuals whose primary language is not English to inadvertently slip from speaking English to speaking their native tongue. Any adverse employment decision against an individual based on a violation of the rule will be considered as evidence of discrimination if an employer has not given effective notice of the rule.

Accent – The Commission has determined that an employer must show a legitimate non-discriminatory reason for the denial of employment opportunity because of an individual's accent or manner of speaking. Investigations will focus on a claimant's qualifications to do the job and whether the claimant's accent or manner of speaking would have a detrimental effect on job performance. Requirements that employers or applicants be fluent in English may also violate Title VII if they are adopted for discriminatory reasons or applied in a discriminatory manner, or if they have the effect of excluding individuals of a particular national origin and are not related to successful job performance.

Harassment – The Commission has consistently held that harassment on the basis of national origin is a violation of Title VII. It holds that an employer has an affirmative duty to maintain a working environment free of harassment on the basis of national origin. This rule, which has been adopted by the courts in race and sex cases, clearly applies equally to national origin.

Ethnic slurs and other verbal or physical conduct relating to an individual's national origin constitutes harassment when this conduct (1) has the purpose or effect of creating an intimidating, hostile, or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an individual's work performance; or (3) otherwise adversely affects an individual's employment opportunities.

An employer is responsible for its acts and those of its agents and supervisory employees under Title VII, regardless of whether the acts were specifically authorized or forbidden by the employer and regardless of whether the employer knew or should have known of the acts.

The guidelines for determining whether harassment exists distinguish between the employer's responsibility for the acts of its

agents or supervisors and the responsibility it has for conduct among fellow employees. Liability for acts of national origin harassment between fellow employees in the workplace exists only when the employer, or its agents or supervisory employees, knows or should have known of the conduct, and the employer cannot demonstrate that it took immediate and appropriate corrective action. In certain circumstances, where an employer may be shown to have the necessary control, it may also be responsible for the acts of non-employees with respect to harassment of employees in the workplace on the basis of national origin.

Hiring Non-Nationals – With the enactment of the Immigration Reform and Control Act of 1986, Congress for the first time made it unlawful for an employer to hire individuals who are not legally authorized for employment in the United States. (For an expanded description of this law, please refer to Chapter 12, Immigration Control - Verification of Employment.) After the adoption of these new requirements, Congress became concerned that some employers might overreact and refuse to hire individuals who appeared or sounded “foreign.” Although Congress recognized that the existing prohibitions on national origin discrimination in Title VII of the Civil Rights Act would cover much of the potential discrimination, Congress also included in the Act a new non-discrimination provision, to be enforced by the Department of Justice, which prohibits national origin discrimination by small employers not covered by Title VII and discrimination because of citizenship status by all employers with four or more employees.

While the Immigration Act prohibits discrimination on the basis of citizenship in some circumstances, it specifically states that it is not a violation of the Immigration Act to prefer a citizen over an alien where both are equally qualified. Employers should be aware, however, that such citizenship preferences may

still violate Title VII if they have the purpose or effect of discriminating on the basis of national origin.

Affirmative Action Guidelines

The legislative purpose of Title VII was to encourage voluntary action without recourse to legal proceedings and, for that reason, the EEOC has encouraged voluntary affirmative action to improve opportunities for minorities and women. Therefore, in providing guidelines for affirmative action programs, the EEOC offers what could be an affirmative good faith defense to any subsequent equal employment discrimination charge. The Commission recommends that such a plan be in writing and be dated so that it could serve as credible evidence of an employer’s compliance efforts in case of a subsequent challenge.

The Supreme Court has strongly endorsed the use of affirmative action, including specific hiring goals, to remedy past employment discrimination. The Court has authorized federal judges to set goals and timetables requiring employers who have engaged in past discrimination to hire or promote specific numbers of minorities. It has also permitted private and public sector employers the ability, under defined circumstances, to voluntarily adopt specific goals for their work forces without court orders.

In a 1987 decision, the Supreme Court held that in hiring and promotion decisions, employers may sometimes favor women and members of minorities over better qualified men and whites in order to achieve better balance in their work force. The decision upheld a California city’s affirmative action plan for women and minority group members.

The ruling was the Court’s first involving affirmative action plans which give job preferences to women over men. The Court

rejected a discrimination claim by a man who said he had been the victim of illegal sex discrimination when a less qualified woman was promoted instead of him. The decision also marked the first time the Court had clearly held that in a case where there was no proof of past discrimination against women or minorities by a particular employer, the employer may use racial and sexual preferences in hiring and promoting to bring its work force into line with the make up of the local population or relevant labor market. “In determining whether an imbalance exists that would justify taking sex or race into account, a comparison of the percentage of minorities or women in the employer’s work force with a percentage in the area labor market or general population is appropriate in analyzing jobs that require no special expertise.”

Pregnancy Discrimination Guidelines

The Pregnancy Discrimination Act of 1978 makes it clear that discrimination on the basis of pregnancy, childbirth, or related medical conditions constitutes unlawful sex discrimination under Title VII.

The basic principle of the Act is that women affected by pregnancy and related conditions must be treated the same as other applicants and employees on the basis of their ability or inability to work. The Equal Employment Opportunity Commission has issued guidelines, including questions and answers, interpreting the Act. They provide guidance as to what employment practices would be considered by the Commission as violating the Act. Adoption of the Family Medical Leave Act has provided additional leave protection for giving birth or adopting a child.



Frequently Asked Questions Relating to Pregnant Employee Rights

Provide Another Job

Q. If, for pregnancy-related reasons, an employee is unable to perform the functions of her job, does the employer have to provide an alternative job?

A. An employer is required to treat an employee temporarily unable to perform the functions of the job (because of her pregnancy-related condition) in the same manner as it treats other temporarily disabled employees, whether by providing modified tasks, alternative assignments, disability leave, leave without pay, etc. For example, a woman’s primary job function may be the operation of a machine, and, incidental to that function, she may carry materials to and from the machine. If other employees temporarily unable to lift are relieved of these functions, pregnant employees also unable to lift must be temporarily relieved of the function.

How to Determine if She Can Work

Q. May an employer place on leave a pregnant employee who claims she is able to work, or deny leave to a pregnant employee who claims she is disabled from work?

A. An employer may not single out pregnancy-related conditions for determining an employee’s ability to work. However, an employer may use any procedure used to determine the ability of all employees to work. For example, if an employer requires its employees to submit a doctor’s statement concerning their inability to work before granting leave or paying sick benefits, the

FAQs – Pregnant Employee Rights *(continued)*

employer may require employees affected by pregnancy-related conditions to submit such statements. Similarly, if an employer allows its employees to obtain doctors' statements from their personal physicians for absences due to other disabilities or return-dates from other disabilities, it must accept doctors' statements from personal physicians for absences and return-dates connected with pregnancy-related disabilities.

Length of Leave

Q. Can an employer have a rule which prohibits an employee from returning to work for a predetermined length of time after childbirth?

A. No.

Stay off Until Delivery?

Q. If an employee has been absent from work as a result of a pregnancy-related condition and recovers, may her employer require her to remain on leave until after her baby is born?

A. No. An employee must be permitted to work at all times during pregnancy when she is able to perform her job.

Keep Job Open?

Q. Must an employer hold open the job of an employee who is absent on leave because she is temporarily disabled by pregnancy-related conditions?

A. Unless the employee on leave has informed the employer that she does not intend to return to work, her job must be held open for her return on the same basis as jobs are held open for employees on sick or disability leave for other reasons.

Status During Leave

Q. May an employer's policy concerning the accrual and crediting of seniority during absences for medical conditions be different for employees affected by pregnancy-related conditions?

A. No. An employer's seniority policy must be the same for employees absent for pregnancy-related reasons as for those absent for other medical reasons.

Fringe Benefits

Q. For purposes of calculating such matters as vacations and pay increases, may an employer credit time spent on leave for pregnancy-related reasons differently than time spent on leave for other reasons?

A. No. An employer's policy with respect to crediting time for the purpose of calculating such matters as vacation and pay increases cannot treat employees on leave for pregnancy-related reasons less favorably than employees on leave for other reasons. For example, if an employee on leave for medical reasons is credited with the time spent on leave when computing entitlement to vacation or pay raises, an employee on leave for pregnancy-related disability is entitled to the same kind of time credit.

FAQs – Pregnant Employee Rights (continued)

Hiring

Q. Must an employer hire a woman who is medically unable, because of a pregnancy-related condition, to perform a necessary function of a job?

A. No. An employer can refuse to hire a woman because of her pregnancy-related condition so long as she is unable to perform the major functions necessary to do the job.

Only Marrieds Protected?

Q. May an employer limit disability benefits for pregnancy-related conditions to married employees?

A. No.

All Female Workforce

Q. If an employer has an all-female workforce or job classification, must benefits be provided for pregnancy-related conditions?

A. Yes. If benefits are provided for other conditions, they must be also be provided for pregnancy-related conditions.

Income Maintenance

Q. For what length of time must an employer who provides income maintenance benefits for temporary disabilities provide such benefits for pregnancy-related disabilities?

A. Benefits should be provided for as long as the employee is unable to work for medical reasons unless some other limitation is set for all other temporary disabilities, in which case pregnancy-related disabilities should be treated the same as other temporary disabilities.

Long-Term Disability

Q. Must an employer who provides benefits for long-term or permanent disabilities provide such benefits for pregnancy-related conditions?

A. Yes. Benefits for long-term or permanent disabilities resulting from pregnancy-related conditions must be provided to the same extent that such benefits are provided for other conditions which result in long-term or permanent disability.

Fringe Benefits

Q. If an employer provides benefits to employees on leave, such as installment purchase disability insurance; payment of premium for health, life, or other insurance; or continued payments into pension, savings or profit-sharing plans, must the same benefits be provided for those on leave for pregnancy-related conditions?

A. Yes, the employer must provide the same benefits for those on leave for pregnancy-related conditions as for those on leave for other reasons.

Vacation

Q. Can an employee who is absent due to a pregnancy-related disability be required to exhaust vacation benefits before receiving sick leave pay or disability benefits?

A. No. If employees who are absent because of other disabling causes receive sick leave pay or disability benefits without any requirement that they first exhaust vacation benefits, the employer cannot impose this requirement on an employee for a pregnancy-related cause.

Pre-Employment Inquiries

Employment application forms and pre-employment interviews have traditionally been instruments for screening out, at an early stage, “unsuited” or “unqualified” persons from consideration for employment and often have been used in such a way as to restrict or deny employment opportunities for women and members of minority groups.

The law, interpreted through court rulings and EEOC decisions, prohibits the use of all pre-employment inquiries and qualifying factors which disproportionately screen out members of minority groups or members of one sex, are not valid predictors of successful job performance, and cannot be justified by “business necessity.”

In devising or reviewing application forms or in seeking information from job applicants, employers should ask themselves: (1) Will the answers to these questions directly or indirectly reveal information concerning an applicant’s membership in a protected class? (2) Will the answers to this question, if used in making a selection, result in disparate treatment or disparate effect on minorities and/or members of one sex (e.g., disqualify a significantly larger percentage of members of a particular group than others)? and (3) Is this information really needed to judge an applicant’s competence or qualification for the job in question?

The concept of business necessity has been narrowly defined by the courts. When a practice is found to have discriminatory effects, it can be justified only by showing that it is necessary to the safe and efficient operation of the business, that it effectively carries out the purpose it is supposed to serve, and that there are no alternative policies or practices which would better or equally well serve the same purpose with less discriminatory impact.

Title VII specifically excludes from its discrimination ban any employment practices based upon giving and acting upon the “results of any professionally developed ability test, provided that such test, its administration, or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin.” In a technically complex guideline, the EEOC states that the use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory and inconsistent with Title VII, unless the selection procedure has been validated. The guidelines also explain validity studies and establish certain minimum technical standards for them.

An employer needs to be able to demonstrate through statistical evidence that any selection procedure which has a “disparate effect” on groups protected by the law is job related (i.e., validation tests indicate that the selection procedure validly predicts successful performance for the type of job in question). For example, if a valid written civil service examination is given for law enforcement applicants, one would expect the best officers to score the highest on the test. A correlation study, comparing performance evaluations (later success on the job) with the prediction of success (the written test) will prove, or disprove, the test’s validity. If this cannot be shown or if the employer cannot or does not wish to perform a technical validation study, the use of the selection procedure should be discontinued or altered in such a way that there is no longer a discriminatory effect. Even when a procedure having an adverse impact can be validated, it may not be used if there are other procedures which would accomplish the same goal and have less of a discriminatory effect.

Data Required for Legitimate Business Purposes

An employer may justifiably seek and obtain information regarding a job applicant's race, sex, or ethnicity if needed for implementation of affirmative action programs, court-ordered or other government reporting or recordkeeping requirements, and for studies to identify and resolve possible problems in the recruitment and testing of members of minority groups and/or women to insure equal employment for all persons.

Data on such matters as marital status, number and age of children, and similar matters, which could be used in a discriminatory manner in making employment decisions but which are necessary for insurance, reporting requirements, or other business purposes, can and should preferably be obtained after a person has been employed, not by means of an application form or pre-employment interview or process.

The employer, however, must be able to demonstrate that such data was collected for legitimate business purposes. Such information should be kept separate from the regular permanent employee records to insure that it is not used to discriminate in making personnel decisions. To protect against the improper use of such information by their selected officials, employers should consider collecting the facts by the use of a "tear-off sheet." After completing the application and the tear-off sheet, the latter is separated from the application, not provided to the decision-makers, and used only for purposes unrelated to the selection decision. The tearoff sheet should contain a statement about the purpose for which the information is being collected and that the information will not be made available or used for making employee selections. This should help allay applicant concern that the information will be used to discriminate on a prohibited basis.

It is reasonable to assume that all questions on an application form or in a pre-employment interview are used for some purpose and that selection or hiring decisions are made on the basis of the answers given. Seeking information other than that which is relevant to evaluate effectively a person's qualification for employment increases the potential exposure to charges of discrimination in legal proceedings. Therefore, applications should be reviewed to insure that only relevant, lawful questions are asked and persons conducting interviews are properly trained.

Race, Color, Religion, Sex, or National Origin – Pre-employment inquiries concerning race, color, religion, sex, or national origin are not considered independent violations of the law. However, inquiries which either directly or indirectly disclose such information, unless otherwise explained, may constitute evidence that discrimination prohibited by Title VII has occurred. Some states' fair employment practice laws expressly prohibit direct or indirect inquiries on employment applications concerning the applicant's race, color, religion, sex, or national origin or indirectly reveal such information. In some states, it may also be considered illegal to seek related data (former name, past residence, names of relatives, place of birth, citizenship, education, organizational memberships and activities, a photograph, and color of eyes and hair) which could indirectly reveal similar information. Denial of equal employment opportunity to individuals because of marriage to or association with persons of a specific national, ethnic, or racial origin, or because of attendance at schools or churches, or membership in organizations identified with particular racial or ethnic groups, may be considered a violation of Title VII. Charges presented to the EEOC alleging such discrimination will be examined with particular concern to determine if, indeed, the alleged discrimination was based on race or national origin.

Height and Weight – The Equal Employment Opportunity Commission and the courts have ruled that minimum height and weight requirements are illegal if they screen out a disproportionate number of minority-group individuals (e.g., height requirements have been found to disproportionately screen out Spanish-surnamed or Asian Americans) or women, and the employer cannot show that these standards are essential to the safe and proper performance of the job in question.

Marital Status, Number of Children, and Provisions for Child Care – Questions about marital status, pregnancy, future child-bearing plans, and number and age of children are frequently used to discriminate against women and may be a violation of Title VII if used to deny or limit employment opportunities for female applicants. Employers are cautioned against use of such non-job-related questions. Information needed for tax, insurance, or Social Security purposes may be obtained after employment. It is a violation of Title VII for employers to require pre-employment information about child care arrangements from female applicants only. The U.S. Supreme Court has ruled that an employer may not have different hiring policies for men and women with pre-school children.

English Language Skill – When the use of an English language proficiency test has an adverse effect upon a particular minority group and English language skill is not a requirement of the work to be performed, there is a violation of Title VII.

Educational Requirements – The U.S. Supreme Court has found an employer's requirement of a high school degree discriminatory where statistics showed such a requirement operated to disqualify blacks at a substantially higher rate than whites, and there was no evidence that the requirement was significantly related to successful job performance. This same standard applies to

any adverse impact on a group protected under Title VII with respect to educational attainment, unless job-relatedness or business necessity can be established.

Friends or Relatives Working for the Employer – Information about friends or relatives working for an employer is not relevant to an applicant's competence. Requesting such information may be unlawful if it indicates a preference for friends and relatives of present employees and the composition of the present work force is such that this preference would reduce or eliminate opportunities for women or minority group members. Such "word-of-mouth" recruiting efforts may have adverse impact and not survive business necessity scrutiny. Also, a "nepotism" policy which prohibits or limits employment opportunities of a spouse or other relative also may be illegal if it has an adverse impact on job opportunities for either women or men as a group and is not narrowly drawn to reflect business necessity. For example, a prohibition against persons working in a supervisory – subordinate relationship and the option for either employee to terminate employment would probably survive challenge.

Arrest Records – Because members of some minority groups are arrested substantially more often than whites in proportion to their numbers in the population, making personnel decisions on the basis of arrest records has a disproportionate effect on the employment opportunities of members of these groups. Further, since an arrest, unlike a conviction, is not proof of criminal activity or misconduct, it cannot be job related. The courts and the commission, accordingly, have held that without proof of business necessity, an employer's use of arrest records to disqualify job applicants is unlawful discrimination. Even if an employer does not consider arrest information, the mere request for such information tends to discourage

minority applicants and will, therefore, be considered suspiciously by the Commission.

The EEOC recently issued a policy statement on arrest records stating the bottom line: refusing to hire any and all applicants based on arrest records will be found to be discrimination under Title VII of the Civil Rights Act. Since it is generally presumed employers ask only questions which are deemed relevant to employment decisions, routinely asking job applicants about arrest records on an employment application or in a job interview may violate Title VII, unless further inquiry is made about the circumstances surrounding an arrest.

An arrest alone is not reliable evidence that a person actually committed a crime. Even where the conduct alleged in an arrest record is related to the job at issue, the EEOC states the employer must investigate whether the arrest is proof of a particular conduct. The employer should conduct its own investigation into the surrounding circumstances, offer the applicant or employee an opportunity to explain, and, if the person denies engaging in the conduct, make follow-up inquiries to evaluate the person's credibility. The purpose of the investigation is to determine whether the conduct that led to the arrest, which would make the employee ineligible for the job, did in fact occur.

This does not mean information about arrests can never be used to make an employment decision. As with conviction records, arrest records may be considered as evidence that conduct occurred which renders an applicant unsuitable for a particular position, the EEOC explains. But, to use an arrest record to support a refusal to hire, the employer must consider the relationship of the arrest charges to the position applied for, and determine the likelihood the conduct actually occurred.

Even asking for conviction records, which do provide reliable proof a person engaged in illegal acts, carries some risks. National

law enforcement statistics indicate blacks and Hispanics are convicted in numbers disproportionate to whites. Basing employment decisions on conviction records could thus have an adverse impact on minority groups and, therefore, must be job related. While convicted child molesters can be denied jobs as nursery school teachers and embezzlers need not be offered jobs as bank tellers, job relatedness is not always that easy to determine.

Conviction Records – A conviction for a felony or misdemeanor may not, by itself, lawfully constitute an absolute bar to employment. However, an employer may give fair consideration to the relationship between a conviction and the applicant's fitness for a particular job. Conviction records should be cause for rejection only if their number and nature would cause the applicant to be unsuitable for the position. If such inquiries are made, they should be accompanied by a statement that a conviction record will not necessarily be a bar to employment and that factors such as age and time of the offense, seriousness and nature of the violation, and rehabilitation will be taken into account.

Discharge from Military – Employers should not, as a matter of policy, reject applicants with less than honorable discharges from military service. Minority service members have had a higher proportion of general and undesirable discharges than nonminority members of similar aptitude and education.

Thus, an employer's requirement that to be eligible for employment ex-members of the armed services must have been honorably discharged has a disparate effect upon minorities and may be a violation of Title VIII.

One federal district court has held that an employer may inquire about an applicant's military service record if information regarding discharge status is used not in making a hiring decision, but in deciding whether

further investigations should be made into the applicant's background and qualifications. If further inquiry reveals nondiscriminatory grounds for denying employment, the employer may then refuse to hire the applicant.

Since a request for this information may discourage minority workers from applying and, therefore, be grounds for a discriminatory charge, employers should avoid such questions unless "business necessity" can be shown. As in the case of conviction records discussed above, questions regarding military service should be accompanied by a statement that a dishonorable or general discharge is not an absolute bar to employment and that other factors will affect a final decision to hire or not to hire.

National Security — It is not unlawful to deny employment to an individual who does not fulfill the national security requirements.

Economic Status — Rejection of applicants because of poor credit ratings might have a disparate impact on minority groups and has been found unlawful by the Commission, unless business necessity can be shown.

Inquiries as to an applicant's financial status, such as bankruptcy, car ownership, rental or ownership of a house, length of residence at an address, or past garnishments of wages, if utilized to make employment decisions, may likewise violate Title VII.

Availability for Work on Weekends or Holidays — Employers and unions have an obligation to accommodate the religious beliefs of employees and/or applicants, unless to do so would cause undue hardship. The EEOC has determined that the use of pre-employment inquiries that establish an applicant's availability has an exclusionary effect on the employment opportunities of persons following certain religious practices. Questions relating to availability for work on Friday evenings, Saturdays, or holidays should not be asked unless the employer can show

that the questions have not had an exclusionary effect on its employees or applicants who would need an accommodation for their religious practices, that the questions are otherwise justified by business necessity, and that there are no alternative procedures which would have a lesser exclusionary effect.

EEOC Enforcement Procedures

An Overview – The Equal Employment Opportunity Commission's representatives have full investigatory powers to:

1. Enter and inspect the place of employment, review records, and interview employees;
2. Advise employers regarding any changes necessary or desirable to comply with the law (if a violation of the law is found, the EEOC will attempt to negotiate a settlement to make the employees whole and eliminate the discriminatory practice);
3. Subpoena witnesses and order production of documents;
4. Supervise back wage payments; and
5. Initiate and conduct litigation.

Typically, information is submitted in person, by telephone, or by mail to an EEOC field office. When the information involves a violation, a charge is drawn up with EEOC assistance, if desired, which generally contains the following information:

1. The full name, address, and telephone number of the person making the charge;
2. The full name and address of the employer; and
3. A clear and concise statement of the facts, including pertinent dates constituting the alleged unlawful employment practices.

The EEOC, in a "Memorandum of Understanding," has given the Department of Labor power to seek relief from federal

Family and Medical Leave Act **5**

Legislative Purpose

In 1993, Congress passed the Family and Medical Leave Act (FMLA). The FMLA requires covered employers to allow eligible employees up to 12 weeks of unpaid leave during any 12-month period for medical reasons, for the birth or adoption of a child, or for the care of a child, spouse, or parent who has a serious health condition.

The enactment of the FMLA was predicated on the demands of the workplace and the needs of families. Many children and elderly have become dependent upon family members who are active in the workplace. When a family emergency arises, workers need reassurance that they will not be asked to choose between continuing their employment and meeting their personal and family obligations. At the same time, the law seeks to accommodate the legitimate interests of employers, and to minimize the potential for employment discrimination on the basis of sex, while promoting equal opportunity for men and women.

The FMLA is both intended and expected to benefit employers as well as their employees. A direct correlation exists between stability in the family and productivity in the workplace. The legislation's supporters believed that workers who can count on durable links to their jobs are able to make their own full commitments to their work and family.

Coverage

1. Covered Employers — The FMLA covers private employers with 50 or more employees. These employers must have 50 or more employees (part-time employees count for this purpose) for each working day during each of 20 or more calendar work weeks in either the current or the preceding calendar year. In the case of a public agency, or public or private elementary and secondary schools, coverage occurs without regard to the threshold that 50 employees are carried on the payroll each day for 20 or more weeks in a year; however, the requirement that there be 50 employees at a worksite or within 75 miles pertains. (This latter concept is explained later in this chapter.)

One federal district court has held that supervisors are personally liable under the FMLA. The definition of an employer in the FMLA statute includes a person acting directly or indirectly in the interests of an employer. In addition, a U.S. Department of Labor regulation states that “individuals acting in the interest of the employer are individually liable under FMLA, like they are under the Fair Labor Standards Act.”

2. Eligible Employees — The FMLA requires that an employee work for a covered employer and be employed by that employer for at least 12 months; have worked at least 1,250 hours in the 12-month

period immediately preceding any taking of leave; and be engaged at a worksite where 50 or more employees are employed by that employer within 75 miles of that worksite. The law is clear that the 12 months needed for coverage need not be consecutive. In order to establish whether the 1,250 hours have been worked, the principles of the Fair Labor Standards Act are used. The employer has the burden of proving that the worker has not worked the requisite hours. In the case of full-time teachers, regardless of the teaching level (e.g., primary, secondary, college, etc.), they are deemed to have met the 1,250-hour test.

The critical date for the application of these tests is as of the date of commencement of leave. An employer who receives a “need for FMLA leave” request must act within two business days or the employee will be deemed eligible. Once the employee is determined eligible in response to a notice of the need for a leave, the employee’s eligibility is not affected by any subsequent change in the number of employees employed at or within 75 miles of the employee’s worksite, for that particular leave request. Similarly, an employer may not terminate an employee’s leave once started even if the employee count drops below 50.

The 75-mile distance is measured by surface miles, not as the crow flies, using surface transportation over public streets, roads, highways, and waterways, by the shortest route from the facility where the eligible employee needing leave is employed.

Circumstances That Require Granting Family or Medical Leave

Covered employers must grant requests for leave in the following situations:

1. For the birth and care of a newborn child;

2. For the placement of a child for adoption or foster care;
3. For the care of the employee’s spouse, child, or parent with a serious health condition; and
4. For a serious health condition that makes the employee unable to perform the functions of the employee’s job.

The law applies equally to male and female employees.

Defining a “Serious Health Condition”

A “serious health condition” means an illness, injury, impairment, or physical or mental condition that involves:

1. Inpatient care (i.e., an overnight stay) in a medical care facility which would include any period of incapacity during which work, school, or regular daily activities are restricted due to the serious health condition, treatment, or convalescence arising out of the inpatient care; or
2. Continuing treatment of a serious health condition by a health care provider. Continuing treatment includes any one or more of the following conditions:
 - a. A period of incapacity for more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:
 - i. Two or more treatments by a health care provider; or
 - ii. One treatment by a health care provider with a continuing regimen of treatments under the supervision of that provider.
 - b. Any period of incapacity due to pregnancy or for prenatal care.

- c. A period of incapacity on account of a chronic serious health condition that:
 - i. Requires periodic visits for treatment by a health care provider;
 - ii. Continues over an extended period of time; and
 - iii. May cause episodic rather than a continuing period of incapacity (i.e., asthma, diabetes, epilepsy, etc.).
- d. A period of incapacity which is permanent or long term due to a condition for which treatment may not be effective (e.g., Alzheimer's, a severe stroke, or the terminal stages of a disease).
- e. Any period of absence to receive multiple treatments including restorative surgery that is likely to result in a period of incapacity of more than three consecutive calendar days (e.g., chemotherapy, radiation, etc.).

Determining How Much Leave an Employee Is Entitled To

The FMLA provides that an eligible employee is entitled to a total of 12 work weeks of leave during any 12-month period. The actual year may be based on the calendar year, any fixed 12-month “leave year,” the 12-month period measured forward from the date any employee’s first FMLA leave begins, or a “rolling” 12-month period measured backward from the date an employee uses any FMLA leave. To illustrate this last option, assume an employee has taken eight weeks of leave during the past 12 months; therefore, an additional four weeks of leave could be taken.

An employer can choose any option so long as it is consistently and uniformly applied to all employees. If a change is made, then

employees are to be given 60 days’ notice, and under no circumstance may a new method be implemented in order to avoid the law’s leave requirements. There is, however, one exception to this rule involving an employer with operations in a number of states. If one state mandates that family leave be taken by using a certain 12-month period, it is permissible to use a different method in all other states other than the one with the mandate.

1. Intermittent Leave — When one takes leave in separate periods of time, rather than in one continuous period of time, it is called intermittent leave. A reduced leave schedule is a leave schedule that reduces an employee’s usual number of working days or hours per workweek or hours per workday.

After the birth or placement of a child for adoption or foster care, an employee may take leave intermittently or on a reduced leave schedule only if the employer agrees. The employer’s consent is not necessary when there is a serious health condition in connection with the birth of a child or if the newborn child has a serious health condition.

Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy treatment. A pregnant employee may take leave intermittently for prenatal examinations or for her own condition, such as for periods of severe morning sickness. An example of an employee taking leave on a reduced leave schedule is an employee who is recovering from a serious health condition and is not strong enough to work a full-time schedule.

There is no limit on the size of an increment of leave when an employee takes

intermittent leave or leave on a reduced leave schedule. However, an employer may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave, provided it is one hour or less. For example, an employee might take two hours off for a medical appointment, or might work a reduced day of four hours over a period of several weeks while recuperating from an illness.

2. Intermittent Leave/Alternative Position

— The employer may require the employee to transfer temporarily, during the period of intermittent or reduced leave, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position.

The alternative position must have equivalent pay and benefits.

An employer may not transfer the employee to an alternative position in order to discourage the employee from taking leave or otherwise work a hardship on the employee.

When an employee, who is taking leave intermittently or is working on a reduced leave schedule and has been transferred to an alternative position, no longer needs to continue on leave and is able to return to full-time work, the employee must be placed in the same or equivalent job as the one left when the leave commenced.

- ## **3. Calculating Intermittent Leave**
- When an employee takes leave on an intermittent schedule, only the amount of leave actually taken may be counted toward the 12 weeks of leave to which an employee is entitled. For example, if an employee who normally works five days a week takes off one day, the employee would use one-fifth of a week of FMLA leave. Similarly, if a full-time

employee who normally works eight-hour days works four-hour days under a reduced leave schedule, the employee would use one-half week of FMLA leave each week.

Where an employee normally works a part-time schedule or variable hours, the amount of leave to which an employee is entitled is determined on a pro rata or proportional basis by comparing the new schedule with the employee's normal schedule. For example, if an employee who normally works 30 hours per week works only 20 hours a week under a reduced leave schedule, the employee's 10 hours of leave would constitute one-third of a week of FMLA leave for each week the employee works the reduced leave schedule.

If an employer has made a permanent or long-term change in the employee's schedule (for reasons other than FMLA, and prior to the notice of need for FMLA leave), the hours worked under the new schedule are to be used for making this calculation.

If an employee's schedule varies from week to week, a weekly average of the hours worked over the 12 weeks prior to the beginning of the leave period would be used for calculating the employee's normal work week.

FMLA Leave – Paid or Unpaid

As a general proposition, FMLA leave is unpaid. Paid vacation or personal leave, including leave earned or accrued under plans allowing "paid time off," may be substituted, at either the employee's or the employer's option, for any qualified FMLA leave. If neither the employee nor the employer elects to substitute paid leave for unpaid FMLA leave, the employee will remain entitled to all the paid leave which

is earned or accrued under the terms of the employer's plan.

Substitution of paid sick/medical leave may be elected to the extent the circumstances meet the employer's usual requirements for the use of sick/medical leave. An employer is not required to allow substitution of paid sick or medical leave for unpaid FMLA leave "in any situation" where the employer's uniform policy would not normally allow such paid leave. An employee, therefore, has a right to substitute paid medical/sick leave to care for a seriously ill family member only if the employer's leave plan allows paid leave to be used for that purpose. Similarly, an employee does not have a right to substitute paid medical/sick leave for a serious health condition which is not covered by the employer's leave plan.

Informing Employees of Their FMLA Rights

1. **Posting Requirements** – Every employer covered by the FMLA is required to post and keep posted on its premises, in conspicuous places where employees are employed, whether or not it has any "eligible" employees, a notice explaining the Act's provisions, and providing information concerning the procedures for filing complaints of violations of the Act with the Wage and Hour Division.

An employer that fails to post the required notice cannot take any adverse action against an employee, including denying FMLA leave, for failing to furnish the employer with advance notice of a need to take FMLA leave.

Where an employer's workforce is composed of a significant portion of workers who are not literate in English, the employer shall be responsible for

providing a notice in a language in which the employees are literate.

2. **Employee Handbook** – If an employer provides an employee handbook to all employees that describes the employer's policies regarding leave, wages, attendance, and similar matters, the handbook must incorporate information on FMLA rights and responsibilities, and the employer's policies regarding the FMLA.
3. **No Employee Handbook** – If an employer does not have a handbook describing employee benefits and leave provisions, the employer shall provide written guidance to an employee concerning all the employee's rights and obligations under the FMLA. This notice shall be provided to employees each time a request is made for FMLA leave. Employers may duplicate and provide the employee a copy of a notice contained in the Appendix — "Employer Responses to Employee Request for Family or Medical Leave."

The employer shall also provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. The written notice must be provided to the employee in a language in which the employee is literate. Such specific notice must include, as appropriate:

- a. that the leave will be counted against the employee's annual FMLA leave entitlement;
- b. any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so;
- c. the employee's right to substitute paid leave and whether the employer will require the substitution of paid

- leave, and the conditions related to any substitution;
- d. any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments and the possible consequences of failure to make such payments on a timely basis (i.e., the circumstances under which coverage may lapse);
 - e. any requirement for the employee to present a fitness-for-duty certificate to be restored to employment;
 - f. the employee's status as a "key employee" and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial;
 - g. the employee's right to restoration to the same or an equivalent job upon return from leave; and
 - h. the employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking the leave.

The written notice must be provided to the employee no less often than the first time in each six-month period that an employee gives notice for the need for FMLA leave (if FMLA leave is taken during the six-month period). The notice shall be given within a reasonable time after notice of the need for leave is given by the employee, generally within one or two business days, if feasible. If leave has already begun, the notice should be mailed to the employee's address of record.

The Elements of an Employee's Notice for FMLA Leave

1. **30 Days' Notice** – An employee must provide the employer at least 30 days' advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or of a family member. If 30 days' notice is not practicable, because of lack of knowledge of approximately when the leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable. For example, an employee's health condition may require leave to commence earlier than anticipated before the birth of a child. Similarly, little opportunity for notice may be given before placement or adoption. Whether the leave is to be continuous, taken intermittently, or on a reduced schedule basis, notice need only be given one time, but the employee shall advise the employer as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown.

"As soon as practicable" means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. The Department of Labor regulations and cases interpreting them indicate that the employee need not specifically request an FMLA leave. If the employee gives notice to his employer that his leave may be covered, it is the burden of the employer to adequately investigate to determine whether an FMLA leave is available.

For foreseeable leave, when it is not possible to give as much as 30 days' notice, "as soon as practicable" ordinarily would mean at least verbal notification to the employer within one or two business days

of when the need for leave becomes known to the employee.

2. **Verbal Notice** – An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave and the anticipated timing and duration of the leave. The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may state only that leave is needed for an expected birth or adoption, for example. The employer should inquire further if it is necessary to have more information about whether FMLA leave is being sought by the employee. In the case of medical conditions, the employer may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave.
3. **Scheduling Medical Treatments** – When planning medical treatment, the employee must consult with the employer and make a reasonable effort to schedule the leave so as not to unduly disrupt the employer’s operations, subject to the approval of the health care provider. Employees are ordinarily expected to consult with their employers prior to scheduling treatment in order to work out a treatment schedule which best suits the needs of both the employer and the employee. If an employee who provides notice of the need to take FMLA leave on an intermittent basis for planned medical treatment neglects to consult with the employer to make a reasonable attempt to arrange the schedule of treatments so as not to unduly disrupt the employer’s operations, the employer may initiate discussions with the employee and require the employee to attempt to make such arrangements subject to the approval of the health care provider.
4. **Intermittent Leave** – In the case of intermittent leave or leave on a reduced leave schedule which is medically necessary, an employee shall advise the employer, upon request, of the reasons why the intermittent reduced leave schedule is necessary. The employee and employer shall attempt to work out a schedule which meets the employee’s needs without unduly disrupting the employer’s operations, subject to the approval of the health care provider.
5. **Unforeseeable Need for Leave** – When the approximate timing of the leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable. It is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible. In the case of a medical emergency requiring leave because of an employee’s own serious health condition or to care for a family member with a serious health condition, written advance notice pursuant to an employer’s internal rules and procedures may not be required when FMLA leave is involved.

The employee should provide notice to the employer either in person or by telephone, e-mail, facsimile, or other electronic means. Notice may be given by the employee’s spokesperson (e.g., spouse, adult family member, or other responsible party) if the employee is unable to do so personally. The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may state only that leave is needed. The employer will be expected to obtain any additional required information through informal means. The employee or spokesperson will be expected to provide more information when it can readily

be accomplished as a practical matter, taking into consideration the exigencies of the situation.

6. Employer’s Right if Employee Fails to Provide the Required Data—An employer may waive employees’ FMLA notice obligations or the employer’s own internal rules on leave notice requirements.

If an employee fails to give 30 days’ notice for foreseeable leave with no reasonable excuse for the delay, the employer may delay the FMLA leave until at least 30 days after the date the employee provides notice to the employer of the need for FMLA leave.

In all cases, in order for the onset of an employee’s FMLA leave to be delayed due to lack of required notice, it must be clear that the employee had actual notice of the FMLA notice requirements. This condition would be satisfied by the employer’s proper posting of the required notice at the worksite where the employee is employed.

Medical Certification

The Department of Labor has provided a medical certification form for use by health care providers. A copy of the “Certification of Health Care Provider” is contained in the Appendix. Use of this form will meet certification requirements.

An employer may require an employee to provide medical certification. In those circumstances, an employer must give written notice of a requirement for medical certification each time a certification is required. An employer’s oral request to an employee to furnish any subsequent medical certification is sufficient.

When the leave is foreseeable and at least 30 days’ notice has been provided, the employee

should provide the medical certification before the leave begins. When this is not possible, the employee must provide the requested certification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer’s request), unless it is not practicable under the particular circumstances to do so despite the employee’s diligent, good faith efforts.

In most cases, when the employer requests that an employee furnish certification from a health care provider, it should be given to the employer at the time the employee gives notice of the need for leave or within two business days thereafter, or, in the case of unforeseen leave, within two business days after the leave commences. The employer may request certification at a later date if the employer later has a reason to question the appropriateness of the leave or its duration.

At the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee’s failure to provide adequate certification. The employer shall advise an employee whenever the employer finds a certification incomplete and provide the employee a reasonable opportunity to cure any such deficiency.

If an employee submits a complete certification signed by the employee’s health care provider, the employer may not request additional information from the provider. However, a health care provider representing the employer may contact the employee’s health care provider, with the employee’s permission, for the purposes of clarification and authenticity of the medical certification.

An employer who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employer’s expense. Pending receipt of the second (or third) medical opinion, the employee

is provisionally entitled to the benefits of the Act, including maintenance of group health benefits. If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave shall not be designated as FMLA leave and may be treated as paid or unpaid leave under the employer's established leave policies. The employer is permitted to designate the health care provider to furnish the second opinion, but the selected health care provider may not be employed on a regular basis by the employer.

If the opinions of the employee's and the employer's designated health care provider differ, the employer may require the employee to obtain certification from a third health care provider, again at the employer's expense. This third opinion shall be final and binding.

Employee Rights on Return to Work

On return from FMLA leave, an employee is entitled to be reinstated to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. An employee is entitled to such reinstatement even if the employee has been replaced or the position has been restructured to accommodate the employee's absence.

If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA. However, the employer's obligations may be governed by the Americans with Disabilities Act (see Chapter 7 for a discussion of the ADA). An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits, and working conditions, including privileges, perquisites, and status. It must involve the same or

substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

With respect to pension and other retirement plans, any period of unpaid FMLA leave shall not be treated as, or counted toward, a break in service for purposes of vesting and eligibility to participate.

Denying a "Key" Employee's Right to Reinstatement

A "key employee" is a salaried FMLA-eligible employee who is among the highest paid 10 percent of all the employees employed by the employer within 75 miles of the employee's worksite.

In order to deny restoration to a key employee, an employer must determine that the restoration of the employee to employment will cause "substantial and grievous economic injury" to the operations of the employer, not whether the absence of the employee will cause such substantial and grievous injury.

A precise test cannot be set for the level of hardship or injury to the employer which must be sustained. If the reinstatement of a "key employee" threatens the economic viability of the firm, that would constitute "substantial and grievous economic injury." A lesser injury which causes substantial, long-term economic injury would also be sufficient. Minor inconveniences and costs that the employer would experience in the normal course of doing business would certainly not constitute "substantial and grievous economic injury."

An employer who believes that reinstatement may be denied to a key employee must give written notice to the employee at the time the employee gives notice of the need for FMLA leave (or when FMLA leave commences, if earlier) that he or she qualifies as a key employee. At the same time, the employer must

also fully inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employer should determine that substantial and grievous economic injury to the employer's operations will result if the employee is reinstated from FMLA leave. An employer who fails to provide such timely notice will lose its right to deny restoration even if substantial and grievous economic injury will result from reinstatement.

After notice to a "key" employee has been given that substantial and grievous economic injury will result if the employee is reinstated to employment, that employee is still entitled to request reinstatement at the end of the leave period even if the employee did not return to work in response to the employer's notice. The employer must then again determine whether there will be substantial and grievous economic injury from reinstatement, based on the facts at that time. If it is determined that substantial and grievous economic injury will result, the employer shall notify the employee in writing (in person or by certified mail) of the denial of restoration.

FMLA Enforcement

Employees who believe their rights under the FMLA have been violated can either: (1) file, or have another person file on his or her behalf, a complaint with the Secretary of Labor; or (2) file a private lawsuit.

If the employee files a private lawsuit, it must be filed within two years after the last action which the employee contends was in violation of the Act, or three years if the violation was willful.

If an employer has violated one or more provisions of FMLA, and if justified by the facts of a particular case, an employee may receive one or more of the following: wages, employment benefits, or other compensation

denied or lost to such employee by reason of the violation; or, where no such tangible loss has occurred, such as when FMLA leave was unlawfully denied, any actual monetary loss sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages for the employee. A court may award liquidation damages unless such amount is reduced by the court because the violation was in good faith and the employer had reasonable grounds for believing the employer had not violated the Act. When appropriate, the employee may also obtain appropriate equitable relief such as employment, reinstatement, and promotion. When the employer is found in violation, the employee may recover a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action from the employer, in addition to any judgment awarded by the court.

FMLA Recordkeeping Requirements

The FMLA provides that employers shall preserve records in accordance with the recordkeeping requirements of the Fair Labor Standards Act and the FMLA regulations. FMLA also authorizes the Department of Labor (DOL) to require any employer to submit books or records not more than once during any 12-month period unless the Department has reasonable cause to believe a violation of the FMLA exists or the DOL is investigating a complaint. The regulations establish no requirement for the submission of any records unless specifically requested by a Department official.

No particular order or form of records is required. However, employers must keep the records specified by these regulations for no less than three years and make them available for inspection by representatives of the Department of Labor upon request.

Records must disclose the following:

1. 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.
2. Dates FMLA leave is taken by FMLA-eligible employees (e.g., available from time records, requests for leave, etc., if so designated). Leave must be designated in records as FMLA leave; leave so designated may not include leave required under state law or an employer plan which is not also covered by FMLA.
3. If FMLA leave is taken by eligible employees in increments of less than one full day, the hours of the leave.
4. Copies of employee notices of leave furnished to the employer under FMLA, if in writing, and copies of all general and specific written notices given to employees as required under FMLA. Copies may be maintained in employee personnel files.
5. Any documents (including written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves.
6. Prepayments of employee benefits.
7. Records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and for the disagreement.

Covered employers with no eligible employees must maintain the payroll records. Covered employers in a joint employment situation must keep all the records required with respect

to any primary employees, and must keep the payroll records only for secondary employees.

If FMLA-eligible employees are not subject to FLSA's recordkeeping regulations for purposes of minimum wage or overtime compliance, an employer need not keep a record of actual hours worked, provided that:

1. Eligibility for FMLA leave is presumed for any employee who has been employed for at least 12 months; and
2. 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 record.

Records and documents relating to medical certifications, recertifications, or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if the Americans with Disabilities Act (ADA) is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements.

FMLA's Effect on Other Federal and State Laws

Nothing in the FMLA modifies or affects any federal or state law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability (e.g., Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act). FMLA's legislative history explains that FMLA is not intended to modify or affect the Rehabilitation Act of 1973 or the Americans with Disabilities Act of 1990. Thus, the leave provisions of the FMLA are wholly distinct from the reasonable accommodation obligations of employers covered under the ADA. The purpose of the

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About The Authors –

Louis P. DiLorenzo, Esq.

Mr. DiLorenzo has practiced Labor and Employment Law for 30 years and is Co-Chair of the Labor and Employment Law Department of the law firm of Bond, Schoeneck & King, PLLC. He also is Chair of the firm's Compensation Committee and Managing Partner of its New York City and Garden City Offices.

A graduate of Syracuse University and the University of Buffalo Law School, he represents employers and management in all aspects of Labor and Employment Law. His areas of expertise include collective bargaining, workplace investigations, NLRB proceedings, labor audits, supervisory training, wage and hour issues, arbitration, jury trials in both state and federal courts, wage incentive plans, OFCCP audits and proceedings, employment litigation before the EEOC and alternative dispute resolution techniques. Mr. DiLorenzo also serves several insurance companies as panel counsel with respect to employment litigation matters and served as General Counsel and Secretary to a Fortune 500 Company.

Mr. DiLorenzo is a Fellow of the College of Labor and Employment Lawyers, a New York representative of the worldwide Employment Law Alliance, listed in *Best Lawyers in America* (for over ten years), listed in *Who's Who in American Law*, *Who's Who in America* and *Chambers USA*. He has served as an adjunct professor at Syracuse University's School of Management, a member of the Editorial Board of the *New York State Bar Journal* and Chair of the New York State Bar Association's Labor and Employment Law Section. He has co-authored and contributed to a long list of treatises and has published articles on a variety of labor-related topics for a number of legal journals, educational publications, and HR-related periodicals and publications. He has been a keynote speaker at numerous seminars throughout the United States and other countries, and continues to lecture to university groups and local, state and national business associations.

Corporate Counsel Magazine named him "The Great Negotiator" and *Forbes Magazine* featured him in a cover story on Sexual Harassment.



Sheldon I. London, Esq.

Sheldon I. London in his 37 year legal career served some of the leading national trade associations as a principal in a Washington, D.C. based law firm. He carved a special niche for himself when in 1978, he wrote *How to Comply with Federal Employee Laws*. It was to become one of the important books in helping employers understand the complex area of compliance with federal employee laws.

The initial success of that publication was followed by a number of revised editions he authored over the next 25 years. As the Congress passed a dizzying array of new legislation, as the federal labor regulatory agencies issued complex new regulations, and the federal judiciary continually reviewed these new initiatives and established new judicial precedents, employers were anxiously looking for guidance. Mr. London earned the reputation of a lawyer who could write for the non-lawyer and make sense of the confusing myriad of laws, regulations and court decisions.

As he conducted seminars with employers and human resource professionals across America, he became keenly aware of their questions and needs. In his writing, he strove to keep it simple, while offering helpful suggestions to insure that his book would foster understanding and not add to confusion. His was a singular goal: provide employers with solid, accurate guidance for compliance in an understandable way.

Mr. London is a graduate of Dartmouth College. He earned an MBA from the Amos Tuck School of Business Administration, and a JD degree from the University of Connecticut School of Law.



Bond, Schoeneck & King – Firm Profile

Bond, Schoeneck & King, PLLC was founded in 1897 and developed a reputation for professional excellence, integrity, and success that lives on, more than a century later. These hallmarks of the firm have played an important role in attracting quality clients and legal work; have allowed BS&K to participate in the evolution and growth of the communities it serves; and have been the basis, not only for the noteworthy cases won, but for acknowledged leadership in the marketplace, the breadth of its practice and the talent BS&K has to offer.

From three attorneys a century ago, BS&K has grown to more than 160, making it one of the nation's largest 300 law firms. From its original Syracuse, New York location, BS&K has expanded to eight locations in New York, two in Florida, and one in Kansas. From a general law firm, BS&K has developed 27 discrete practice areas:

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Collegiate Sports	Immigration	School Districts
Commercial Lending	Intellectual Property and Technology	Securities
Construction	Labor & Employment Law	Small Business
Creditors' Rights	Litigation	Tax
Employee Benefits	Media and Communications	Tax Assessment, Condemnation & Valuation

BS&K's high quality work product is also recognized as a great value, offering "big city" expertise at business-friendly rates, an attraction for a surprisingly varied clientele. BS&K represents clients from across the nation in the areas of Labor & Employment Law, Employee Benefits, and Collegiate Sports. In other areas, such as Business, Higher Education, Intellectual Property, and Litigation, BS&K's representation is more regional or statewide in scope.

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BS&K attorneys have distinguished themselves by serving as New York State Lieutenant Governor, Majority Leader and Legislator, Insurance Commissioner, and in various judicial appointments; three times as President of the New York State Bar Association (including the second woman elected to the post); twice as President of the National Association of College and University Attorneys; as Corporation Counsel for various governmental entities; as Dean of the Syracuse University College of Law and President and CEO of the Albany (New York) Medical Center; as members of the boards of directors of numerous corporations and not-for-profit organizations; and as members of a multitude of local, state, and American Bar Association sections and committees.

BS&K's **Labor & Employment Law Department** is well known, locally, state-wide, and beyond. With 60 attorneys in this department along with the Employee Benefits Practice Group, BS&K has one of the largest practices of its kind in the Northeast. In addition to sheer numbers, the attorneys in the Department have distinguished themselves by having 14 selected to The Best Lawyers of America, more than any other practice in New York State, having 3 selected to Chambers USA, one of the most prestigious listings of its kind in the world, and having 4 selected as Fellows to the American College of Labor and Employment Law Lawyers.

The firm has a long history of providing timely information to keep clients, professional associations and industry groups current with new trends and case law as well as to provide practical tools to help meet the myriad challenges they face every day. In addition to print publications like this book, the firm provides seminars ranging from short "breakfast briefings" to full-day conferences with break out sessions that cover topics across its practice areas.