

# **INTRODUCTION**

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For some fifty years, the Washington Lawyers' Committee for Civil Rights and Urban Affairs (WLC) has labored to defend the rights of working people, and to address the issues of poverty, racism, and other forms of discrimination. The WLC presents this 2022 edition of the Workers' Rights Manual. The Workers' Rights Manual was originally published by the District of Columbia Employment Justice Center. In April 2017, the EJC merged into the Washington Lawyers' Committee and its efforts on behalf of justice for low-wage workers are now an integral part of the WLC. This manual is an attempt to provide a comprehensive source of legal information about the rights of workers in the Washington, D.C., Maryland and Virginia area.

The Washington Lawyers' Committee is very grateful to all those who have contributed to the publication of the various editions of the Workers' Rights Manual. Below please find a list of individuals who have contributed to the manual since its inception.

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## **Disclaimer**

This manual is intended to provide general information regarding legal rights relating to employment in the Washington metropolitan area. It is not a substitute for legal advice from a lawyer about a specific factual situation. In addition, because laws and procedures frequently change, the Washington Lawyers' Committee cannot ensure that the information in this manual is current nor be responsible for any use to which it is put. Experienced counsel should be consulted for current legal advice.

For more information about specific employment laws or to provide corrections or information that you believe would be useful for inclusion in this manual, please contact the WLC at (202) 319-1000. You can also visit the Washington Lawyers' Committee website at [www.washlaw.org](http://www.washlaw.org).

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**Table: Sources of Law – Wage and Hour**

Federal Statute	Fair Labor Standards Act, 29 U.S.C. §§ 201-219
Federal Regulations	29 C.F.R. §§ 500-899
D.C. Statutes	D.C. Code § 32-1001 <i>et seq.</i> (Minimum Wage and Overtime) D.C. Code § 32-1301 <i>et seq.</i> (Wage Payment and Collection)
D.C. Regulations	7 DCMR §§ 900-999 (CDCR 7-900 <i>et seq.</i> in Lexis)
Maryland Statutes	Md. Code Ann., Labor & Empl. § 3-501 <i>et seq.</i> (Maryland Wage Payment and Collection Law) Md. Code Ann., Labor & Empl. § 3-401 <i>et seq.</i> (Maryland Wage and Hour Law); Md. Code Ann., Labor & Empl. § 3-901 <i>et seq.</i> (Maryland Workplace Fraud Act)
Virginia Statutes	Va. Code Ann. § 40.1-28 <i>et seq.</i> (Virginia Minimum Wage Law) Va. Code Ann. § 40.1-29 <i>et seq.</i> (Virginia Wage Payment Law)
Federal Government Employees	Fair Labor Standards Act
D.C. Government Employees	D.C. Code §§ 1-611.01 to 1-612.01 District Personnel Manual

## **Table: Statutes of Limitations for Wage and Hour Claims**

\* For quick reference. See relevant sections for details on accrual, tolling, exceptions, and means of enforcement other than court actions.

F.L.S.A.	2 years (3 years if willful) 29 U.S.C. § 255
D.C. Wage Payment and Collection	3 years
D.C. Minimum Wage Revision Act	3 years (D.C. Code § 32-1013), but tolled as long as employer does not provide Notice of Hire form (D.C. Code § 32-1008(c))
Davis Bacon Act	2 years (3 years for willful violations) 29 U.S.C. § 255 (no private cause of action)
Service Contract Act	6 years for Dep't of Labor enforcement 28 U.S.C. § 2415; 29 C.F.R. § 4.187 (no private cause of action)
Walsh-Healy Public Contracts Act	2 years (3 for willful violations) 29 U.S.C. § 255
False Claims Act complaint alleging failure to pay prevailing wages on federal or D.C. government contracts	6 years after date of violation or 3 years after government knew or should have known of violation (whichever is later), but no action may be brought after 10 years (31 U.S.C. § 3731)
Virginia suits by workers against employers for breach of contract	3 years (for oral contracts) and 5 years (for written contracts) (Va. Code Ann. § 8.01-246)

## **Federal Wage & Hour Laws – Fair Labor Standards Act**

### **Enterprise Coverage or Individual Coverage Required**

In order to be covered by the FLSA, an employee must work for a business or organization fitting into one of two categories. The employer, which must have at least two employees, must:

(1) have an annual gross volume of sales made, or business done, that is not less than \$500,000 (“enterprise coverage”); **OR** (2) have employees engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by persons (“individual coverage”).

See 29 U.S.C. § 203(s).

Although the limits of individual coverage continue to be refined and tested, courts generally distinguish between employees producing or transporting goods into the flow of interstate commerce and employees merely consuming goods used in interstate commerce. *Compare, e.g., Foster v. Gold & Silver Private Club, Inc.*, No. 7:14CV00698 2015 U.S. Dist. LEXIS 165217, at \*16, (W.D. Va. Dec. 9, 2015) (finding individual coverage where Virginia exotic dancers used Internet as a tool of interstate commerce to attract clientele), and *Shomo v. Junior Corp.*, No. 7:11-cv-508, 2012 U.S. Dist. LEXIS 93275, at \*11 (W.D. Va. July 6, 2012) (finding individual coverage where employee resold purchased goods, thereby becoming “another intermediary in the chain of commerce”) with *Jimenez v. Southern Parking, Inc.*, No. 07-23156-CIV, 2008 U.S. Dist. LEXIS 70147, at \*22-23 (S.D. Fla. Sept. 16, 2008) (finding no individual coverage where car washers only engaged in interstate commerce when using cleaning products made out of state); and *Ergashov v. Global Dynamic Transp., LLC*, No. JFM-15-1007, 2015 U.S. Dist. LEXIS 154874 at \*9 (D. Md. Nov. 13, 2015) (finding no individual coverage where employee delivered donuts made in state exclusively to in-state consumers); see also *Thorne v. All Restoration Servs., Inc.*, 448 F.3d 1264, 1266 (11th Cir. 2006) (“[A] customer who purchases an item from Home Depot is not engaged in [interstate] commerce even if Home Depot previously purchased it from out-of-state wholesalers.”).

### **Minimum Wage & Overtime**

Under the *Federal Fair Labor Standards Act (FLSA)*, the current federal **minimum wage is \$7.25 an hour**, and **employers are required to pay non-exempt employees overtime at a rate of time-and-a-half of an employee’s regular rate of pay for hours worked in excess of 40 per week**. See 29 U.S.C. §§ 206(a)(1), 207(a)(1). Up-to-date information regarding the Fair Labor Standards Act can be found at <http://www.dol.gov>, a website of the U.S. Department of Labor (DOL).

Employee performance is irrelevant to the requirement that an employer pay minimum wage and overtime to a non-exempt employee. *See, e.g. Skipper v. Superior Dairies, Inc.*, 512 F.2d 409, 419 (5th Cir. 1975).

**Practice Tip:** Because the FLSA establishes only minimum standards that must be followed, the worker may be able to benefit from additional protections provided under state laws. Thus, in any court case, the worker should allege violations of the FLSA **and** more expansive state laws, if such laws apply. *See* 29 C.F.R. § 541.4.

## Exceptions to the Minimum Wage Requirement

### Tipped Employees

Under the FLSA, tipped employees may be paid as little as \$2.13 per hour for regular hours worked, though their tips received must make up the difference between the employer's pay (the "minimum cash wage") and the applicable minimum wage. If not, the employer must make up the difference itself. More detail on these concepts is below. Local laws also provide for a higher minimum cash wage in D.C. (\$5.35), Maryland (\$3.63), and Montgomery County (\$4.00).

Tipped employees are those who "customarily and regularly" receive more than \$30 per month in tips. Tips are the property of the employee. The employer is prohibited from using an employee's tips for any reason other than as a credit against its minimum-wage obligation to the employee ("tip credit") or in furtherance of a valid tip pool. Only tips actually received by the employee may be counted in determining whether the employee is a tipped employee and in applying the tip credit.

**Tip Credit:** Section 3(m) of the FLSA permits an employer to take a tip credit toward its minimum wage obligation for tipped employees equal to the difference between the required cash wage (which must be at least \$2.13) and the federal minimum wage. Thus, the maximum tip credit that an employer can currently claim under the FLSA is \$5.12 per hour (the minimum wage of \$7.25 minus the minimum required cash wage of \$2.13). The tip credit does not change for overtime hours. Thus, a tipped employee must be paid a cash wage of  $\$7.25 \times 1.5 = \$10.88 - \$5.12 = \underline{\$5.76}$  for overtime hours. *See* 29 C.F.R. § 531.

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Tip Credit Cheat Sheet					
	Minimum Regular Wage	Minimum OT Wage	Maximum Tip Credit	Minimum Regular Cash Wage	Minimum OT Cash Wage*
Federal	\$7.25	\$10.88	\$5.12	\$2.13	\$5.76
D.C.	\$16.10	\$24.15	\$10.75	\$5.35	\$13.40
Maryland	\$12.50**	\$18.75	\$8.87	\$3.63	\$9.88
Virginia	\$11.00	\$16.50	\$8.87	\$2.13	\$7.63

\* To calculate the minimum OT cash wage rate, subtract the Tip Credit amount from the Overtime Rate. Keep in mind that many tipped employees – and the establishments they work for – fall within certain federal and state law exemptions from coverage for overtime pay. For example, though the minimum overtime cash wage in Maryland may be, generally speaking, \$9.88, many restaurant workers are exempt from Maryland state laws regarding overtime pay. Thus, the minimum overtime cash wage for a particular restaurant worker in Maryland may be \$5.76 – the rate pursuant to the FLSA.

\*\*Montgomery County and Prince George’s County have separate minimum wage provisions. In Montgomery County, as of July 1, 2022, the minimum wage is \$15.65 for an employer with 51 or more employees, \$14.50 for an employer with 11 to 50 employees, and \$14.00 for an employer with 10 or less employees. The minimum overtime wage is therefore \$23.48, \$21.75, and \$21.00 respectively. The minimum cash wage for tipped employees in Montgomery County is \$4.00, and the minimum overtime cash wage for tipped employees is \$11.83, \$11.25, and \$11.00 respectively. In Prince George’s County, as of October 1, 2017, the minimum wage is \$11.50, or the minimum wage pursuant to the Maryland Wage and Hour Law or the FLSA, whichever is greater—making the current minimum wage \$12.50 and the minimum overtime wage \$18.75. The minimum cash wage for tipped employees in Prince George’s County is \$3.63, and the minimum overtime cash wage for tipped employees is \$9.88.

**Tip Pool:** The requirement that an employee must retain all tips does not preclude a valid tip pooling or sharing arrangement among employees who customarily and regularly receive tips, such as waiters, waitresses, bellhops, counter personnel (who serve customers), bussers, and service bartenders. A valid tip pool may not include employees who do not customarily and regularly received tips, such as dishwashers, cooks, chefs, and janitors. Managers or supervisors may only keep tips that they receive from customers directly for services that the manager or supervisor directly and solely provides. Any employer that collects tips to facilitate a mandatory tip pool generally must fully redistribute the tips within the pay period.

**Employer Requirements for Receiving the Tip Credit:** The employer must provide the following information to a tipped employee before the employer may use the tip credit:

1. the amount of cash wage the employer is paying a tipped employee, which must be at least \$2.13 per hour;
2. the additional amount claimed by the employer as a tip credit, which cannot exceed \$5.12 per hour (the difference between the minimum required cash wage of \$2.13 and the current minimum wage of \$7.25);

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3. that the tip credit claimed by the employer cannot exceed the amount of tips actually received by the tipped employee;
4. that all tips received by the tipped employee are to be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and
5. that the tip credit will not apply to any tipped employee unless the employee has been informed of these tip credit provisions.

**Dual Jobs:** It is somewhat common for tipped workers to also perform work that is non-tip-producing, a waiter cleaning or setting tables, for example. The Department of Labor prohibits employers from taking the tip credit for “substantial” time (more than 20 percent per week, or for a continuous period of more than 30 minutes) spent on non-tipped work. If such non-tip-producing work is not substantial, however, an employer may still take the tip credit for that work.

For more information on the tip regulations under the Fair Labor Standards Act, *see* <https://www.dol.gov/agencies/whd/flsa/tips>.

### **Sub-minimum Wage for Persons with Disabilities**

*FLSA* allows employers to pay sub-minimum wages to workers whose disabilities impair their productive capacity for the work they perform, but this is a limited exception. *See* U.S. DOL WHD, Fact Sheet # 39, “The Employment of Workers with Disabilities at Special Minimum Wages,” <https://www.dol.gov/sites/dolgov/files/WHd/legacy/files/whdfs39.pdf>.

All rates must be approved by the Department of Labor and are subject to review by petitioning the Department of Labor. Petitions disputing the worker’s wage rate should be mailed to: Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave. NW, Washington, D.C. 20210. No particular form is required, but the petition must be signed by the worker or his/her parent or guardian, and must contain the employer’s address.

### **Unpaid Interns at For-Profit Employers**

There are some narrow circumstances under which individuals who participate in “for-profit” private sector internships or training programs may do so without compensation.<sup>1</sup> The Supreme Court has held that the term “suffer or permit to work” cannot be interpreted so as to make a person whose work serves only his or her own interest an employee of another who provides aid or instruction. *See Walling v. Portland Terminal*, 330 U.S. 148 (1947). This may apply to interns who receive training for their own

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<sup>1</sup> DOL considers unpaid internships for public sector and non-profit charitable organizations generally permissible. *See* U.S. DOL WHD, “Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act,” <https://www.dol.gov/whd/regs/compliance/whdfs71.pdf>.

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educational benefit if the training meets certain criteria. The determination of whether an internship or training program meets this exclusion depends upon all of the facts and circumstances of each such program. The following six criteria must be applied when making this determination:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training that would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

For more information, see U.S. DOL WHD, “Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act,” <http://www.dol.gov/whd/regs/compliance/whdfs71.pdf> See also *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 537 (2d Cir. 2015).

### **New Employees Younger than 20 Years Old**

The minimum wage for employees younger than 20 years old for the first 90 days of employment is \$4.25. See 29 U.S.C. § 206(g). For more information, see U.S. DOL WHD, “Fact Sheet #32: Youth Minimum Wage – Fair Labor Standards Act,” <https://www.dol.gov/agencies/whd/fact-sheets/32-minimum-wage-youth>.

## **Issues in Calculating Overtime**

### **Determining the Workweek**

The workweek is a fixed period of 168 hours (seven consecutive 24-hour periods) that can begin at any time and that regularly repeats. It need not coincide with the calendar week. See 29 CFR § 778.105. Once established, the starting point of an employee’s workweek can be changed only if the change is meant to be permanent and is not for the purpose of evading overtime wage laws. In the case of large plants, a workweek may be established for the entire plant rather than for individual workers. Workweeks stand alone for determining overtime hours and cannot be combined and averaged with other workweeks. See 29 CFR § 778.104. This means that a week of 30 hours cannot be combined with a week of 50 hours in order to have two weeks of 40 hours (and thus be overtime-free).



## Wage and Hour

Figuring out when an employee's workweek begins is important because it may determine whether, for example, seven consecutive days of work are part of the same or different workweeks. It is important to remain consistent with whatever starting point is established, so that each workweek is based on the same unit of time.

### **Flat or Fixed Rates for a Job**

Employers and employees are allowed to agree on compensation in a flat or fixed amount for work done on a particular job or for a particular day or week of work. *See* 29 CFR § 778.112. In these scenarios, an employee's regular hourly wage equals the total amount she receives divided by the total number of hours worked in the day, the week, or on the job. To the extent that the actual hours worked by the employee exceeded 40 in a given workweek, an employer must pay 1.5 times the regular hourly rate for the excess hours. The employee is considered to have already received his or her regular (non-overtime) wage from the fixed salary.

**Note:** Although employers and employees can agree upon this type of arrangement, they cannot negotiate a fixed salary that would result in an hourly wage below the legally-mandated minimum wage.

In trying to determine the regular rate for an employee with a flat or fixed salary for a pre-determined number of hours per week, see 29 C.F.R. § 778.113. The key is to determine "the number of hours which the salary is **intended to compensate**." 29 C.F.R. § 778.113(a) (emphasis added). This section may apply whether the number of hours is greater or fewer than 40 per week. In either case, where the hours and salary remain fixed, the regular rate is determined by dividing the salary by the number of hours worked per week. All hours are considered to have been compensated for at the regular rate, so that only the overtime premium (*i.e.*, the one half extra for each overtime hour) is due.

**Example 1:** If an employee receives \$500 per week for 55 hours of work, the regular rate is  $\$500/55 \text{ hours} = \$9.09$ . The overtime premium of \$4.55 ( $\$9.09 \times 50\%$ ) is due for hours worked in excess of 40. Here, in addition to the weekly salary of \$500, the employee is owed \$68.18 (15 hours  $\times$  \$4.55) as an overtime premium. In this example, the employer *intended* that the employee would work 55 hours.

**Example 2:** If the employer and employee had an arrangement whereby the employee received a certain amount for 40 hours of work, and the employee worked more than 40 hours, the employee would be owed the overtime rate for all hours more than 40. The regular hourly rate would be calculated by dividing the salary into 40 hours, not the number of hours actually worked. In this example, the employer intended that the employee would work 40 hours.

### **Flat or Fixed Salaries for a Fluctuating Workweek**

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If an employer pays an employee a flat sum for a week, the employer is still liable for overtime for hours in excess of 40, but there may be a question as to how much overtime is owed. Ordinarily, an employee who works more than 40 hours per week will be entitled to overtime at a rate of one-and-a-half times the regular hourly rate for the hours more than 40. **This is based on the presumption that the regular weekly pay is for 40 hours per week.**

If the parties agree that the weekly rate is for all hours worked, regardless of how many, the employer may be able to pay the employee a flat sum per week, plus an additional amount for weeks in which the employee worked overtime. The additional overtime amount would be a ½ pay differential rather than time and a half. **The regular hourly rate will vary from week to week depending on how many hours the employee actually works each week.** For this reason, any hours worked over 40 have already been compensated as straight-time hours and the employer need only pay additional half-time pay to satisfy the FLSA.

The requirements that an employer must meet in order to use the **fluctuating workweek method** are set forth in 29 CFR § 778.114. If the requirements are met, the employer can simply pay the half-time differential on top of the fixed weekly pay. In the regulation, the requirements are as follows: (1) there must be a “clear mutual understanding” between the employer and employee that the fluctuating workweek method of pay is being used; (2) “the employee’s hours must fluctuate from week to week;” (3) the salary must be fixed even if hours change; (4) the salary must be enough such that the employee receives minimum wage; and (5) the employer must pay extra compensation (at a rate of half the hourly rate) for all overtime hours worked.

If the fluctuating workweek method applies, the hourly rate upon which overtime compensation is based will vary from week to week depending on how many hours were worked that week. If these requirements are not met by the employer, the employer may be liable to the employee for payment of overtime as if the employee had never paid any wages to the employee for those overtime hours. *See Rainey v. Am. Forest and Paper Assn., Inc.*, 26 F.Supp.2d 82, 102 (D.D.C.1998) (employer liable at a rate of one-and-a-half times the hourly rate because there was no clear mutual understanding between the parties and because it did not pay overtime at the half-time rate).

**Example:** Assume (1) the employee is paid \$750 per week regardless of the number of hours worked and (2) the fluctuating workweek method applies. In week 1, the employee works 50 hours, and, in week 2, the employee works 75 hours. The week 1 hourly rate is  $\$750/50 \text{ hours} = \$15$ , and the week 2 hourly rate is  $\$750/75 \text{ hours} = \$10$ . For week 1, the employee must be paid ½ time for the overtime premium, which is  $\$7.50 \times 10 \text{ hours}$ , or \$75. For week 2, the employee must be paid the overtime rate of  $\$5 \times 25 \text{ hours}$ , or \$125.

## Waiting Time

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The key issue here is whether the employee was “engaged to wait” or “waited to be engaged.” *Skidmore v. Swift*, 323 U.S. 134, 137 (1944); 29 C.F.R. § 785.14. Whether waiting time is working time is a common-sense inquiry dependent upon the circumstances. *See* 29 C.F.R. § 785.14. Generally, if it benefits the employer to have the employee in a standby capacity, then the waiting time is compensable. *See Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944).

The DOL regulations provide guidance about whether waiting time is compensable, and it gives the following examples and explanation:

A stenographer who reads a book while waiting for dictation, a messenger who works a crossword puzzle while awaiting assignments, a fireman who plays checkers while waiting for alarms and a factory worker who talks to his fellow employees while waiting for machinery to be repaired are all working during their periods of inactivity. . . . [The wait time is work time because] **the employee is unable to use the time effectively for his own purposes. It belongs to and is controlled by the employer. In all of these cases waiting is an integral part of the job. The employee is engaged to wait.**

29 C.F.R. § 785.15 (emphasis added) (citations omitted). An employee is off-duty, that is, “waiting to be engaged,” only where s/he is “completely relieved from duty” and where the time period is “long enough to enable him to use the time effectively for his own purposes.” 29 C.F.R. § 785.16(a).

### **Break and Meal Time**

Rest periods that are fewer than 20 minutes long constitute time worked under the regulations. *See* 29 C.F.R. § 785.18. Although meal periods of more than 30 minutes do not constitute work time, such periods might constitute work time if the employee is required to work during the meal period. *Id.* at § 785.19(a). There are, however, special rules for domestic workers that govern deductions from pay for meals and lodging. *Id.* at § 552.100.

### **Training Time**

Under FLSA, workers must be compensated for time spent in training programs, lectures, or meetings unless the following four criteria are met:

- 1) Attendance is outside the employee’s regular working hours;
- 2) Attendance is voluntary<sup>2</sup>;

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<sup>2</sup> Attendance is not voluntary when attendance is required by the employer, or when the employee “is given to understand or led to believe that his present working conditions or the continuance of his employment

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- 3) The training program, lecture, or meeting is not directly related to the employee's job<sup>3</sup>; and
- 4) The employee does not perform any productive work during the training program, lecture, or meeting.

See 29 C.F.R. § 785.27.

### Exceptions

If the training program "corresponds to courses offered by independent bona fide institutions of learning," the time spent participating in the training program is not compensable even if the training is directly related to the employee's job as long as attendance is voluntary and the training is outside the employee's regular working hours. See 29 C.F.R. § 785.31.

Training time is not compensable if the employee is working under a "bona fide apprenticeship program" and the training program does not include "performance of the apprentice's regular duties." See *Wage and Hour Law: Compliance and Practice* § 6:23.<sup>4</sup> In *Ballou v. General Electric Co.*, the First Circuit held that employees engaged in an apprenticeship program were not entitled to compensation for time spent attending academic and theoretical classes conducted off the company's premises by independent educational institutions, even though the employees were required to attend these classes under their employment contracts. The apprenticeship program included direct job training on the employer's premises, for which the employees were compensated, in addition to the academic and theoretical classes for which the employer paid the employees' tuition fees but did not compensate the employees for time spent attending and preparing for classes. See 433 F.2d 109 (1st Cir. 1970).

There is a special rule for law enforcement officers and firefighters. Time spent in training programs is compensable unless the following criteria are met:

- 1) Attendance is outside regular working hours; and
- 2) The training is specialized or follow-up training; and

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would be adversely affected" by his failure to attend the training program, lecture, or meeting. 29 C.F.R. § 785.28.

<sup>3</sup> The training program is directly related to the employee's job when "it is designed to make the employee handle his job more effectively." The training program is not directly related to the employee's job when the training is designed to train him for another job, or to develop a new or additional skill. The training program is not directly related to the employee's job when the training program is designed to prepare the employee for "advancement through upgrading the employee to a higher skill, and is not intended to make the employee more efficient in his present job...even though the [training program] incidentally improves his skill in doing his regular work." 29 C.F.R. § 785.29

<sup>4</sup> The apprenticeship program must be a "written agreement or program which fundamentally meets the standards of the Bureau of Apprenticeship and Training of the United States Department of Labor." WHLCP § 6:23.

3) The training is required by a governmental organization.

*See* 29 C.F.R. § 553.226.

## **Exemptions from FLSA Overtime Requirement**

One of the main purposes of the FLSA was to guarantee overtime for “blue collar” workers. Thus, the act exempts from its overtime coverage workers who are paid on a **salary basis** AND who have certain **duties**. *See* 29 C.F.R. § 541.3. These exemptions are generally referred to as the **white collar exemptions**.

### **White Collar Exemptions**

**Salary Basis Test:** A worker who is paid a salary (not an hourly wage) and earns at least \$684 per week or \$35,568 per year may be exempt from receiving overtime pay pursuant to a white collar exemption. *See* 29 C.F.R. §§ 541.100 *et seq.* Regardless of job duties, any worker earning less than this amount is automatically eligible for overtime.

**Duties Test:** In addition to being paid on a salary basis, the worker must have duties that qualify as **administrative, executive, or professional**, or the employee must be a qualifying **creative professional, computer professional, outside salesperson, or highly compensated employee**. *See* 29 U.S.C. § 213(a)(1); 29 C.F.R. § 541.<sup>5</sup>

**Administrative Duties Test:** The worker’s primary duties must be the performance of non-manual work directly related to the management or general business operations of his or her employer, and the worker must exercise discretion and independent judgment on matters of significance.

**Executive Duties Test:** The worker must have the authority to hire and fire employees, or at least to make regular and generally relied upon recommendations regarding hiring, firing, or employee advancement. The worker’s primary duties must be managing the employer’s business or a department of the employer’s business. Generally, the worker must supervise or direct the work of at least two or more subordinates. Equity owners of 20% or more are also considered executive employees.

**Professional Duties Test:** The worker must have engaged in a prolonged course of specialized instruction to work in his or her job, and the advanced instruction must be in a field of science or learning. The work must require the consistent exercise of discretion or judgment.

**Creative Professionals:** The worker’s primary duty must be the performance of work requiring invention, imagination, originality, or talent in a recognized artistic or creative

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<sup>5</sup> The “duties” tests are laid out in 29 C.F.R. §§ 541.100(a), 541.200(a), and 541.300(a).

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**Computer Employees:** Computer employees may be paid on an hourly basis and still be exempted from the FLSA, so long as they are paid at least \$27.63 an hour. The exemption generally applies to computer systems analysts, computer programmers, software engineers, or other similarly skilled workers.

**Outside Salespersons:** The outside salesperson must be regularly performing sales work away from the employer's place of business and must be primarily working making sales for which a customer or client will pay.

**Highly Compensated Employees:** Workers who perform office or non-manual work and are paid total annual compensation of \$100,000 or more (which must include at least \$455 per week paid on at least a salary or non-hourly basis) are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative, or professional employee, discussed above.

**Note:** The white collar exemptions do not apply to **police officers, firefighters, paramedics, park rangers, hazardous materials workers and similar employees**. In addition, no matter how highly paid these workers may be, they are entitled to overtime under the FLSA. *See* 29 C.F.R. 541.3(b).

### **Domestic Worker Exemption**

Domestic workers who live in the household of their employers are exempt from the act's overtime requirements. *See* 29 U.S.C. § 213(b)(21). However, these workers are protected by the minimum wage and record-keeping requirements. *See* 29 U.S.C. § 206(F); 29 C.F.R. §§ 516.2, 516.5, 516.27.

### **Home Care Workers**

Under what is commonly known as the "companionship exemption," home care workers who are employed to assist the elderly or infirm in their homes have been generally exempt from the minimum wage and overtime provisions of the FLSA. *See* 29 U.S.C. § 213(a)(15). However, in September 2013, the U.S. Department of Labor issued regulations that extend the protections of the FLSA to home care workers, clarifying and narrowing this exemption. After the Supreme Court declined to review an appeals court's decision upholding the new regulations, the regulations went into effect on October 13, 2015. *Home Care Ass'n of Am. v. Weil*, 799 F.3d 1084 (D.C. Cir.), *cert. denied*, 579 U.S. 927 (2016).

Perhaps most significantly, the new regulations provide that third-party employers such as home care agencies and state intermediaries may not claim the exemption for home care workers they employ, regardless of the breakdown of duties. Put simply, all home care workers who are employed by a third party to provide services to elderly or

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disabled persons are entitled to federal minimum wage and overtime. *See* 29 C.F.R. § 552.109.

For workers not employed by third-party employers, the final regulations narrow the definition of “companionship services,” defining it as the provision of fellowship and protection. The regulations clarify that home care workers who spend more than 20% of their weekly work hours assisting an individual with “ADL”s (activities of daily living) and “IADL”s (instrumental activities of daily living) – including grooming, dressing, feeding, bathing, toileting, and transferring (ADLs); as well as meal preparation, driving, light housework, managing finances, and arranging medical care (IADLs) – are not exempt from minimum wage or overtime. 29 C.F.R. § 552.6. Workers who are exempt may not provide medically-related services, nor are they allowed to perform domestic services primarily for the benefit of other household members.

### **Workers Under a Collective Bargaining Agreement**

If a collective bargaining agreement negotiated by a certified bargaining representative provides for certain minimum and/or maximum hours and certain rates of pay, employers cannot be found to have violated the FLSA. *See* 29 U.S.C. § 207(b). Practically speaking, the provisions of most collective bargaining agreements exceed the requirements of the FLSA with respect to wages and hours of work.

### **Employees of Recreational, Organized Camp, Religious, or Non-Profit Educational Centers**

Workers employed in a recreational, organized camp, religious, or non-profit educational center may not be entitled to minimum wage or overtime if the facility operates for no more than seven months per year or if its revenue from one six-month period in the previous year is not more than one-third of its revenue during the other six months of that year. *See* 29 U.S.C. § 213(a)(3).

### **Employees of State and Local Governments**

State and local government employees are generally covered under the FLSA, with the exception of elected officials, their staffs and advisors, and employees of state and local legislative bodies. *See* 29 C.F.R. § 553.3(a); *see also*, 29 C.F.R. § 553.11 & 553.12. For other exemptions for employees of public agencies, *see* 29 C.F.R. § 553.32.

### **Motor Carrier Act**

The FLSA provides an overtime exemption at 29 U.S.C. § 213(b)(1) for employees “who are within the authority of the Secretary of Transportation to establish qualifications and maximum hours of service pursuant to [Section 204 of the Motor Carrier Act of 1935],” except those employees covered by the “small vehicle exception.”

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The rules are somewhat complicated, but generally speaking, an employee who is a: (a) driver, (b) driver's helper, (c) loader or (d) mechanic affecting the safety of operation of motor vehicles may be within this exemption if his or her duties involved motor vehicles that fit into one the following categories:

- 1) Vehicles that weigh 10,001 pounds or more; or
- 2) Vehicles that are designed or used to transport more than eight passengers, including the driver, for compensation; or
- 3) Vehicles that are designed or used to transport more than 15 passengers, including the driver, and not used to transport passengers for compensation; or
- 4) Vehicles that are used in transporting hazardous material.

For more information, see "Fact Sheet #19: The Motor Carrier Exemption under the Fair Labor Standards Act (FLSA)," <http://www.dol.gov/whd/regs/compliance/whdfs19.pdf>.

## **Other Exemptions from Minimum Wage and Overtime Requirements**

The following is a list of other types of employees who are exempted from the FLSA's minimum wage and overtime requirements:

- Certain workers in the fishing and seafood processing industries (29 U.S.C. § 213(a)(5))
- Certain agricultural workers (29 U.S.C. § 213(a)(6))
- Local delivery drivers paid by "trip rates" (29 C.F.R. § 551)
- Employees of small, local newspapers (29 U.S.C. § 213(a)(8))
- Seamen employed on vessels other than American vessels (29 U.S.C. § 213(12))
- Casual babysitters and domestic workers, caregivers, and companions for the aged and infirm (29 U.S.C. § 213(a)(15))
- State government employees may be paid with compensatory time instead of overtime in certain circumstances (29 U.S.C. § 207(o))
- Commissioned employees: Retail or service industry employees need not be paid the overtime rate if (1) the regular rate of pay of such an employee is in excess of 1.5 times the minimum wage; and (2) more than half the employee's compensation for a representative period (of at least one month) represents commissions on goods or services (29 U.S.C. § 207(i))

For additional exemptions from overtime requirements only, see 29 U.S.C. § 213(b).

In general, exemptions from the FLSA are narrowly construed. The Act, as remedial social legislation, should be construed in favor of the workers it was designed to protect.



*See Arnold v. Kanowsky, Inc.*, 361 U.S. 388, 392 (1960).

It is an employer's burden to show that a worker is exempt from the overtime provisions in FLSA. *See Jones and Assoc., Inc. v. District of Columbia*, 642 A.2d 130, 133 (D.C. 1994).

## **Losing the Exemption – Improper Deductions from Pay**

As a general principle, exempt employees should always receive a predetermined amount of pay for each pay period, with no deductions for the quality or quantity of work performed. In addition, the **employer should not make any full day or less than full day deductions from an exempt employee's pay** for employer-necessitated absences, jury, witness, or military duty (although taking an offset for any fees paid for service is allowed). Less than full day or full day deductions due to FMLA leave, however, are permissible. Full-day deductions can be made for full-day absences due to personal reasons, sickness, or disability, so long as the deductions are in conformity with other laws, and for days not worked during the first or last week of employment.

Improper deductions from an otherwise exempt employee's pay can result in a loss of the exemption for the entire class of employees, not just that employee. The U.S. Department of Labor, however, issued regulations in 2004 allowing employers a **safe harbor**. The safe harbor provision is designed to protect employers who make one-time, inadvertent errors. In these cases, the exemption is lost only for employees in the same job class who work for the same manager who made the improper deduction. The safe harbor provision does not apply when there is a pattern and practice of improper deductions. To qualify for safe harbor, an employer must have a written policy against improper deductions, employees must be notified about the policy, and employees must be reimbursed for improper deductions. In addition, the regulations allow an employer to make disciplinary deductions for one day in response to safety violations of major significance.

## **Miscellaneous Liability Issues**

### **Temporary or Contingent Workers – Joint Liability**

When employees are working for an employer through a temporary agency, both the employer and the agency may be liable for violations of FLSA if the retaining employer is not acting independently from the staffing agency. *See* 29 C.F.R. § 791.2(a). For more on joint employers, see Joint Employer section, *infra*.

### **Individual Liability**

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Individual owners, managers, directors, shareholders, or officers can be personally liable for violations of FLSA in certain circumstances. *See Lambert v. Ackerley*, 180 F.3d 997, 1012 (9th Cir. 1999) (“Where an individual exercises control over the nature and structure of the employment relationship, or economic control over the relationship, that individual is an employer within the meaning of the Act, and is subject to liability”); *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 66-77 (2d Cir. 2003) (discussing two formulations of the **economic reality test** to determine whether one is an “employer” and thus liable under FLSA).

## Wage Payment under FLSA

Technically, the FLSA does not have a wage payment component. Thus, although an employee may bring a claim under the FLSA for unpaid minimum or overtime wages, there is no cause of action available under the FLSA for workers who have simply not been paid their regular rate for hours worked (apart from a cause of action for the minimum wage portion of their regular rate). Generally, the failure to pay wages must be enforced under D.C. or state law. Some courts, however, have recognized a cause of action under FLSA for late payment of wages, called the **prompt payment requirement**. This cause of action has not been explicitly accepted or rejected in the District of Columbia or by the 4th Circuit. The leading case is *Biggs v. Wilson*, 1 F.3d 1537 (9th Cir. 1993). In *Biggs*, the 9th Circuit found the State of California liable for prejudgment interest and liquidated damages when it failed to pay some employees until two weeks after the regular payday (because no state budget had been passed appropriating the funds).

## Penalties and Enforcement of FLSA

### Liquidated Damages, Attorneys’ Fees & Criminal Sanctions

An employer who violates the act is liable to the employee for the unpaid wages and an additional equal amount as liquidated damages. *See* 29 U.S.C. § 216(b). The employer, however, may not be liable for liquidated damages if it demonstrates that its actions were in good faith and that it had reasonable grounds for believing its actions or omissions did not violate the law. *Id.* at § 260.<sup>6</sup>

A prevailing plaintiff/worker in court must be awarded reasonable attorneys’ fees and costs to be paid by the defendant. *See* 29 U.S.C. § 216(b). A worker cannot, however, recover prejudgment interest. *See Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 715 (1945).

The FLSA also provides for both civil and criminal penalties. Civil penalties can

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<sup>6</sup> In a lawsuit for the violation of the anti-retaliation provisions, a prevailing plaintiff/worker can recover any amount of damages deemed equitable by the court. *See* 29 U.S.C. § 215(a)(3); *Avitia v. Metro. Club of Chi., Inc.*, 49 F.3d 1219 (7th Cir. 1995); *Soto v. Adams Elevator Equip. Co.*, 941 F.2d 543 (7th Cir. 1991); *Bogacki v. Buccaneers Ltd. Partnership*, 370 F.Supp.2d 1201 (M.D. Fla. 2002).

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amount to \$1,000 per violation. *See* 29 U.S.C. § 216(e). Criminal penalties for willful violations can be up to six months in jail and up to a \$10,000 fine. *Id.* at § 216(a).

### **Enforcement**

Workers can pursue claims through the U.S. Department of Labor, *see* 29 U.S.C. § 216(c), or by proceeding directly to state or federal court, *see* 29 U.S.C. § 216(b).<sup>78</sup> In certain cases, however, a worker's right to sue ends if the Secretary of Labor brings an action in court on the worker's behalf. *See* 29 U.S.C. § 216(b).

The Wage & Hour Division of the Department of Labor has offices at the following locations:

U.S. Department of Labor, Wage & Hour Division (District Office)  
2 Hopkins Plaza, Room 601  
Baltimore, MD 21201  
Phone: 410-962-6211  
1-866-4-US-WAGE (1-866-487-9243)

U.S. Department of Labor, Wage & Hour Division (Area Office)  
2300 Clarendon Blvd., Suite 503  
Arlington, VA 22201  
Phone: 703-235-1182

U.S. Department of Labor, Wage & Hour Division (Area Office)  
6525 Belcrest Road, Suite 250  
Hyattsville, MD 20782  
Phone: 301-436-6767

In a suit by the Secretary, the Secretary can seek injunctive relief in addition to damages. *See* 29 U.S.C. § 217. Such a "hot goods" injunction could prohibit the employer from shipping goods across state lines if the goods were produced by workers who were not paid the appropriate minimum wage and/or overtime. *See* 29 U.S.C. § 215(a)(1); 29 U.S.C. § 216(b); 29 U.S.C. § 216(c).

### **Statute of Limitations**

The statute of limitations for filing a lawsuit under FLSA is **two years (three years for willful violations)**. *See* 29 U.S.C. §§ 255(a). Each workweek is treated separately for

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<sup>7</sup> Although the FLSA does not preclude bringing an action in state court, an additional inquiry is whether the state court will have jurisdiction over the claim.

purposes of the statute of limitations. The standard for determining willfulness is whether “the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute.” *McLaughlin v. Richland Shoe*, 486 U.S. 128, 133 (1988). Courts have found willful violations of FLSA where the employer had notice of the law through earlier violations, but kept perpetrating the illegal scheme, *see Dole v. Elliott Travel*, 942 F.2d 962, 966-67 (6th Cir. 1991), and where, even after a DOL investigation confirmed the violations, the employer still continued the illegal practices, *see Reich v. Monfort*, 144 F.3d 1329, 1334-35 (10th Cir. 1998).

### **Equitable Tolling of the Statute of Limitations**

Some plaintiffs have had success arguing that the two/three-year statute of limitations should be equitably tolled for any applicable limitations period because the employer failed to post the statutorily required notice of FLSA rights at the worksite. *See Kamens v. Summit Stainless, Inc.*, 586 F.Supp. 324, 328 (E.D. Pa. 1984) (citing *Bonham v. Dresser Indus.*, 569 F.2d 187, 193 (3d Cir. 1978)). Courts have generally declined to permit tolling *per se* if no notice was posted, and have instead adopted a context-based analysis that looks at evidence of a larger deception to avoid informing employees of their FLSA rights. *See, e.g., Ayala v. Tito Contrs., Inc.*, 82 F. Supp. 3d 279, 291 (D.D.C. 2015) (“[T]he relevant question for tolling is the effect of the failure to post in the context of the entire exchange between employer and employee”); *Patraker v. Council of Env’t of N.Y.*, No. 02 Civ. 7382 (LAK), 2003 WL 22336829, at \*2 (S.D.N.Y. Oct. 14, 2003) (holding that once plaintiff has retained an attorney, failure to post notice becomes immaterial); *Antenor v. D&S Farms*, 39 F.Supp.2d 1372, 1379-80 (S.D. Fla. 1999).

## **Retaliation**

Under FLSA, an employer may not “discharge or in any other manner discriminate against any worker because that worker has filed a complaint or instituted or caused to be instituted any proceeding...or has testified or is about to testify in any proceeding.” 29 U.S.C. § 215(a)(3). In order to succeed on a retaliation claim under this section, the plaintiff/worker must prove the following:

- (1) The worker engaged in **protected activity**;
- (2) The employer took an **adverse action** against him or her; and
- (3) **Causation** (the employer took the adverse action *because* the worker engaged in protected activity).

*See Conner v. Schnuck Markets, Inc.*, 121 F.3d 1390, 1394 (10th Cir. 1997); *McKenzie v. Renberg’s Inc.*, 94 F.3d 1478 (10th Cir. 1996); *Saffels v. Rice*, 40 F.3d 1546 (8th Cir. 1994).

### **Protected Activity**

FLSA complaints made to the U.S. Department of Labor and filed as lawsuits in court

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are clearly protected activity; however, it is unclear whether informal complaints made to the worker's employer constitute protected activity. State or District wage laws often have stronger anti-retaliation protections.

The U.S. Supreme Court has held that oral complaints constitute protected activity under FLSA. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335 (2011). The Court in *Kasten* noted, and the Fourth Circuit later stressed, that even in cases of oral complaints, however, employers must still receive "fair notice as to when a complaint ha[s] been filed." *Minor v. Bostwick Labs, Inc.*, 669 F.3d 428, 432 (4th Cir. 2012); *see also Randolph v. ADT Sec. Servs.*, 2011 U.S. Dist. LEXIS 87464 (D. Md. Aug. 8, 2011).

### **Causation**

With regard to the element of causation, the worker must show that the protected activity was a substantial factor in the adverse action, meaning that "but for" the protected activity, the adverse action would not have occurred. *See Conner v. Schnuck Mkts., Inc.*, 121 F.3d 1390, 1394 (10th Cir. 1994); *Knickerbocker v. City of Stockton*, 81 F.3d 907, 911 (9th Cir. 1996); *Reich v. Davis*, 50 F.3d 962 (11th Cir. 1995). It is an employer's burden to negate or disprove the "but for" causation, that is, to show that it would have taken the adverse action regardless of the worker's protected activity. *See Conner*, 121 F.3d at 1394; *Knickerbocker*, 81 F.3d at 911.

### **Damages**

If an employer violates FLSA's anti-retaliation provision, the plaintiff may recover "such legal or equitable relief as may be appropriate." 29 U.S.C. § 216(a) (3). Courts are divided, however, as to whether this includes punitive damages. *See Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928 (11th Cir. 2000) and *Johnston v. Davis Sec., Inc.*, 217 F.Supp.2d 1224 (D. Utah 2002) (punitive damages not available under anti-retaliation provision) *cf. Travis v. Gary Co. Mental Health Ctr., Inc.*, 921 F.2d 108, 111 (7th Cir. 1991) and *Marrow v. Allstate Sec. & Investigative Services, Inc.*, 167 F.Supp.2d 838 (E.D. Pa. 2001) (punitive damages available for violation of anti-retaliation provision).

### **Retaliation Against Two or More Workers**

In addition to those protections, when two or more workers complain about wages and are terminated or punished because of the complaint, it may be appropriate for the workers to file a charge under the *National Labor Relations Act*, which protects "concerted activity." For more information, see the Manual's chapter on [Labor Unions and Labor Law](#).

### **Retaliation Against Undocumented Workers**

Several federal courts have held that it is illegal under FLSA to report a worker to the Immigration and Naturalization Service (INS) as retaliation for a wage-hour complaint. *See Zirintusa v. Whitaker*, 2007 U.S. Dist. D.C. (Jan. 3, 2007) (No. 05-1738) at \*15; *Singh v.*

*Jutla & C.C.&R's Oil, Inc.*, 214 F. Supp. 2d 1056 (N.D. Cal. 2002); *Contreras v. Corinthian Vigor Insurance Brokerage, Inc.*, 25 F. Supp. 2d 1053 (N.D. Cal. 1998). Under FLSA, undocumented workers may recover unpaid wages and liquidated damages for “work actually performed.” [\*Lucas v. Jerusalem Cafe, LLC\*, 721 F.3d 927, 937 \(8th Cir. 2013\)](#). However, undocumented workers are ineligible for reinstatement and back pay for “for years of work not performed, for wages that could not lawfully have been earned.” *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 149 (2002).

## Miscellaneous Issues

### 11<sup>th</sup> Amendment Immunity Issues

In the case of *Alden v. Maine*, 527 U.S. 706 (1999), the Supreme Court held that state employees may not sue the state for FLSA violations because states are immune from such suits under the 11th Amendment to the U.S. Constitution. Puerto Rico, a territory, enjoys similar immunity from FLSA suits. See *Rodriguez v. Puerto Rico Federal Affairs Admin.*, 435 F.3d 378 (D.C. Cir. 2006).

This immunity might not apply to D.C. government workers for two reasons. First, D.C. is not a state but is a federal district created and overseen solely by Congress; therefore the language of the 11th Amendment does not apply. See U.S. Const. Art I, Sec 8. (2), which explicitly gave Congress the power to regulate D.C.’s affairs. Second, D.C. is more like a municipality than a state, and municipalities are liable under FLSA. See *Monell v. Dept. of Social Servs.*, 436 U.S. 658 (1978) (holding a municipality can be sued under the Civil Rights Act of 1871 and is not entitled to absolute immunity). There is some case law supporting the assertion that the District of Columbia alone is a municipality. *O’Callaghan v. D.C.*, 741 F. Supp. 273, 276 (D.D.C. 1990) (holding D.C. a municipality, not a state; applying *Monell* and citing Congress’ intent to subject D.C. to § 1983 liability by amending § 1983 to specifically include it); see also *Morgan v. Dist. of Columbia*, 824 F.2d 1049, 1056-58 (D.C. Cir. 1987) (allowing a § 1983 claim against D.C. because, as a municipality, it may be liable if “its official policy or custom is responsible for the deprivation of constitutional rights”).

On the other hand, the tri-state agency WMATA (Metro) has been held, by both the D.C. and the Fourth Circuits, to be a state agency and to enjoy sovereign immunity. See *Lizzi v. Alexander*, 255 F.3d 128, 132-34 (4th Cir. 2001) (holding WMATA did not waive 11th Amendment immunity except for certain tort and contract actions; concluding that hiring, training, and supervision are governmental functions, for which WMATA retains sovereign immunity); *Morris v. WMATA*, 781 F.2d 218, 220 (D.C. Cir. 1986) *overruled on other grounds by Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (recognizing WMATA’s sovereign immunity; holding it waived for certain tort and contract actions but not for “any torts occurring in the performance of a governmental function”).

## **Class Action Issues**

Unfortunately, class actions under Federal Rule of Civil Procedure 23 are not allowed under FLSA. Each worker with a claim must **opt in** to what is called a “collective action.” See 29 U.S.C. § 216(b). However, counsel may wish to file a so-called “Hybrid Action,” with both class action state law claims *and* FLSA claims.

## **Prevailing Federal Wage Laws**

**Practice Tip: *The Wage Theft Prevention Amendment Act of 2013*** dramatically changed how the prevailing wage laws may be enforced in D.C. The act broadened the definition of “wages” in the D.C. Wage Payment and Collection Law to include: “Other remuneration promised or owed...[p]ursuant to a contract between an employer and another person or entity; or [p]ursuant to District or federal law.” D.C. Code § 32-1301(3). The new law also amended the D.C. Wage Payment and Collection Law to state that “[i]n enforcing the provisions of this act, the remuneration promised by an employer to an employee shall be presumed to be at least the amount required by federal law, including federal law requiring the payment of prevailing wages, or by District law.” D.C. Code § 32-1305(b). These changes were intended by proponents of the bill to secure a private right of action – under the D.C. Wage Payment and Collection Law – for employees who have not been paid wages mandated by prevailing wage laws such as the Davis-Bacon Act. However, this application of the Wage Theft Prevention Act of 2013 has not yet been tested against federal preclusion defenses.

These laws set prevailing wage and fringe benefit rates in federal and D.C. government contracts. They apply to both prime contractors and subcontractors working on federal government or D.C. government contracts. These laws cover government contractors and do not apply to private commercial business not engaged in performing government contracts. They provide an important source for higher wages and benefits for workers in the District of Columbia. The prevailing wage is usually an average of all the wages paid for the same type of work in a geographic area. But for some trades or contracts, the prevailing wage and fringe benefits may be derived from union collective bargaining agreements.

As of January 1, 2022, the prevailing minimum wage is \$11.25 for federal government contract workers and \$7.40 for tipped federal government contract workers.

## **Davis-Bacon Act: Construction Contracts**

The *Davis-Bacon Act* applies to contracts in excess of \$2,000 for the construction, alteration, or repair of federal or D.C. public buildings or other public works. See 40 U.S.C. §

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3142. This includes painting, renovation, and other work that involves discrete line items of construction work. The work must be performed on the site of the public work and by laborers or mechanics. The act covers both federal government contracts and federally assisted construction (i.e., state, local, or grantee construction financed in part by the federal government). Under the act, workers must be paid the prevailing wage and given prevailing fringe benefits. The Secretary of Labor is charged with setting prevailing wage levels. *Id.* at § 3142(b). Pursuant to that authority, the U.S. Department of Labor (DOL) has issued wage determinations covering the District of Columbia. These are schedules that set the prevailing wages and fringe benefits. Copies of those wage determination can be found at <https://sam.gov/content/wage-determinations>. These wage determinations, along with standard contract clauses, are supposed to be inserted into the prime contract and made applicable to subcontractors as well. Please see [How to Find a Wage Rate](#).

### *Enforcement of the Davis-Bacon Act*

There is no federal private right of action to enforce the Davis-Bacon Act. Historically, this meant that an employee could not sue to enforce the act and instead had to file a complaint with DOL (***But see “Practice Tip: The Wage Theft Prevention Amendment Act of 2013,” above.***) However, D.C.’s federal district court allows private actions under the DC Wage Payment Collection Law where the employee did not receive any wages *at all* for hours worked. See *Ayala v. Tito Contrs., Inc.*, 82 F. Supp. 3d 279, 287 (D.D.C. 2015). Following the decision in *Amaya et al. v. Power Design, Inc.*, 833 F.3d 440 (4<sup>th</sup> Cir. 2016) (permitting employees to pursue wages owed under FLSA when working on federal worksite and holding that the highest rate available is the legal rate owed), the District Court allowed employees to seek relief under the FLSA or D.C. wage payment statutes for wages owed at DBA rates. *Garcia et al. v. Skanska USA Bulding, Inc. et al.*, (No. 17-629)(D.D.C. 2018).

The decisions indicate that this failure to pay is not the exclusive province of the Davis-Bacon Act, and is the sort that the D.C. Wage Payment and Collection Law was designed to protect. Courts in this area have not yet recognized a private right of action where the employer did pay a prevailing wage for hours worked, albeit the incorrect one under the DOL wage determinations. See, e.g., *Johnson v. Prospect Waterproofing Co.*, 813 F. Supp. 2d 4, 7 (D.D.C. 2011). In those “misclassification” cases, workers should be instructed that their exclusive remedy remains a complaint with the DOL.

Complaints are filed at the same DOL offices that take FLSA complaints. The District Office of Wage and Hour usually cannot enforce the Davis-Bacon Act unless it relates to a city government contract. Otherwise, for purely federal contracts, enforcement rests exclusively with DOL. If a prime or subcontractor contractor is found to be paying insufficient wages under the act, the federal government may withhold monies from the prime contractor, sue to recover monies, institute debarment for aggravated or willful violations, or move to cancel (i.e., terminate for default) all or part of the contract and recover from the contractor the cost of completing the job with a different contractor. See 40 U.S.C. §§ 3143, 3144(a)(1). Under the Davis-Bacon Act, the statute of limitations is



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ostensibly two years for ordinary violations and three years for willful violations. *See* 29 U.S.C. § 255(a). However, DOL says that it has a contractual right of withholding and offset against any government contract even beyond the limitations period.

While there is generally no private right of action under the Davis-Bacon Act, there may be rights under the surety bonds that construction contractors are required to post as security for performance. Those bonds may also guarantee the payment of all wages due the workers. *See* the Miller Act discussion below. There are strict notice and time limits for such actions.

In addition, under the Davis-Bacon Act, contractors must pay employees weekly and must provide so-called “certified payrolls” to the government. These report wages, fringe benefits, deductions, rebates, and overtime paid to the workers. If the contractors submit false payroll, they may commit false claims or even criminal acts. Workers may be able to bring (in the name of the United States) *qui tam* actions to enforce the False Claims Act and collect a percentage of the treble damages and \$10,000 per false invoice that constitute the damage remedy for the fraud. For further information, *see* the False Claims Act discussion below.

**Practice Tip:** Many times, employers place workers in the wrong prevailing class in order to pay a lower wage. For example, they will classify electrician helpers as laborers rather than electricians. Make sure that the worker is classified in the appropriate class based on the work performed.

## Service Contract Act

The McNamara-O’Hara Service Contract Act (SCA), 41 U.S.C. §§ 6702-6707, 29 C.F.R. § 4, requires certain government service contractors to pay their employees the prevailing wage, including fringe benefits such as health and welfare sums, holidays, and vacation time. The act applies to contracts primarily for services “through the use of service employees” with the federal or D.C. government, in excess of \$2,500, except for the following:

- contracts for the construction, alteration, and repair, including painting and decorating of public buildings or public works (See Davis-Bacon Act, above);
- contracts for supply of good or manufacturing governed by the Walsh-Healy Public Contract Act, see below;
- contracts for the carriage of freight where published tariff rates are in effect;
- contracts for services by radio, telephone, telegraph, or cable companies (See Communications Act of 1934, 47 U.S.C.S. §§ 151 *et seq.*);
- public utility contracts, including electric, power, water, steam, and gas;
- employment contracts for direct services to a Federal agency by an individual or individuals;

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- contracts with the U.S. Postal Service for operation of postal contract stations (See 41 U.S.C. § 6702);
- prime or subcontractor contracts for certain enumerated commercial services where the work force spends less than 20% of its time performing services for the government;
- contracts for medical services related to Medicare or Medicaid;
- contracts for commercial services involving automatic data processing or other high-tech equipment where the work is done by the original equipment manufacturer or supplier;
- contracts involving disabled workers, apprentices, student learners, under government-approved programs;
- workers who are exempt as executive, administrative, or professional employees or computer employees as defined in Part 541 of the Code of Federal Regulations. [This is the most important exemption];
- certain National Park Service concessionaires who service the public; and
- certain prime contractor employees of government-owned and contractor-operated nuclear energy facilities.

This law applies to the District of Columbia government for “the contracts of all agencies and instrumentalities that procure contract services for or on behalf of the District or under the authority of the District government.” 29 C.F.R. § 4.108. Workers on these contracts must be paid the “prevailing wage” and given prevailing benefits. 41 U.S.C. § 6702. Prevailing wage determinations can be found at <https://sam.gov/content/wage-determinations>. Please see [How to Find a Wage Rate](#). The SCA wage determination and contract clauses should be inserted into the prime contract and made applicable to all service subcontractors who are working on the contract.

The wage determinations under the Service Contract Act in D.C. range from a low of near the District’s minimum wage to more than \$48 an hour for highly skilled registered nurse level IVs. The wage rates and health and welfare fringes change once a year, generally in June. The current health and welfare (H&W) benefits in the D.C. metropolitan area are \$3.50; holiday benefits include 10 named holidays. Vacation benefits are based on length of service with the employer or the predecessor contractor and are at least two weeks. Part-time and temporary employees are covered by the act and entitled to pro rata fringe benefits. Wage determinations are updated from time to time, and the prevailing wage a worker is due may depend on whether the services were previously performed in the area under an SCA-covered contract, whether the worker has a collective bargaining agreement, and other factors.

The prevailing wage in the District of Columbia also includes fringe benefits at an amount of \$4.48 per hour, as of July 11, 2018. See *All Agency Memorandum No. 227*, at <http://www.dol.gov/whd/govcontracts/sca/sf98/aam227.pdf>. Again, this changes annually. The wage determination also includes 10 holidays and vacation benefits according to length of employment (two weeks after one year; three weeks after five years; four weeks after 15 years). See e.g., Wage Determination No.: 2005-2103, Revision 12 (June

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13, 2012). However, fringe benefits are not part of the base rate used to calculate overtime pay. There are two types of SCA wage determination. The even-number wage determinations allow for H&W benefits to be paid on average to workers for every hour worked, including overtime hours. Since this is an average calculation, some workers may get more benefits; other workers (like temporary or part-time employees) get little or no benefits. Most wage determinations, however, are based on individual fringe benefits and are odd numbered – they require each worker to be paid their H&W benefit for all hours paid (including holidays and vacations) up to 40 hours per week.

### *Enforcement of Service Contract Act*

Like the Davis-Bacon Act, there is no private right of action under the Service Contract Act. The Secretary of Labor has the exclusive right to enforce the act. *See United States v. Double Day Office Servs.*, 121 F.3d 531, 533 (9th Cir. 1997). Thus, employees must complain to DOL, which has the exclusive enforcement authority. When a violation of the act is established, the DOL may order the government agency to withhold the amount due from further payments from the contractor and pay it directly to the worker. *See* 41 U.S.C. § 6705; 29 C.F.R. § 4.187. Contractors found to have violated the act absent “unusual circumstances” are placed on a debarment list, which means they cannot get any federal or D.C. contracts for three years. *See* 41 U.S.C. § 6706; 29 C.F.R. § 4.188. If an employee thinks a violation has occurred, s/he should contact the agency overseeing the contract’s performance or the Wage and Hour Division of the United States Department of Labor at 1-866-487-9243. The statute of limitations for government actions has been interpreted to be six years. *See* 28 U.S.C. § 2415; 29 C.F.R. § 4.187. However, DOL general enforcement policy is to just go back two years absent willful or repeated violations.

## **Walsh-Healy Public Contracts Act**

Davis-Bacon covers construction contracts; the Service Contract Act covers service contracts; and the *Walsh-Healy Public Contracts Act* (Walsh-Healy, WHPCA, or PCA), 41 U.S.C. § 6705-6706, covers supply contracts with the U.S. Government. The WHPCA originally established basic labor standards, such as wages, hours, and conditions, for work done on U.S. government and D.C. government contracts, in excess of \$10,000 in value, for the manufacture or furnishing of materials, supplies, articles, and equipment. All workers engaged in the manufacturing or furnishing of contracted items are covered, *except* those in executive, administrative, or professional positions, or those performing office, custodial, or maintenance work. The act also is not applicable to contracts for the purchase of materials, supplies, articles, or equipment that can usually be bought in the open market. *See* 41 U.S.C. § 6505. Contractors subject to the Public Contracts Act originally had to certify that they satisfy the following conditions:

- pay prevailing wages (as determined by the Secretary of Labor);
- limit workweeks to 40 hours (unless specifically authorized by FLSA);
- do not employ any males under 16 or any females under 18;

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- do not use convict labor unless they satisfy federal convict labor restrictions;
- do not maintain conditions that are unsanitary, hazardous, or dangerous to the health and safety of employees.

### *Enforcement of the Walsh-Healy Public Contracts Act*

The WHPCA is now largely a dead letter. In 1962, the DOL stopped issuing new WHPCA wage determinations. All the WHPCA wage determinations were exceeded long ago by the minimum wage. So, all that has to be paid on U.S. government supply contracts is the FLSA and D.C. minimum wages. There is no fringe benefit requirement. The WHPCA does give the DOL some extra tools to assure compliance with the FLSA minimum wage, but not much more. There is no private right of action under the WHPCA. Only the Secretary of Labor is authorized to enforce its provisions. *See* 41 U.S.C. § 6507. The statute of limitations for enforcement actions under the WHPCA is two years for ordinary violations and three years for willful violations. *See* 29 U.S.C. § 255(a).

## **How to Find a Wage Rate and File a Complaint**

To find out the prevailing wage for a particular job classification, generally called a **wage determination**, or to enforce a wage determination, contact the U.S. Department of Labor. The DOL now has a website where the most up-to-date wage determinations for the Davis-Bacon Act and the Service Contract Act can be found. Visit the Wage Determination Online site at <https://sam.gov/content/wage-determinations>. A library of resources is also available electronically at that website. The DOL website has descriptions of different job classifications, which also are available on the site.

To start an investigation, a D.C. worker may call the Baltimore District Office of the DOL or write a letter of complaint. To reach any DOL district office, call 1-866-4-USWAGE (1-866-487-9243). The Regional Administrator of the Wage and Hour Division can be contacted at the U.S. Department of Labor, Wage and Hour Division, 6525 Belcrest Road, Suite 250, Hyattsville, MD 20782. The Director of Wage Determinations can be reached at (301) 436-6767.

## **Other Federal Wage-Related Statutes**

### **Miller Act: Construction Bonds**

The Miller Act of 1935, 40 U.S.C. § 3131 *et seq.*, requires that before any contract is awarded for the construction, alteration, or repair of any public building or public work of the United States (not the District of Columbia), the construction contractor must furnish a payment bond to protect wages of employees. *See* 40 U.S.C. § 3131(b)(2). The act applies to contracts over \$100,000 awarded by the U.S. government only. *Id.* at § 3131(b); *but see id.*

at § 3132(a) (stating that contractors with contracts greater than \$25,000 but less than \$100,000 may be allowed an alternative to payment bonds). Employees who are owed wages under the act must send a notice to the surety (an insurance company usually) generally within 90 days of stopping work and must file suit within one year of the violation in federal court. *See* 40 U.S.C. § 1332. These time limits are strictly construed. D.C. often requires its own performance bonds.

## Contract Work Hours and Safety Standards Act

The Contract Work Hours and Safety Standards Act (40 U.S.C. § 3701 *et seq.*) applies to any laborers, mechanics, and night watchmen (*i.e.*, guards), who work on federal government or D.C. contracts. It applies to both prime and subcontractors. It covers blue collar SCA-covered workers, and it covers federally assisted construction contracts, *i.e.*, those financed in whole or in part by loans or grants from the United States. *See* 40 U.S.C. § 3701(b)(1). It also applies to contracts financed by federal loan guarantees, as long as the assistance of the federal agency extends beyond merely guaranteeing the loan. *Id.* Finally, it applies to any worker “performing services in connection with dredging or rock excavation in any river or harbor...of the District of Columbia.” 40 U.S.C. § 3701(b)(2)(A). The act only applies to contracts that are for more than \$100,000. *Id.* at § 3701(b)(3)(iii).

While CWHSSA once had an eight-hour day overtime requirement, that was abolished in 1985 in the DoD Authorization Act of that year. Now, **CWHSSA only requires time and one-half premium overtime be paid for all hours worked in excess of 40 hours per week.** In this sense it requires no more than the FLSA or existing D.C. wage laws. The regular rate of pay calculation for the FLSA is the same calculation that is done for CWHSSA.

In addition to the health and safety rules in §§ 3704 and 3705, this act enforces the 40-hour week and overtime compensation, and allows liquidated damages of \$10 per each workday that an employer violates those rules. The liquidated damages are payable to the U.S. government but not to the employee. *See* 40 U.S.C. § 3702. In addition, the agency authorizing and paying for the contracted work is authorized to withhold from its payment the full amount for which it believes the employer is liable. *Id.* at §§ 3702(d); 3703. The U.S. Comptroller General is authorized to pay the aggrieved worker directly. *Id.* at § 3703. The act provides for criminal penalties: up to \$1,000 fine and 6 months’ imprisonment for willful violations of the safety requirement. *Id.* at § 3708. Willful wage and hour violations can lead to debarment.

Workers aggrieved under this act should file a complaint with the contracting agency or the U.S. DOL. *See* 40 U.S.C. § 3703(a). Generally there is no private right of action. The DOL and the contracting agencies are the exclusive enforcement mechanism. The statute’s wage and overtime requirements apply regardless of any less generous terms the employee or contractor agreed to or contracted for. *Id.* at § 3703(c); § 3702; *see also National Electro-Coatings, Inc. v. Brock*, 28 Wage & Hour Cas. (BNA) 1289 (1988), No. C86-

2188, 1988 WL 125784 (N.D. Ohio July 13, 1988) (holding that the contract between the employer and the government need not contain provisions requiring payment for overtime in order to enforce the overtime provisions of CWHSSA). That case also held that the statute of limitations for CWHSSA is six years.

## **False Claims Act**

Except in the limited circumstances noted above, there is generally no private right of enforcement under the various prevailing wage laws. The worker can ask for an investigation, future payments can be withheld from the contractor, and the contractor can be debarred from receiving government contracts in the future. Some courts, however, allow **qui tam** (i.e., whistleblower) actions under the False Claims Act.

The False Claims Act (FCA) prohibits contractors from making false claims for payment from the government and applies in cases where workers are not being paid the correct wages under the prevailing wage laws, the contractor is accepting payments from the government, and the contractor is falsely claiming that it is complying with these laws. In FCA cases, any person who knows about the fraud can sue the company on behalf of the United States. This person is called a **qui tam relator** and s/he can recover civil penalties, plus a percentage of what the government recovers from the contractor. *See* 31 U.S.C. § 3730. If the FCA action is for violation of a statute without a private right of action, however, the *qui tam* relator may not sue on his or her own behalf or recover damages for his or her own unpaid wages. *See e.g. United States v. Double Day Office Servs., Inc.*, 121 F.3d 531 (9th Cir. 1997) (FCA/Service Contract claim OK); *but see United States ex. rel Windsor v. DynCorp, Inc.*, 895 F. Supp 844 (E.D. Va. 1995) (misclassifying employees under the Davis-Bacon Act is exclusive province of Secretary of Labor, late filing of wage records is not a false claim).

### **Statute of Limitations**

The *qui tam* complaint must be filed no more than six years after the date of the violation or no more than three years after the government knew or should have known of the violation, whichever is longer. The claim, however, can never be filed more than 10 years after the violation occurred. *See* 31 U.S.C. § 3731.

### **Procedure**

*Qui tam* complaints must be filed under seal with a copy of the complaint served on the Attorney General and the U.S. Attorney who has jurisdiction – not on the defendant. *See* 31 U.S.C. § 3730(b)(2). This allows the United States to determine whether it wants to prosecute the case. It is preferable to have the U.S. Department of Justice (DOJ) try the case, as it will incur all the expense of researching the case. The complaint must remain under seal for 60 days, but the United States may request extensions. *Id.* at § 3730(c). It is not uncommon for complaints to be kept under seal for as many as two years.

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If the DOJ does not want to try the case, the *qui tam* relator may prosecute the case privately. If the relator wins the case, she will be given a larger percentage of the money recovered on behalf of the government than s/he would receive had the DOJ successfully prosecuted the case after she initiated it. *See* 31 U.S.C. § 3730(c) & (d).

**Note:** It is very important to include every claim in the original complaint, as *qui tam* claims must be plead with particularity, just like all other fraud claims. *See* Fed. R. Civ. P. 9(b).

### **Retaliation Claims**

If a worker suffers adverse employment actions because of contemplating or actually filing a *qui tam* claim, the worker is protected. *See* 31 U.S.C. § 3730 (h). The worker does not have to actually file a claim to be protected; even triggering an investigation or simply providing information to the government will entitle her to protection from retaliation. *See Neal v. Honeywell*, 33 F.3d 860 (7th Cir. 1994). If the worker prevails, she can receive double back pay with interest, reinstatement, special damages, and attorney's fees. *See* 31 U.S.C. § 3730 (h). If a worker sues her employer for retaliation as authorized in subsection (h), the most closely analogous state statute of limitations applies instead of the six-year statute of limitations for other FCA actions. *See Graham County Soil & Water Conservation Dist. v. United States*, 545 U.S. 409 (2005).

**Note:** This is a very complex law and seeking specialized legal assistance is recommended. For more information, contact the National Whistleblower Center ([www.whistleblowers.org](http://www.whistleblowers.org)), 4348 P Street NW, Washington, D.C. 20007, (202) 342-1902; or Taxpayers Against Fraud's False Claims Act Legal Center. ([www.taf.org](http://www.taf.org)) (202) 296-4826.

## **D.C. Wage & Hour Law**

The D.C. wage and hour laws are generally more expansive than the FLSA and should always be consulted when representing a D.C. worker in a wage and hour case.<sup>7</sup>

The two main D.C. wage and hour laws are the **D.C. Wage Payment and Collection Act**, D. C. Code § 32-1301, *et seq.*, which requires that wages be paid in a timely manner, and the **D.C. Minimum Wage Revision Act**, D.C. Code § 32-1001, *et seq.*, which governs the payment of minimum wages and overtime. There are also Wage and Hour Rules within the D.C. Municipal Regulations. *See* 7 DCMRA § 900.1 *et seq.* The FLSA and the D.C. Minimum Wage Revision Act are to be interpreted similarly unless there are explicit differences. *See Villar v. Flynn Architectural Finishes, Inc.*, 664 F. Supp. 2d 94, 96 (D.D.C. 2009). Thus, it is appropriate to use federal case law and the FLSA regulations at 29 C.F.R. §§ 510-794 to

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<sup>7</sup>The employer must follow whichever law is more beneficial to the worker. *See* 29 U.S.C. § 218 (a), 29 C.F.R. § 541.4.

interpret the D.C. Minimum Wage Revision Act, noting the exceptions spelled out there and in the D.C. Wage and Hour Rules.

## Minimum Wage & Overtime

### General Overview

Currently the **minimum wage for private employers in D.C., as of July 1, 2022, is \$16.10 per hour** for all workers, regardless of the size of the employer. The base minimum wage for tipped employees is \$5.35 per hour. However, if an employee's hourly earnings with trips – based on a weekly average – do not equal D.C.'s full minimum wage, the employer must pay the difference. *See* D.C. Code § 32-1003(a). Pursuant to the **Fair Shot Minimum Wage Amendment Act of 2016**, the minimum wage in D.C. increases each successive year starting in 2021 in proportion to the average annual increase of the Consumer Price Index for the D.C. metro area, rounded to the nearest multiple of \$.05.

Start Date	End Date	D.C. Minimum Wage	D.C. Min. OT Rate
July 1, 2019	June 30, 2020	\$14.00/hour	\$21.00/hour
July 1, 2020	June 30, 2021	\$15.00/hour	\$22.50/hour
July 1, 2021	June 30, 2022	\$15.20/hour	\$22.80/hour
July 1, 2022	June 30, 2023	\$16.10/hour	\$24.15/hour
July 1, 2023	Indefinite	\$(15 + CPI Increase)/hour	\$(15+CPI) x 1.5/hour

In 2006, the **Living Wage Act** became law in the District of Columbia. D.C. Code §§ 2-220.01 – 220.11. The Living Wage Act currently requires employers that receive government contracts or government assistance in excess of \$100,000 (including subcontractors receiving \$15,000 or more of the funds received by the contractor or \$50,000 or more of the funds received by the recipient of government assistance) to pay workers a living wage of **\$16.10 per hour**.<sup>9</sup> On March 1 of each year, the D.C. Department of Employment Services will announce that year's living wage.<sup>10</sup> D.C. Code § 2-220.03. There are exceptions throughout the act and specifically at D.C. Code § 2-220.05.

As under the FLSA, non-exempt employees in D.C. are entitled to receive **overtime** at a rate of one and one-half times the employee's regular rate of pay for hours worked in excess of 40 per week. *See* D.C. Code § 32-1003(c). The D.C. Municipal Regulations further provide that overtime under the act must be **paid in the same manner as under the federal statute and regulations**, *see* 29 C.F.R. 778, with some exceptions (*i.e.*, the

<sup>9</sup> The law defines "government assistance" as "a grant, loan, or tax increment financing that results in a financial benefit from an agency, commission, instrumentality, or other entity of the District government." D.C. Code §2-220.02(3).

<sup>10</sup> *See*

<https://does.dc.gov/sites/default/files/dc/sites/does/publication/attachments/2022%20Living%20Wage%20Poster%20.pdf>.



exception of Subpart A (General Considerations), Subpart E (Exceptions from the Regular Rate Principles), Subpart G (Miscellaneous), and Section 778.101 (Maximum Non-overtime Hours)). *See* 7 DCMR § 902.6.

### **Record-keeping Requirements**

#### *Notice of Hire Form and Statute of Limitations*

Under D.C. law, all employers in D.C. must provide employees with a “notice of hire” form detailing the name and contact information of the employer, the employee’s exempt/non-exempt status, rate of pay, the basis of the rate of pay, and any allowances taken from pay (i.e. tip credit). New employees must receive this form upon hire, and existing employees as of February 26, 2015 should have received the form by May 27, 2015.

If employees can show that they did not receive this form, the fact finder is permitted to count it against the employer’s credibility, and the statute of limitations is tolled for the time the employee did not receive the notice. D.C. Code. § 32-1008(c).

#### *Record-keeping Following Hire*

Employers must keep for three years wage records that include the full names, Social Security numbers, addresses, occupations, and dates of birth of each worker; regular hourly rates of pay; the total number of hours worked each day and each workweek by each worker; the time of day and day of week each workweek begins for each worker; the basis on which wages are paid; a daily record of hours, total straight time, and overtime earnings; their gross and net wages including deductions or additions to wages; dates of payment; and the pay periods covered by the payments. *See* D.C. Code § 32-1008 (a)(1); 7 DCMR § 911. These records must be made available to the mayor for inspection upon request. *See* D.C. Code § 32-1008 (a)(2). The Supreme Court held that evidence that the employer failed to adhere to these requirements may be evidence that defendants’ records are inadequate. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946)). D.C. Courts have similarly applied the Anderson Standard to D.C.’s wage and hour laws, holding that “[i]t is a long-standing principle in wage law that where an employer fails to produce records of the employee’s hours and wages, the employee can meet [their] burden of proof by ‘produc[ing] sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.’” *Serrano v. Chicken-Out Inc.*, 209 F. Supp. 3d 179, 187 (D.D.C. 2016) (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946)).

In accordance with the Minimum Wage Amendment Act of 2013, employers of tipped workers are required to submit quarterly wage reports to the Department of Employment Services, certifying that all tipped employees were paid a minimum wage.

### **Itemized Statements Must be Provided to Employees**

## Wage and Hour

An employer must furnish to each worker at the time of payment an itemized statement showing the date of wage payment, gross wages paid (showing separately the earnings for overtime and non-overtime hours worked), an itemization of deductions and additions to wages, net wages paid, and hours worked during each pay period. *See* D.C. Code § 32-1008(b); 7 DCMR § 911.2.

Employers must also post a summary of wage and hour law in a “conspicuous and accessible place.” D.C. Code § 32-1009(a); 7 DCMR § 912. The Wage Theft Prevention Amendment Act of 2014 added significant new posting requirements, which are available on the Office of Wage-Hour’s website.

### **Coverage and Definitions**

**Employer:** The term “employer” is broadly defined in the act. For example, it includes individuals as employers. In some cases, individual owners, managers, officers, or directors may be liable as employers even though there is also a corporate entity that is also liable.<sup>11</sup> It does not include, however, the D.C. or federal governments. *See* D.C. Code § 32-1002(3).

Under amendments effective February 26, 2015, a general contractor can be held liable for the D.C. wage violations of a subcontractor. Neither “general contractor” nor “subcontractor” are defined by the statute or regulations. *Id.* The general contractor can escape liability by showing that it promptly paid the subcontractor under the terms of their contract. D.C. Code § 32-1012(c).

**Practice Tip:** Whenever possible, name individuals as defendants in addition to the corporate entity. Establishing the liability of both the entity and individuals increases the chances of collecting on a judgment and also increases the pressure on the defendants to settle the case.

**D.C.-based employee:** A person is considered to be employed in the District of Columbia if that worker (a) regularly spends more than 50% of his or her working time in D.C.; or (b) is based in D.C. *and* regularly spends a substantial amount of his or her working time in D.C. and not more than 50% of his or her working time in another state. *See* D.C. Code § 32-1003(b).

**Working time:** The term “working time” is defined to include all of the time the employee: “(A) is required to be on the employer’s premises, on duty, or at a prescribed place; (B) Is permitted to work; (C) Is required to travel in connection with the business of the employer; or (D) Waits on the employer’s premises for work.” D.C. Code § 32-1002(10). Examples of what constitutes working time can be found at 29 C.F.R. § 785.<sup>12</sup>

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<sup>11</sup> For a discussion of individual liability, please see the section on Wage and Hour Related Issues.

<sup>12</sup> However, references to the Portal-to-Portal Act have no force and effect. D.C. Code 32-1002 (10).

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Regular rate: The term “regular rate” is defined to include all remuneration to the employee except for the items set forth in 29 U.S.C. §§ 207 (e)(1)-(7). Extra compensation described in 29 U.S.C. §§ 207 (e)(5)-(7) is creditable toward overtime compensation. See D.C. Code § 32-1002 (7). Reviewing the FLSA regulations is necessary when calculating the regular rate of pay for a worker who is paid a flat sum per week or other period; for workers who receive commissions; or for other special circumstances. See 29 C.F.R. §§ 778.0-778.603 – Overtime Regulations.<sup>13</sup>

### **Specific Minimum Wage Issues**

#### ***Minimum Wage – Exemptions from Coverage***

The act exempts the following categories of workers from the minimum wage provisions:

- Federal and D.C. government employees (D.C. Code § 32-1002(3))
- Executive, administrative, and professional employees (as defined by the Fair Labor Standards Act) (D.C. Code § 32-1004 (a)(1)).<sup>14</sup>
- Volunteers at educational, charitable, religious, or non-profit organizations (D.C. Code § 32-1002 (2)(A))
- Lay members “elected or appointed to office within the discipline of any religious organization and engaged in religious functions” (D.C. Code § 32-1002 (2)(B))
- Casual baby-sitters, meaning those who do so on an intermittent basis and whose vocation is not babysitting (D.C. Code § 32-1002 (2)(C))
- Outside salespersons, meaning (1) an employee who works regularly away from the employer’s place of business selling or obtaining contracts; and (2) “hours of work not related to his or her outside sales do not exceed 20 percent of the hours worked in the workweek by nonexempt employees of the employer” (7 DCMR §§ 902.3, 999.2)
- Home newspaper deliverypersons (D.C. Code § 32-1004 (a)(2))

The minimum wage provision does not apply in instances where other laws or regulations establish minimum rates for the following:

- Disabled employees not covered by FLSA because the employer has a valid certificate issued by the U.S. Department of Labor authorizing payment less than the minimum wage (D.C. Code § 32-1003 (d))
- Job Training Partnership Act participants (7 DCMR § 902.4 (b))

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<sup>13</sup> But note that 7 DCMR § 902.6 states that subparts A, E, G and § 778.101 of the FLSA regulations “shall have no force and effect.”

<sup>14</sup> 7 DCMR § 999.1 defines “administrative,” “executive,” and “professional” capacity but also states that interpretations of these terms shall be made in accordance with 29 C.F.R. § 541. See also *Jones & Assocs. v. District of Columbia*, 642 A.2d 130 (D.C. 1994) (a worker without authority to hire, fire, or discipline employees, who did not have as his primary duty management of the company was not employed in a “bona fide executive or administrative capacity”).

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- Individuals employed under the Older Americans Act of 1965, 42 U.S.C. § 3001 *et seq.* (7 DCMR § 902.4 (c))
- Individuals employed under the Youth Employment Services Initiative Amendment Act (7 DCMR § 902.4 (d))
- Adult learners, who are defined as “newly hired persons 18 years of age or older,” and who can be paid the federal minimum wage for a period not to exceed 90 days (7 DCMR § 902.4 (e))
- Students employed at higher education institutions (*e.g.*, college, university, junior college, or professional school) may be paid the federal minimum wage (7 DCMR §§ 902.4, 999.2)
- Minors (younger than 18) may be paid the federal minimum wage (7 DCMR § 902.4)
- Security Officers working in an office building in the District of Columbia (D.C. Code § 32-1003(h))

### ***Minimum Daily Wage***

In D.C., there is also a minimum daily wage. A worker must be paid for at least four hours on each day she reports to work, unless the worker is regularly scheduled for fewer than four hours. The payment is the regular rate for hours worked plus the minimum wage for the hours not worked. *See* 7 DCMR § 907.1.

### ***Split Shifts***

In addition to the wages required by the wage and hour rules, the employer must pay one additional hour of wages at the minimum wage for each day that a split shift is worked. 7 DCMR § 906.1. A “split shift” is a schedule of daily hours where the hours are not consecutive and the total time out for meals exceeds one hour. 7 DCMR § 999.2. This rule, however, is not applicable to an employee living on the employer’s premises. 7 DCMR § 906.1.

### ***Employer Deductions and/or Charges***

#### ***Housing & Meals***

In limited circumstances, the employer may pay part of a worker’s wages in something other than money. **Housing** costs may be deducted from a paycheck at no more than 80% of the rental value of the housing provided, as determined by “a comparison with the value of similar accommodations in the vicinity of those furnished.” 7 DCMR § 904.1.

**Practice Tip:** A good way to check the value of a particular apartment is to check the rent control files at the D.C. Consumer and Regulatory Agency, Rental Accommodations and Conversion Division. You can request the file for an entire apartment building and check the rent ceiling and actual rent charged for all apartments in the building, then take an average to determine the rental value.

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Allowances for **meals** may be deducted at not more than \$2.12 per meal. 7 DCMR § 904.2. If an employee works fewer than four hours, only one meal allowance may be deducted; if the employee works more than four hours, only two meal allowances may be deducted. *Id.* Allowances may not exceed \$6.36 per day for an employee who lives at his or her place of employment. *Id.*

Employers are required to maintain records of these allowances and must furnish workers with an itemized statement showing all deductions or additions. *See* 7 DCMR § 911.1 (j) & § 911.2.

### ***For Certain Deductions – No Deductions that Reduce Wages Below Minimum Wage***

An employer may not deduct or require the employee to pay the employer for “breakages, walkouts, mistakes on customer checks and similar charges, or to pay fines, assessments or charges” if such deductions reduce wages below the minimum wage. *See* 7 DCMR § 915.

### ***Employers Must Pay Extra if Employees Buy or Care for Uniforms***

It is the employer’s responsibility to provide, maintain and clean any required uniforms or protective clothing. However, in lieu of purchasing, maintaining, and cleaning uniforms, the employer may pay the worker an additional 15 cents per hour beyond the prevailing minimum wage, up to \$6 a week. 7 DCMR § 908.1. If the employer purchases but the employee maintains and cleans the uniform, the employer must pay an additional 10 cents per hour. 7 DCMR § 908.2. If the employee purchases and the employer cleans and maintains the uniform, the employer must pay an additional 8 cents per hour. 7 DCMR § 908.3. This payment only applies to uniforms that are plain and washable and *does not* apply to protective clothing.

### ***Employer is Responsible for Travel, Tools, and Other Work-Related Expenses***

Employers are responsible for travel expenses and the purchase or maintenance of any tools required “in performance of the business of the employer.” 7 DCMR § 909.1.

### ***Workers Who Receive Tips***

The minimum wage required to be paid by any employer in the District of Columbia to any employee who receives gratuities shall be \$ 5.35 an hour, provided that the employee actually receives gratuities in an amount at least equal to the difference between the hourly wage paid and the D.C. minimum wage ( \$16.10 as of July 1, 2022). D.C. Code §

32-1003(a)(5)(A); D.C. Code § 32-1003(f) . The employee must be informed about these provisions and all tips must have been retained by the employee (although pooling by employees who receive tips is allowed). *See* D.C. Code § 32-1003(g). The employer has the burden to prove the employee received at least as much tips as the amount of the allowance taken. 7 DCMR § 903.1.

### ***Break and Meal Time***

The District of Columbia does not require that employers provide employees with break and meal times. These are scheduled at the discretion of the employer. If an employer provides break and meal times, the FLSA applies for purposes of determining time worked. *See supra*.

### **Specific Overtime Issues**

#### ***Overtime – Exemptions from Coverage***

In addition to those employees exempt from the minimum wage provisions listed above, the act also exempts the following categories of workers from the overtime provisions:

- Seamen (D.C. Code § 32-1004 (b)(1))
- Railroad employees (D.C. Code § 32-1004 (b)(2))
- Automobile dealership employees and mechanics – salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, if employed by a non-manufacturing establishment primarily engaged in the business of selling these vehicles to ultimate purchasers (D.C. Code § 32-1004 (b)(3))
- Airline employees who voluntarily exchange workdays to use air travel benefits (D.C. Code § 32-1004 (b)(6))
- Commissioned Employees (D.C. Code § 32-1002(e))
- Domestic workers who live on the premises of their employer (7 DCMR § 902.5 (a))
- Companions for the aged or infirm (7 DCMR § 902.5 (b))<sup>15</sup>

#### ***Salaried Workers***

An employer may wrongly assume that paying a worker who does not fit into one or more of the above exemptions a weekly or monthly salary exempts the employer from overtime liability, but this is not the case. Even if a worker is salaried, the employee may still be entitled to overtime pay. To determine the amount of overtime that may be owed, the worker's regular rate can be calculated by dividing the worker's *weekly* salary by the number of hours the salary was intended to compensate per week. 29 C.F.R. § 778.113. To

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<sup>15</sup> Persons who spend more than 20 percent of their time on household work not directly related to caring for the aged or infirm are not deemed a "companion for the aged or infirm." 7 D.C.M.R. § 999.2.

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determine the regular rate for workers with fixed salaries who work fluctuating numbers of hours per week, see 29 C.F.R. § 778.114.

### ***Commissioned Workers in Retail or Service Jobs***

Overtime is not required for retail or service employees if the regular rate of pay exceeds 1½ times the minimum wage and more than ½ of the employee's compensation for a representative period (at least one month) represents commissions on goods or services. *See* D.C. Code § 32-1003(e); 7 DCMR § 905.

## **Salary Transparency**

All D.C. private employers are prohibited from requiring, as a condition of employment, that an employee refrain from inquiring about, disclosing, comparing, or otherwise discussing the employee's wages or the wages of another employee. Employers are barred from discharging, disciplining, interfering with, or otherwise retaliating against an employee who inquires, discloses, compares, or otherwise discusses their wages or the wages of another employee. D.C. Code § 32-1452. Certain employees with regular access to wage information, e.g. human resources employees, can be restricted from sharing wage information, unless disclosure is in relation to an investigation, action, hearing, or other legal obligation. *Id.* at § 32-1453. Failure to comply can result in civil fines, however affected employees do not have a private right of action. *Id.* at § 32-1455.

## **D.C. Wage Payment and Collection Law**

The D.C. Wage Payment and Collection Law was passed in 1956, and is codified at D.C. Code §§ 32-1301 through 32-1310. The law requires employers to pay wages within certain time limits and provides remedies for violations.

### **Definitions & Coverage**

The law applies to all employers "employing any person in the District of Columbia." D.C. Code § 32-1301(1B). It does not specifically address workers who work in more than one jurisdiction, but like all remedial legislation, it should be liberally interpreted to find the broadest possible coverage.

### ***Definitions***

*Employer:* The term "employer" is broadly defined in the law. *See* D.C. Code § 32-1301 (1). Of particular importance, the term explicitly includes individuals as employers. In some cases, individual officers or owners may be liable as employers even though there is also a corporate entity that is liable. For a discussion of individual liability, see "Wage and

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Hour Related Issues” at the end of this chapter.

*Employee:* The law broadly defines “employee” to include “any person suffered or permitted to work by an employer.” D.C. Code § 32-1301(2).

*Wages:* The Wage Theft Prevention Amendment Act of 2013 substantially broadened the act’s definition of wages by explicitly including a number of types of compensation. “Wages” means all monetary compensation after lawful deductions, owed by an employer, whether the amount owed is determined on a time, task, piece, commission, or other basis of calculation. D.C. Code §13-1301(3). The definition of “wages” now explicitly includes:

- (A) Bonus;
- (B) Commission;
- (C) Fringe benefits paid in cash;
- (D) Overtime premium; and
- (E) Other remuneration promised or owed:
  - (i) Pursuant to a contract for employment, whether written or oral;
  - (ii) Pursuant to a contract between an employer and another person or entity; or
  - (iii) Pursuant to District or federal law.

*Id.*

*Working day:* The Act states that working days are any days other than Saturdays, Sundays or legal holidays. D.C. Code § 1301 (5). Keep this in mind when determining what day wages are due to the employee.

### ***Employees Exempt from Coverage***

The following types of workers are not covered under the Wage Payment and Collection law:

- U.S. government or agency workers (D.C. Code § 32-1301(1B))
- D.C. government or agency workers (D.C. Code § 32-1301(1B))
- Workers subject to the Railway Labor Act<sup>16</sup> (D.C. Code § 32-1301(1B))

### **Wage Payment and Collection Rules**

#### ***Wages for Non-Exempt Workers Must Be Paid At Least Twice a Month***

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<sup>16</sup> This law applies generally to railroad and airline employees and provides a separate mechanism for wage and hour complaints. See 45 U.S.C. § 151 *et seq.*



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Wages for non-exempt workers must be paid at least twice each calendar month on regular paydays designated in advance by the employer. *See* D.C. Code § 32-1302.<sup>17</sup> Wages must be paid with “lawful money of the United States, or checks on banks payable on demand.” *Id.*

### ***Wages Must be Paid Within 10 Working Days of the Close of the Pay Period***

There cannot be more than 10 “working days” between the close of a pay period and the payment of wages from that pay period. *See* D.C. Code § 32-1302. There are two exceptions to this requirement: (1) when a different period is specified in a collective bargaining agreement between an employer and a bona fide labor organization; or (2) when the employer, by contract or custom, paid wages at least once each calendar month prior to the law’s 1956 enactment and has continued to do so since that time. *Id.*

### ***Pay Stub Requirement***

Every time wages are paid, employers must provide workers itemized statements of hours worked; gross and net pay, with the portions of wages from overtime hours or commission specified; and any deductions or additions to pay. *See* D.C. Code § 32-1008(b); 7 DCMR § 911.2. For more on employers’ record-keeping requirements, see the discussion on “Overtime Rules” below.

### ***Wages Must Be Paid Quickly After Termination of Employment***

Unless otherwise specified in a collective bargaining agreement between an employer and a bona fide union, employers must meet the following requirements upon the termination of employment:

If a worker is discharged, wages must be paid the next “working day” following the discharge, except that when the worker “is responsible for monies belonging to the employer,” the employer is allowed a period of four days from the date of discharge to determine the amount owed and pay wages. *See* D.C. Code § 32-1303(1). If a worker quits, wages must be paid on the next regular payday or within seven days (not working days), whichever is earlier. *See* D.C. Code § 32-1303(2). If an employee is suspended as a result of a labor dispute, the employer must pay wages earned by the next regular payday. D.C. Code §32-1303 (3).

### ***Vacation Time When Workers Leave Employment***

Workers are entitled to accumulated vacation pay when they leave employment, unless there is an agreement to the contrary. An employee may establish a right to monetary compensation for accrued but unused leave by showing that (1) prior to

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<sup>17</sup> White-collar workers may be paid only once per month in certain circumstances.

performance of the work, there was an agreement entitling the employee to accumulate leave, and (2) as of the termination date he or she had accumulated the claimed number of days. Any qualification on that right is in the nature of an affirmative defense that must be pleaded and proved by the employer. *See National Rifle Association v. Ailes*, 428 A.2d 816 (D.C. 1981).

### ***Written Notice of a Bona Fide Dispute***

If there is a bona fide dispute as to the amount of wages due, the employer must give written notice to the employee of the amount of wages conceded to be due, and must pay such amount without condition within the time limits set forth in Sections 32-1302 and 32-1303. D.C. Code §32-1304. Acceptance of payment by an employee under this provision does not constitute a release as to the balance of the claim for wages. *Id.*

### ***Employee Misclassification – D.C. Workplace Fraud Amendment Act***

#### *Scope and Application*

In 2012, the District of Columbia City Council adopted the Workplace Fraud Amendment Act.. The act applies only to the construction industry, with “construction” defined broadly to include “all building or work on buildings, structures, and improvements of all types,” and including “moving construction-related materials on the jobsite.” D.C. Council Bill 19-0169 (2012).

The act creates a presumption of an employment relationship in the construction industry to prevent misclassification of employees as independent contractors. The act states that an employee-employer relationship will be presumed “when work is performed by an individual for remuneration paid by an employer.” *Id.* Employers can rebut this presumption by demonstrating, to the satisfaction of the D.C. Mayor’s Office, that one of two exemptions applies and the worker is therefore an independent contractor under the act. *Id.*

#### *Exemptions*

The act gives employers two ways to rebut the employee-employer presumption. First, an employer can satisfy the requirements to show that the worker is an “exempt person.” The employer must show that the worker:

1. “Performs services in a personal capacity and employs no individuals other than a spouse, child, or immediate family member of the individual”; or
2. “Performs services free from direction and control over the means and manner of providing the services, subject only to the right of the person or entity for whom services are provided to specify the desired result”; and
3. “Furnishes the tools and equipment necessary to provide the service”; and

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4. "Operates a business that is considered inseparable from the individual for purposes of taxes, profits, and liabilities, in which the individual exercises complete control over the management and operations of the business."

*Id.* Second, if the employer cannot demonstrate that the worker is an "exempt person," the employer can also rebut the presumption of an employer-employee relationship by proving the following three elements:

1. That the individual performing the work is free from control and direction over the performance of services;
2. The individual is customarily engaged in an independent trade, occupation, profession, or business; and
3. The work is outside the normal course of business of the employer for whom the work is performed.

*Id.*

### *Remedies and Enforcement*

Employers found to have violated the act may be fined between \$1,000 and \$5,000 per employee misclassification. Employees misclassified can collect "any wages, employment benefits, or other compensation denied or lost as a result of the violation, plus an additional amount in liquidated damages." *Id.* All forms of appropriate equitable relief, including reinstatement and seniority rights, are available to those harmed by misclassification. Reasonable attorneys' fees and costs are also permitted. *Id.*

The act also allows for the assessment of penalties between \$5,000 and \$20,000 against any individual who knowingly aids or abets others in violating the act, or who knowingly forms a corporation or other entity for the purpose of evading the act or facilitating a violation of the act. "Knowingly" is defined as having "actual knowledge of, or acting with deliberate ignorance, or reckless disregard for the prohibition involved." *Id.*

The Workplace Fraud Amendment Act assigns the D.C. Mayor's Office as the primary enforcer of the act. The Mayor's Office is charged with investigating employee classifications that may violate the act, and has the authority to inspect business premises and payroll records and question and take statements from individuals. *Id.*

Misclassified construction workers may pursue their claims through the D.C. Office of Wage-Hour or bring a private action in court against their employer under the act. The act also permits an interested party to file a private lawsuit. Although an "interested party" is defined broadly as any "person with an interest in compliance with this act," the party must also be "aggrieved by a violation of this act...by an employer or entity." *Id.* The relevant terms – "interest" or "aggrieved," for example – have yet to be interpreted by courts. The action must be filed with the D.C. Superior Court within three years of the date of the alleged violation. *Id.*

## **Remedies in Wage Payment & Collection, Minimum Wage, and Overtime Cases**

### **No Waiver of Rights by Agreement**

A worker may not waive his or her rights under these acts, and any agreement by the employee and employer shall not be a defense to a claim for either unpaid wages or liquidated damages. *See* D.C. Code §§ 32-1012(d), 32-1305.

### **Types of Damages Available**

#### ***Wage Payment and Collection – Liquidated and Consequential Damages Available***

If an employer fails to pay a worker upon termination in accordance with the requirements of Section 1303(1), (2) or (3), the employer shall be liable to the employee for not only the wages due but also liquidated damages in the amount of 10% of the unpaid wages per working day after the day that wages were due or an amount equal to **three times the amount of the unpaid wages**, whichever is smaller. *See* D.C. Code § 32-1303(4). If the employer files a petition in bankruptcy, the liquidated damages will not accrue after the date of that filing if the employer is found to be bankrupt. *See* D.C. Code § 32-1303(4). The language of the act mandates an award of liquidated damages for violations of the act – *i.e.*, such an award is not at the discretion of the court as it is under the *D.C. Minimum Wage Revision Act*. *See Klingaman v. Holiday Tours, Inc.*, 309 A.2d 54 (D.C. 1973).

#### ***Minimum Wage and Overtime – Liquidated Damages Available***

If an employer pays an employee less than she is due under the minimum wage and overtime provisions, that employer is liable for the unpaid wages plus an “additional amount” as liquidated damages up to treble the amount owed. D.C. Code § 32-1012. A court may decline to award liquidated damages if the employer demonstrates that “the act or omission that gave rise to the action was in good faith and that the employer had reasonable grounds for the belief that the act or omission was not a violation.” *See* D.C. Code § 32-1012(b)(2).<sup>18</sup> If the employee has already accepted payment of unpaid wages pursuant to an investigation of the Office of Wage-Hour, they can still recover liquidated

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<sup>18</sup> *See Laffey v. Northwest Airlines*, the employer “must affirmatively establish that he acted both in good faith and on reasonable grounds.” *Laffey v. Northwest Airlines*, 567 F.2d 429, 465 (D.C. Cir. 1976) (citing to 29 C.F.R. § 790.22 (b), which states “(1) the employers must show to the satisfaction of the court that the act or omission giving rise to such action was in good faith; and (2) he must show also, to the satisfaction of the court, that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act.”). However, *see also, McLaughlin v. Richland Shoe Co.* 486 U.S. 128, 134, 108 S.Ct. 1677, 1682 (1988). The *McLaughlin* Court criticized the *Laffey* standard and stated that “willful” should be defined as it was in *Trans World Airlines, Inc. v. Thurston*, which defined the term under the ADEA. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 105 S.Ct. 613 (1985).

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damages in a court action. D.C. Code § 32-1012(e) (specifying that an employee only waives his or her rights if she accepts full payment of wages *and* liquidated damages).

Where an employer is not found to have acted in good faith, treble damages are mandatory and not discretionary if requested by the employee. *See Sivaraman v. Guizzetti & Assocs.*, 228 A.3d 1066, 1072 (D.C. 2020).

### ***Attorneys' Fees and Costs***

Plaintiffs who prevail in wage payment and collection cases and in minimum wage and overtime cases **must** be awarded attorneys' fees and costs. *See* D.C. Code §§ 32-1012(c), 32-1308(b). However, pro se plaintiffs are unable to recover attorneys' fees—even those who are attorneys.

Attorneys' fees are also mandatory for wage claims brought in small claims court, despite D.C. Small Claims Court Rule 19, which prohibits attorneys' fees absent such a provision within a written agreement, and even in those cases, limits fees to 15% of the judgment absent a showing of "exceptional circumstances." Small Claims Rule 19. The Wage Payment and Collection Act's statutory provision requiring attorneys' fees trumps the court rule. *See Curry v. Sutherland*, 1983 WL 131192, 26 Wage & Hour Cas. (BNA) 461 (D.C. Super. Ct. 1983).

**Practice Tip:** Attorneys appearing in Small Claims Court should be prepared to argue the basis upon which a fee award can be granted. It is recommended that the attorney take a copy of D.C. Code § 32-1308(b), *Curry v. Sutherland*, and the current Laffey Matrix of attorneys' fees to provide to the judge (found at the U.S. Department of Justice website, [www.usdoj.gov](http://www.usdoj.gov)).

### **Criminal Penalties**

The D.C. Office of Wage-Hour can refer cases for criminal prosecution to the Criminal Division of the D.C. Office of Corporation Counsel's Office of Public Protection and Enforcement (OCC), which will evaluate the case. The OCC considers the likelihood of proving the elements of the case: (1) an employer/employee relationship; (2) hours worked; (3) non-payment; and (4) the employer's ability to pay at the time the wages were due. The more that advocates can develop evidence of these elements, the more likely it is that the OCC will take on the case. Another possibility is to file a criminal complaint against the employer with the D.C. police. The worker can file a criminal complaint with the local police station where she lives or where the employer is located. **Note:** At this writing, neither the OCC nor the D.C. police have been very vigorous in their efforts to enforce wage and hour laws where the D.C. Office of Wage-Hour has not been effective.

### **Wage Payment and Collection**

## Wage and Hour

An employer that willfully violates the act despite having the ability to pay its employee is guilty of a misdemeanor. For a first offense, the employer can be subject to a fine of up to \$5,000, imprisonment of up to 30 days, or both. For subsequent offenses, the employer is subject to a fine of up to \$10,000, imprisonment of up to 90 days, or both. *See* D.C. Code § 32-1307(a).

In addition to criminal penalties, the mayor can assess civil penalties, including \$50 for each employee for the first offense, and \$100 per employee for any subsequent offense. D.C. Code § 32-1307(b).

### **Minimum Wage and Overtime**

Employers that willfully violate § 32-1010 of the act can be fined up to \$10,000 and sentenced to up to six months' imprisonment (imprisonment only on second conviction). *Id.* at § 32-1011 (a), (b). Criminal prosecutions are conducted by Corporation Counsel in D.C. Superior Court. *Id.* at § 32-1011(c).

In addition to criminal penalties, the mayor can assess civil penalties up to a maximum of \$300 for the first violation and up to \$500 per violation for subsequent violations. *Id.* at § 32-1011(d).

**Practice Tip:** A demand letter from the employee may want to reference the existence of criminal penalties; however, lawyers need to be careful not to run afoul of the ethical requirement that the lawyer does not threaten criminal prosecution for the purpose of advancing interests in a civil case.

## **Enforcement Options in Wage Payment & Collection, Minimum Wage, and Overtime Cases**

Typically, when a worker has a wage payment (final paycheck, etc.), minimum wage, or overtime issue at the Workers' Rights Clinic, the worker is advised of three options. First, the worker can write a demand letter. Second, the worker can file a claim for violations of wage payment, minimum wage, or overtime rights with the D.C. Office of Wage-Hour (within the D.C. Department of Employment Services). Third, the worker can file a complaint in D.C. Superior Court, in the Small Claims or Civil Division. As discussed below, each of these options has advantages and disadvantages.

The D.C. Office of the Attorney General's Workers' Rights & Antifraud Section also investigates wage theft violations. In addition to seeking recovery of wage and hour violations, workers can also report violations to the OAG by calling (202) 442-9828 or emailing [workers@dc.gov](mailto:workers@dc.gov) or [trabajadores@dc.gov](mailto:trabajadores@dc.gov). Additional OAG workers' rights resources are available at: <https://oag.dc.gov/worker-rights>.

### **Practice Tip: Finding information on an employer**

Victims of wage theft, particularly day laborers, often do not know the address, or even the name, of the employer who hired them. With a small amount of information, and some assumptions, the sources below may yield further information on an employer.

1. State business license databases:
  - a. D.C.: <https://eservices.dcrd.dc.gov/BBLV/Default.aspx>
  - b. MD: <https://jportal.mdcourts.gov/license/pbPublicSearch.jsp>
  - c. VA: <https://scc.virginia.gov/pages/Businesses>
2. Court records:
  - a. D.C.: <https://www.dccourts.gov/services/cases-online>
  - b. MD: <http://casesearch.courts.state.md.us/casesearch//processDisclaimer.jis>
  - c. VA: [www.courts.state.va.us/caseinfo/home.html](http://www.courts.state.va.us/caseinfo/home.html) (Virginia has a complicated case search system. First select either Circuit or District Court, then select a county, then select either the Criminal/Traffic or Civil system. For Northern Virginia employers, try multiple counties, including Arlington, Alexandria, Fairfax, Falls Church, Loudoun, and Prince William)
  - d. Federal: <https://pcl.uscourts.gov/search> (the PACER case locator will search all federal court systems, including bankruptcy courts. It requires a username and password to log in. The WLC may be able to provide its login details. Ask the supervising attorney at clinic)
3. Permit and licensing websites (these sites may provide a construction company name or a supervisor's contact information):
  - a. D.C. (search by address): <http://pivs.dcrd.dc.gov/#!/searchHomePage>
  - b. MD Home Improvement License Search: <http://www.dllr.state.md.us/license/mhic/> then "License Search" in the menu on the left side of the page.
  - c. VA – Fairfax County (search by address): <http://www.fairfaxcounty.gov/fido/permits/search.aspx?pgmcat=plan&pgmtype=address>

### **D.C. Office of Wage-Hour**

## ***Filing a Claim***

The Office of Wage-Hour (OWH) is the Mayor's office that investigates wage and hour violations. There is no fee for the filing of a complaint at OWH. Workers can file claims:

### **By Mail**

Office of Wage-Hour  
4058 Minnesota Ave. NE, Suite 3600  
Washington, D.C. 20019

### **By Email**

[owh.ask@dc.gov](mailto:owh.ask@dc.gov)

If a claimant has specific questions, they can call the Office of Wage-Hour at: (202) 671-1880. Workers can file claims for wage payment, retaliation, minimum wage, unpaid overtime, accrued sick and safe leave, and living wage violations within **three years** of the accrual of the cause of action (see later in this chapter for more information on statute of limitations). Filing an administrative complaint tolls the statute of limitations for purposes of a civil claim. D.C. Code § 32-1308(c).

The various claim forms, available in Spanish and English, can be found online:

- [Accrued Sick and Safe Leave claim form](#)
- [Living Wage claim form](#)
- [Minimum Wage/Overtime claim form](#)
- [Retaliation claim form](#)
- [Wage Payment claim form](#)

Persons with limited English proficiency or literacy problems can receive assistance in filling out the forms at the OWH or at the Washington Lawyers' Committee. If necessary, be sure to request an interpreter when filing a claim. (See Section on the [D.C. Language Access Act](#), in the [Other Employment Rights](#) chapter.)

## ***Investigation***

As a first step, OWH will collect relevant evidence from each claimant. This includes, but is not limited to: pay stubs, bank records, names of witnesses, witness statements, relevant correspondence with employer. After initial evidence collection, OWH may determine it necessary to request additional information from the claimant. D.C. Code § 32-1308.01.

## ***Notice of Claim to Employer***



OWH will serve notice of a genuine claim to the employer, informing them of the specific allegations and statutes relevant to the claimed violation. An employer must respond to a claim, by either admitting or denying the claim, within **20 days** of receiving it, by mail, from OWH. If an employer fails to respond within 20 days, the allegations shall be deemed admitted and OWH will issue an initial determination requiring the employer to provide relief. D.C. Code § 32-1308.01(c).

### ***Initial Determination & Remedies***

OWH has 60 days from the issuance of the notice of claim to issue an Initial Determination. *Id.* The Initial Determination indicates whether a violation has occurred and, if applicable, requirements for relief. Remedies can include: back wages, liquidated damages equal to the amount of unpaid wages, reasonable attorney fees and costs, reinstatement, injunctive relief, and other appropriate legal or equitable relief. *Id.*

#### **Practice Pointer**

If the employee has already accepted payment of unpaid wages pursuant to an investigation of the Office of Wage-Hour, they can still recover liquidated damages in a court action. D.C. Code § 32-1012(e) (specifying that an employee only waives his or her rights if she accepts full payment of wages *and* liquidated damages).

Both parties receive a copy of the initial determination, which also contains the losing party's appeal rights.

### ***Hearings & Appeals***

If OWH fails to make a determination within that 60-day period, or a party disagrees with OWH's determination, a party can request a formal hearing before an administrative law judge, within 30 days of the date of the determination. OWH may also seek conciliation, and work with the parties to mediate and settle the claims. D.C. Code § 32-1308.01(d).

A hearing should be scheduled for a date within 30 days of the request. The hearing should be a *de novo* review, similar to an unemployment appeal. Although the burden is on the complainant initially to prove liability, the burden will shift to the employer if (a) the employer failed to keep records or the records are inaccurate or incomplete; and (b) the complainant can show, as a matter of just and reasonable inference, the amount of work and the compensation due. In cases where the employer did not keep time records, this burden will likely not be difficult to meet.

At or before the hearing, the ALJ can issue subpoenas, compel production of evidence, and issue orders for unpaid wages, liquidated damages, and attorneys' fees. D.C. Code § 32-1308.01(c-f). If a party fails to obey an ALJ's order, late fees of 10% per month can apply, and the Mayor can deny or suspend business licenses for non-compliant employers. D.C. Code § 32-1308.01(g-h). A party seeking to appeal an ALJ order can do so in "a court of competent jurisdiction," likely the D.C. Court of Appeals, by filing a Petition for Review within 30 days of the decision. D.C. Code § 32-1308.01(f)(3); D.C. App. R. 15 (a)(2).

### ***Enforcing OWH Findings***

OWH and other executive agencies have enforcement powers they can wield against non-compliant employers. These include the ability to deny a business license to an employer found liable within the last 3 years, and the ability to suspend or revoke a business license for a business that has not complied with an ALJ's order. D.C. Code § 32-1308.01(g). These steps would likely need to be taken in conjunction with other D.C. government agencies, such as the D.C. Consumer and Regulatory Affairs office. On its own, OWH can pressure employers to accept its findings under threat of further civil action or criminal prosecution by the Office of the Attorney General. The Attorney General does not prosecute every case. The Mayor's authority to take an assignment of the claim and sue in court is found at D.C. Code § 32-1012(e).

**Practice Tip:** The advantages to using the Office of Wage-Hour to pursue minimum wage or overtime claims are that it is free and usually faster than proceeding in court. The office may investigate the employer's payroll records at the expense of the employer, which sometimes results in an earlier settlement.

### **D.C. Superior Court**

DO THIS: Where an employer is not found to have acted in good faith, treble damages are mandatory and not discretionary if requested by the employee. *See Sivaraman v. Guizzetti & Assocs.*, 228 A.3d 1066, 1072 (D.C. 2020).

Workers may sue employers under either the Wage Payment and Collection Act or the Minimum Wage Revision Act in any court of competent jurisdiction, including but not limited to the D.C. Superior Court's Small Claims Court and its Civil Division. *See* D.C. Code §§ 32-1012 (b), 32-1308 (a).

### ***Where to File – Small Claims Court or Civil Division***

If the claim is only for the recovery of money and the amount in controversy is less than \$10,000, it must be brought in Small Claims Court. *See* D.C. Code § 11-1321. In Small Claims Court, there is mandatory mediation that occurs as soon as 60 days after the filing of a complaint. *See* D.C. Code §§ 11-1322, 16-3906(a). If no agreement is reached in mediation, the proceedings could still be completed in as little as 90-120 days from the date the complaint was filed.

Cases that cannot be brought in Small Claims Court must be brought in the Civil Division. Proceedings in the Civil Division can take one to two years to complete. It is important to note that a judgment from either court may still need to be enforced in a subsequent collection case by the prevailing employee.

## ***Multiple Plaintiffs***

Lawsuits seeking minimum wages, overtime wages, or otherwise unpaid wages under the D.C. wage statutes may be brought as “collective” actions consistent with the procedures for collective actions brought under the FLSA. D.C. Code 32-1308(a)(C)(v).

## **Union Members**

Union members generally need to enforce their wage claims through the mechanism provided in their applicable collective bargaining agreement – the union grievance procedure. In *Papadopoulos v. Sheraton Park Hotel*, the Court held that the plaintiffs were required to exhaust grievance and arbitration procedures outlined within their collective bargaining agreement before filing claims under the Wage Payment and Collection Act or the Minimum Wage Revision Act. 410 F. Supp. 217, 220 (D.D.C. 1976).<sup>19</sup>

## **Statutes of Limitations**

Actions for unpaid wages or liquidated damages under the Wage Payment and Collection Act, the Minimum Wage Revision Act, the Sick and Safe Leave Act, or the Living Wage Act must be brought within **three years** of the accrual of the cause of action, or of the last occurrence if the violation is continuous. See D.C. Code § 32-1308(c).

## **Tolling of Statute of Limitations**

The three-year statute of limitations is tolled in two circumstances: 1) from the date an employee files an administrative complaint *or* during any period an employer fails to provide the employee with actual or constructive notice of the employee’s rights. *Id.*

## **Retaliation**

Under the D.C. Wage Payment and Collection Act, it is illegal to discharge, threaten, penalize, or in any other manner discriminate or retaliate against any employee or person who has, or is believed to have, exercised their rights under the this act. See D.C. Code § 32-1311. This includes, making a complaint to their employer, District employee, or federal employee; initiated or preparing to initiate a proceeding under the WPCA; provided information in an investigation; or testified or is about to testify in an investigation or proceeding. *Id.* Affected employees can file a civil or administrative complaint and receive relief in the form of enjoining the conduct; liquidated damages; front pay; reinstatement; or

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<sup>19</sup> However, an individual employee may assert some federal claims, including FLSA claims, in court without first exhausting applicable grievance procedures. “The pervasive statutory schemes of both Title VII and FLSA evidence Congressional intent that these rights may be judicially enforced.” *Leone v. Mobil Oil Corp.* 523 F.2d 1153, 1157 (D.C. Cir. 1975) (citing *Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 228, 229, 92 S.Ct. 859, 860, 31 L.Ed.2d 165 (1972)).

other forms of equitable relief. *Id.*

Under the D.C. Minimum Wage Revision Act, it is illegal to discharge or in any other manner discriminate against an employee because the employee “has filed a complaint or instituted or caused to be instituted any proceeding under or related to [the minimum wage and overtime provisions] or has testified or is about to testify in any proceeding.” *See* D.C. Code § 32-1010(a)(3); *see also Freas v. Archer Services, Inc.*, 716 A.2d 998, 1003 (D.C. 1998) (holding that the lower court erred in granting a motion to dismiss because plaintiff claimed retaliatory dismissal after complaining about unlawful deductions from his paycheck).

## **Wage & Hour Issues for Government Employees**

### **Federal Employees**

Federal employees **in a union bargaining unit** covered by the provisions of a collective bargaining agreement (CBA) pursue wage and overtime claims as union grievances, unless the CBA specifically excludes the Fair Labor Standards Act (FLSA) or overtime claims. *See* 5 C.F.R. § 551.703.

For those employees not in a bargaining unit or whose CBA excludes such claims, workers can file claims with their agencies, with the Office of Personnel Management (OPM), or file a lawsuit in U.S. District Court or the Court of Federal Claims. *See* 5 C.F.R. §§ 551.703(c); 551.705. However, employees may not simultaneously file claims with both their agencies and OPM.

If the worker decides to file a complaint with his or her agency and receives an unfavorable decision from the agency, she may then go to the OPM. If she chooses to first file a complaint with OPM and receives an unfavorable decision, however, she may not then seek a favorable determination from the agency. *See* 5 C.F.R. § 551.705. OPM encourages workers to use their agencies’ grievance procedures, if available, but does not require it. OPM claims must be sent, in writing, to the following address:

Classification and Pay Programs Manager  
Center for Merit System Accountability  
Office of Personnel Management  
1900 E St NW, Rm. 6484  
Washington, D.C. 20415

For information regarding the contents of the claim, please visit the OPM website, at [www.opm.gov](http://www.opm.gov). Alternatively, workers may contact OPM at 202-606-7948. Claims may not be filed electronically. If the worker’s total claim, including liquidated damages, is for more than \$10,000, the case may **only** be filed in the Court of Federal Claims.

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If a federal employee alleges a violation of the equal pay requirement (not minimum wage, overtime, or child labor laws), the employee should file a complaint with the Equal Employment Opportunity Commission. *See* 5 C.F.R. § 551.701(b).

### **D.C. Government Employees**

D.C. government employees are exempt from D.C.'s wage payment and collection law and the minimum wage and overtime law. However, D.C. employees are covered by the Fair Labor Standards Act, and most employees are covered by the Comprehensive Merit Personnel Act, which contains some wage and hour provisions.

In particular, the Comprehensive Merit Personnel Act provides that employees who are not covered by a collective bargaining agreement are entitled to overtime to the extent required by the Fair Labor Standards Act. *See* D.C. Code § 1-611.03(e).

The D.C. Code mandates a 40-hour workweek for D.C. government employees. *See* D.C. Code § 1-612.01(a). In addition, employees cannot work more than six consecutive days; rather, the workweek should be five days, Monday through Friday when practicable. *Id.*<sup>20</sup> If the workweek is not Monday through Friday, then the worker should have two days off scheduled consecutively. A worker should have the same working hours each day, and any non-overtime workday should not exceed eight hours. There should be no scheduled breaks in work time more than one hour (except in flexible schedules). *See* D.C. Code § 1-612.01(b). Work assignments must be scheduled at least one week in advance.

### **Compensatory Time**

In lieu of overtime, compensatory time is available for D.C. government employees at the discretion of the employer. *See* D.C. Code § 1-611.03(d); *see also* 29 C.F.R. §§ 553.20 to 553.28. The worker earns 1.5 hours off for every one hour of overtime worked. A worker can accrue up to 240 hours (30 days), or 480 (60 days) for emergency workers. *See* 29 C.F.R. § 553.21.

### **Enforcement**

D.C. government employees cannot file claims at the Office of Wage-Hour to collect unpaid wages or to protest minimum wage or hour violations. Instead, workers should write to their personnel and payroll departments and keep copies of all correspondence. At the same time, employees should file union grievances to protect their claims and do so quickly because many grievance procedures have very short deadlines. A worker covered by a collective bargaining agreement should and must follow the procedures in his or her collective bargaining agreement. Non-union employees should follow the worker grievance

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<sup>20</sup> There are exceptions for firefighters and public school and University of the District of Columbia (UDC) employees, who are subject to the wage rules of the Board of Education and the UDC Board.

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procedure contained in the District Personnel Manual, except for D.C. Public School non-union employees, who should *see* 5 DCMR §§ 800 to 906.8.

**Practice Tip:** D.C. government workers may get better results if they send copies of complaint letters to the head of the agency, the head of the division, the head of Labor Relations, the Mayor’s Office and the city councilperson with jurisdiction over the agency.

## **Maryland Wage & Hour Law and Wage Payment and Collection Law**

Like D.C., Maryland has both minimum wage and overtime law, and a wage payment and collection law. The Maryland Wage and Hour Law (MWHL), Md. Code Ann., Labor & Empl. § 3-401 *et seq.*, addresses minimum wage and overtime protections. The Maryland Wage Payment and Collection Law (MWPCCL), Md. Code Ann., Labor & Empl. § 3-501 *et seq.*, addresses the time and receipt of pay. Any agreement not to comply with these laws is void. *See* Md. Code Ann., Labor & Empl. § 3-405. These laws are discussed in detail below.

**Practice Tip:** The MWHL draws on numerous definitions and concepts found in the Fair Labor Standards Act. Where there is no case law under the Maryland law, Maryland courts will seek guidance from FLSA case law.

## **Definitions**

The following definitions apply to Maryland’s minimum wage and overtime law:

**Employer:** The term “employer” is broadly defined. Of particular importance, the term explicitly includes individuals as employers. The definition is drawn from the Fair Labor Standards Act, as are many definitions and doctrines applicable to the MWHL.

**Practice Tip:** Whenever possible, name individuals as defendants in addition to the business entity. Individual liability as an “employer” is fundamentally different and easier to establish under federal and state wage and hour laws than under other statutes or common-law doctrines, which typically require a “piercing of the corporate veil” to attach liability to individuals. Establishing liability of the entity and individuals increases the chances of collecting on a judgment and also increases the pressure on the defendants to settle the case.

**Working Time:** The term “working time” is defined to include all the time the employee is required to be on the employer’s premises, on duty, or at a prescribed place; is permitted to work; is required to travel in connection with the business of the employer; or

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waits on the employer's premises for work. This time does not include commuting time; however, as stated above, after reporting to work the employee must be paid for the time necessary to travel to a worksite.

Work: Work is defined as any service performed by an employee on the employer's time. It does not involve voluntary service so long as the individual took the job knowing that he or she would not be paid and the activity is performed for a charitable, educational, non-profit, or religious organization.

Work does not necessarily require an employee to do or accomplish anything but involves fulfilling the requirements of the employer – even if that means doing nothing for an extended period of time. It includes time traveling to a worksite if the employee is required to report to, check in, or check out at a home office or shop.

When free to leave without penalty, the worker is on his or her own time, even if instructed to remain “on call” with a beeper. Once called back to work, however, the employer must compensate the employee.

Determining the Wages of Tipped Employees: When determining the wage of an employee who receives tips, the employer may credit the employee with a predetermined amount received from tips, currently \$8.87. The employee may challenge the amount credited by proving that she actually received less than the amount set by the employer. See Md. Code Labor & Empl. § 3-419. For this provision to apply, the employee must regularly receive more than \$30 in tips per month, have been informed by his or her employer about the provision, and must keep all of the tips received (although pooling arrangements are considered acceptable).

## Exemptions from Coverage

The following workers are exempt from the Maryland's minimum wage and overtime law and its wage payment law:

- administrative, executive, or professional workers;
- non-administrative camp employees;
- children younger than 16 who work no more than 20 hours per week;
- outside salespeople;
- commissioned workers;
- immediate family members of the employer;
- drive-in theater employees;
- workers employed “as part of the training in a special education program for emotionally, mentally, or physically handicapped students under a public school system”;
- workers for a company that cans, freezes, packs, or processes perishable fresh fruits

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- and vegetables, poultry, or seafood;
- volunteers for a charity, educational institution, not-for-profit, or religious organization, if (a) the service is provided gratuitously; and (b) there is, in fact, no employer-employee relationship;
- workers for a café, drive-in, drugstore, restaurant, tavern, or other similar establishment that (i) sells food and drink for consumption on the premises, and (ii) has a gross annual income of less than \$400,000;
- agricultural workers if during each quarter of the preceding calendar year, the employer used no more than 500 agricultural-worker days;
- workers engaged in the range production of livestock ; and hand-harvest laborer who is paid piece-rate basis or recognized to have been paid on that basis, if (i)(1) commutes daily from permanent residence of the individual to the employer's farm; and (2) during the preceding calendar year, was employed in agriculture less than 13 weeks; or (ii) (1) under the age of 17; (2) is employed on the same farm as a parent of the individual or a person standing in the place of the parent; and (3) is paid the same rate that an employee who is at least 17 years old is paid on the same farm

See Md. Code Ann., Labor & Empl. § 3-403.

## Maryland Minimum Wage & Overtime Law

### Minimum Wage

The minimum wage as set by the Fair Labor Standards Act is a “floor.” As of the printing date of this manual, the federal minimum wage is \$7.25/hour. Up-to-date information on the current federal minimum wage can be found at 29 U.S.C. § 206, or at the U.S. Department of Labor’s web site: <https://www.dol.gov/agencies/whd/minimum-wage>. As of January 1, 2022, Maryland increased the state minimum wage to **\$12.20** per hour for employers with 14 or fewer employees. Employers with 15 or more employees must pay a minimum wage of \$12.50 per hour. See Md. Code Ann., Labor & Empl. § 3-413. In Montgomery County, the minimum wage is \$14.50 per hour for employers with 50 or fewer employees, and \$15.65 per hour for employers with more than 50 employees. See Montgomery County Code Ch. 27 Art. XI. (For more information see <https://www.dllr.state.md.us/labor/wages/minimumwagelawmont.pdf>). Prince George’s County now follows the Maryland state minimum wage. See Prince George’s County Code, Labor Code, Subtitle 13A.

Maryland Minimum Wage*			
Start Date	End Date	15 or More Employees	14 or Fewer Employees
January 1, 2022	January 1, 2023	\$12.50	\$12.20



## Wage and Hour

January 1, 2023	January 1, 2024	\$13.25	\$12.80
January 1, 2024	January 1, 2025	\$14.00	\$13.40
*See above for Montgomery County and Prince George's County minimum wage rates.			

### ***Disabled Workers***

Disabled workers must be paid the minimum wage except in cases where the U.S. Department of Labor has issued a certificate to the employer authorizing payment of less than the minimum wage. *See* Md. Code Ann., Labor & Empl. § 3-414.

### ***Charges for Housing & Meals***

An employer may include, as part of the wage of an employee, the cost that the employer incurs in providing board, lodging, or any other in-kind payment to the employee, unless a collective bargaining agreement precludes the items from being considered a part of an employee's wage. The Commissioner, however, may limit the charge to the actual cost, the reasonable cost, the average cost, or any other appropriate measure of fair value. *See* Md. Code Ann., Labor & Empl. § 3-418.

### ***Cost of Uniforms***

Generally, the cost of providing and maintaining a uniform that bears the name or logo of the employer may be passed on to an employee through a wage deduction – but only **with the employee's signed written authorization**. In addition, an employee may be held responsible for the depreciated value of the uniform if it is not returned as required.

### ***Break and Meal Time***

There is no law requiring an employer to provide breaks, including lunch breaks, unless the employee is under 18 years old or an employee of certain retail establishments.

An employer who chooses to provide a break, however, does not have to pay wages for lunch periods or other breaks in excess of 20 minutes where the employee is free to leave the worksite (or workstation if leaving the workplace is physically impractical), in fact takes their lunch or break (whether freely choosing to leave or remain at the worksite), and the employee does not actually perform work.

If employees are told their pay will be reduced each day by one-half hour for lunch, and they are not free to take this lunch period without an expectation or reasonable understanding that they must work or be on hand to work, they must be paid for the time. A "reasonable understanding" that they must work or be on hand to work is a condition in which it is generally known, or the employee reasonably believes, that failure to perform work (or be available "on hand" to perform work) during their break, will result in some

negative effect on employment. See [Maryland Guide to Wage Payment and Employment Standards](#).

## **Overtime**

### ***Additional Exemptions from Coverage***

In addition to the employee exemptions identified above, Maryland's overtime law does not apply to the following employers:

- hotels or motels;
- restaurants;
- gasoline service stations;
- private country clubs;
- non-profit entities engaged in providing temporary at-home care services for the aged or infirm;
- amusement or recreational establishments if certain conditions are met;
- those for whom the Secretary of Transportation may set qualifications and maximum hours of service under 49 U.S.C. § 31502;
- mechanics, salespeople, or partspersons for automobiles, farm equipment, trailers, or trucks (if employer sells to the consumer);
- taxicab drivers

See Md. Code Ann., Labor & Empl. § 3-415(b) and (c).

**Practice Tip:** When litigating minimum wage and overtime claims, it is very important to simultaneously analyze the case under both the FLSA and MWHL. For example, while live-in domestic workers are not covered by the overtime protections of the FLSA, they are covered by the overtime protections of the MWHL. Similarly, while a Maryland motel housekeeper is not covered by the Maryland overtime protections, that same person is not exempt from the FLSA's overtime protections.

### ***Calculating Overtime***

A regular workweek is 40 hours within a seven-day period. See Md. Code Ann., Labor & Empl. § 3-420. Any additional hours must be credited at an overtime rate of 1.5 times the "regular rate" at which the employee is paid. An employer cannot set a "regular" workweek of more than 40 hours and thereby avoid overtime liability unless subject to the limited exceptions listed below. When an employer pays a weekly salary and the employee works more than 40 hours, the employee is entitled to overtime under the FLSA and Maryland law.

### ***Exceptions to the 40-Hour Workweek***

Overtime may be computed based on a **60-hour workweek** if the employee is engaged in agriculture and exempt from the provisions of the FLSA.

Overtime may be computed based on a 48-hour workweek for an employee of a bowling establishment and for an employee of an institution that: (1) is not a hospital, but (2) is engaged primarily in the care of individuals who are aged, mentally retarded or sick, or have a mental disorder, and reside at the institution.

### **Record-keeping Requirements**

Each employer shall keep, for at least three years, in or about the place of employment, a record of:

- The name, address, and occupation of each employee;
- The rate of pay of each employee;
- The amount that is paid each pay period to each employee; and
- The hours that each employee works each day and workweek;

See Md. Code Ann., Labor & Empl. § 3-424.

These record-keeping requirements mirror those of the Fair Labor Standards Act. Responsibility to keep records falls on the employer, and failure to provide the itemized statements can create an adverse inference at trial that the employer did not properly pay its workers. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946). The Fourth Circuit has similarly applied *Anderson* to claims under Maryland's wage and hour laws where employers failed to keep records of employee's hours. *See Castillo v. Urquhart*, 855 F. App'x 877, 880 (4th Cir. 2021). When the employer lacks records, an employee's direct testimony of his or her hours worked will generally be acceptable evidence of hours worked. Employees should be advised to keep their own records of hours worked, as contemporaneous employee records of hours worked are regularly accepted in court as evidence of entitlement to unpaid wages, including unpaid minimum wage and overtime compensation.

**Practice Tip:** The record-keeping requirements of the FLSA, the MWHL, and the MWPCCL should be read in tandem. Employers will often not conform to these requirements, and such violations may serve to strengthen your client's claim of unpaid wages. *See e.g., Marshall v. Gerwill, Inc.*, 495 F.Supp. 744 (D.Md. 1980).

### **Statement of Wages and Deductions Must be Provided to Employees**

An employer must furnish to each worker at the time of payment a statement of the

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gross earnings of the employee and deductions from those gross earnings. If the employer chooses to change the wage or payday of an employee, the employer must provide notice of the change at least one pay period in advance. *See* Md. Code Ann., Labor. & Empl. § 3-504.

### **State and Local Prevailing and Living Wage Laws**

A patchwork of other laws gives additional wage protections and benefits to various types of workers in Maryland. Perhaps the most well-known are “Prevailing Wage” protections for workers in the construction industry working under certain public contracts. These are also sometimes referred to as “scale jobs” because detailed wage scales are set by governmental determination for different occupational categories and level of worker experience and training.

#### ***Maryland’s Prevailing Wage Law***

Maryland’s Prevailing Wage Law, Md. Code Ann. State Fin. & Procurement §17-201, *et seq.*, governs, among other things, an employee’s rate of pay, working hours, and other employer obligations on construction projects for which the state expends more than \$500,000, and when state public funds cover 50% or more of the construction expenses. For construction projects covered by this law, all contractors and subcontractors on the job must pay the required prevailing wage rate, as well as overtime pay for hours worked in excess of 10 hours on any given day or for hours worked on Sundays and legal holidays.

Workers have a private right of action for the difference between the wages they were actually paid and the wages to which they were entitled under the established prevailing wage rates. In addition, aggrieved employees may also avail themselves of assistance from the **Maryland Division of Labor and Industry, Prevailing Wage Unit, 1100 North Eutaw St., Room 606, Baltimore, MD 21202; (410) 767-2342**. Contractors are subject to additional penalties for their failure to pay prevailing wage rates and for their failure to submit required certified payroll information to the state.

#### ***Maryland’s Living Wage Law***

Maryland’s Living Wage Law is similar in many respects to its prevailing wage law, but it applies to different industries. While the prevailing wage law applies primarily to public works and construction contracts, the Living Wage Law applies to service contracts, with services defined as the “rendering of time, effort, or work rather than the furnishing of a specific physical product.” COMAR 21.11.10.01. The law covers most forms of maintenance and information technology contracts, provided they meet the requirements listed below.

To fall under the Living Wage Law, employers must have state contracts lasting at least 13 weeks, valued for at least \$100,000, beginning on or after Oct. 1, 2007. For a subcontractor to be covered, the prime contractor must be covered and certain size and contract value requirements must be met. Visit [www.dllr.state.md.us](http://www.dllr.state.md.us) for information on

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subcontractor requirements.

To be covered under this law, employees must be older than 18 and spend at least half of their work time on a public contract for the required value. If covered, employees on public service contracts in **Tier 1** (counties of Montgomery, Baltimore, Prince George's, Howard, Anne Arundel, and the city of Baltimore) must be paid **\$14.55 per hour**. Employees in **Tier 2** (all other counties) must be paid **\$10.93 per hour**. The Commissioner of Labor and Industry normally sets the rates within 90 days of July 1 each year.

The Commissioner of Labor and Industry enforces the Living Wage Law and can assess fines against employers. Employees can sue privately for their wages as well.

### ***Baltimore City's Prevailing & Living Wage Laws***

Baltimore City follows the State of Maryland's minimum wage law (\$12.20-\$12.50), but has its own prevailing and living wage ordinances. The Baltimore City Wage Commission is charged with enforcing these standards. See <https://civilrights.baltimorecity.gov/wage-commission/commission>.

Baltimore was among the first jurisdictions in the country to pass a living wage (City Ordinance No. 442, City Code, Hours and Wages – Service Contracts § 26), which applies to work performed under city service contracts. The current living wage rate is \$12.74 per hour beginning July 1, 2022. The prevailing wages for city-funded construction jobs under contracts worth \$5,000 or more are established by the Board of Estimates and cover different job classifications and types of projects. Current prevailing wage rates can be found at <https://civilrights.baltimorecity.gov/wage-commission/wages#living>. The City Wage Commission may be contacted at: 7 E. Redwood St. 9th Floor, Baltimore, MD 21202. Phone: (410) 396-4835. Or through the online portal: <https://civilrights.baltimorecity.gov/wage-commission/contact-us>.

### ***Montgomery County's Minimum & Living Wage Law***

In Montgomery County, the minimum wage rates are \$15.65 per hour for employers with 51 or more employees, and \$14.50 per hour for employers with 50 or fewer employees. Tipped employees must be paid at least \$4.00 per hour by their employer.

Montgomery County has a living wage law that requires contractors working under a service contract with the county to pay at least \$16.00 per hour (a rate that is subject to upward adjustment to continue to reflect a living wage standard). The wage requirements for county service contractors are published on the Montgomery County website at: <https://www.montgomerycountymd.gov/PRO/DBRC/wage-requirements-law.html>.

### ***Prince George's County's Minimum & Living Wage Law***

As of January 1, 2021, Prince George's County applies the Maryland State minimum

wage law. See [Maryland Minimum Wage and Overtime Law Prince George's County](#).

Prince George's County passed a living wage bill that requires contractors under county service contracts with a value greater than \$50,000 and who employ 10 or more workers to pay employees a living wage of \$15.60 per hour. The wage rate will be adjusted in relationship to the Consumer Price Index.

### ***Workplace Fraud Act of 2009***

The Workplace Fraud Act of 2009 addresses the widespread problem of misclassification of employees as “independent contractors” in the construction and landscaping industries. It became effective Oct. 1, 2009, and creates a presumption that, absent an exception, any work in these industries “performed by an individual for remuneration paid by an employer” is considered an employer-employee relationship. Md. Code Ann., Labor & Empl. § 3.903. The act establishes a system of fines. The law also requires employers in the construction and landscaping industries to provide notice and explanation of an independent contractor classification to any individual classified as an independent contractor or an exempt person with whom they contract. The law gives the Commissioner of Labor and Industry the authority to investigate workplace fraud in the construction and landscaping industries, as workers in these industries are often classified incorrectly.

The employee-employer presumption in the Workplace Fraud Act is subject to three exceptions. An individual will not be considered an employee if: (1) the individual is an exempt person (*e.g.*, s/he performs services in personal capacity, free from outside direction and control, and personally provides the necessary tools/equipment); (2) the employer demonstrates that the individual usually controls his or her own business and usually works as an independent contractor; or (3) the employer provides the Commissioner with a signed contract with terms that clearly indicate that the individual is an independent contractor and a similar notice posted in a conspicuous place at every jobsite and at the place of business of the person or business for which the individual performs services (in both English and Spanish). See Md. Code Ann., Labor & Empl. § 3.903.1 *et seq.*

The requirements for each of these exceptions are extensive and fact-specific. See the construction and landscaping illustrations at [www.dllr.state.md.us](http://www.dllr.state.md.us) for more information.

The Workplace Fraud Act also established an Employee Misclassification Task Force, charged with ensuring agency cooperation and enforcement of the act. Individuals who believe they have been misclassified can submit a form to the Task Force, which, after an investigation and a positive finding, will prompt the Task Force to notify other state agencies (Unemployment, Workers' Compensation, etc.) that this employee has been misclassified by his employer. Each agency will then take action according to the needs of the case and their own internal procedures and definitions. The form to report a potential

misclassification can be found at [How to Get Help Resolving Worker Classification Issues - Worker Classification Protection - Division of Labor and Industry \(state.md.us\)](#) . Completed forms can be mailed to:

Division of Labor and Industry  
Worker Classification Protection Unit  
1100 N. Eutaw St., Room 607  
Baltimore, MD 21201

## **Maryland Wage Payment and Collection Law**

The Maryland Wage Payment and Collection Law (MWPCCL) passed in 1991 and is codified at Md. Code Ann., Labor & Empl. § 3-501 *et seq.* It requires employers to pay wages within certain time limits and provides remedies for violations. The text of the law and a relatively comprehensive guide named the “Maryland Wage Payment Guide” (<https://www.dlir.state.md.us/labor/wagepay/>) can be found on the Maryland Department of Labor & Industry website.

### **Additional Coverage Issues and Definitions**

The law applies to all employers “who employ an individual in the State” of Maryland. The Wage Payment and Collection law does not specifically address workers who work in more than one jurisdiction, but like all remedial legislation, it should be liberally interpreted to find the broadest possible coverage. Md. Code Ann., Labor & Empl. § 3-501(b). The MWPCCL does not apply to independent contractors. Thus, under the MWPCCL, like the FLSA and MWHL, it is important to be able to identify an “employee” versus an “independent contractor.”

#### **Employee v. Independent Contractor:**

For employee/independent contractor issues in the construction and landscaping industries in Maryland, see the discussion of the Workplace Fraud Act of 2009 above.

For the employee/independent contractor analysis in all other industries, the following factors should be considered:

- Who has the right to control and direct the individual who performs the services, not only to the result but to the details and means by which that result is accomplished?
- Who has the right of discharge?
- Who furnishes the tools, materials, and a place to work?
- Is the person performing the services in a position to suffer financial loss if the objective is not achieved?

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- A signed agreement declaring that a worker is an independent contractor does not, by itself, establish that she is such.

This is often a complex determination that has huge implications for both the employer and employee (*e.g.*, tax implications).

Wages: The act defines “wages” to mean “all compensation due to an employee for employment,” including overtime, a bonus, commission, fringe benefit, or any other remuneration promised for service. *See* Md. Code Ann., Labor & Empl. § 3-501(c).

### **Fundamental Rules about Wage Payments**

#### ***Wages for Non-Exempt Workers Must be Paid at Least Twice a Month***

Wages for non-exempt workers must be paid at least twice each calendar month, and paydays must be regular and designated in advance by the employer. If the regular payday of an employee is a non-workday, an employer shall pay the employee on the preceding workday. *See* Md. Code Ann., Labor & Empl. § 3-502(a)(1). Administrative, executive, or professional employees are exempt workers under this provision and may be paid less frequently than twice a month. *Id.* at § 3-502(a)(2).

#### ***Wages Must be Paid Quickly after Termination of Employment***

Each employer must pay a terminated employee all wages due for previous work done on or before the first pay day after the termination on which the employee was regularly scheduled to be paid. *See* Md. Code Ann., Labor & Empl. § 3-505. This section does not permit employers to avoid the prompt payment after termination to administrative, executive, and professional employees. This is a “by the next payday” requirement.

#### ***Vacation Time when Workers Leave Employment***

Workers are not automatically entitled to accumulated vacation pay when they leave employment; it depends on the employer’s regular and stated policy. If the employer informs employees in writing at the time of hiring that unused vacation time will be lost or forfeited when their employment is terminated, then an employee will not be able to claim and recover compensation for unutilized vacation time. On the other hand, where the employer does not have a written policy that limits the compensation for accrued leave to a terminated employee, that employee is entitled to the cash value of whatever unused earned vacation leave was left – provided it was otherwise usable.

#### ***Sick Leave when Workers Leave Employment***

Sick leave is a safeguard against illness, and as such, unlike vacation pay, sick leave



## Wage and Hour

generally cannot be claimed at termination unless expressly written into the employee's contract or stated by the employer's policy.

### ***Severance Pay***

There is no requirement that any employer pay a departing employee severance pay.

Under certain conditions, what is termed "severance pay" is actually deferred compensation for work already performed (consideration for past services) or given as a gift, bonus, or incentive for the outgoing employee to do or refrain from certain actions. For a detailed discussion, see *Stevenson v. Branch Banking and Trust Corp.*, 159 Md. App. 620, 638 (2004).

### ***Deductions from Wages***

An employer may not take any deductions from an employee's paycheck unless the deduction is pursuant to existing law (such as the deductions for income tax withholding and social security) or those otherwise legally permitted. Md. Code Ann., Labor & Empl. § 3-503. The Maryland Division of Labor and Industry explains the basic standards for wage deductions as follows:

"Work, whether satisfactory or not, must be awarded compensation. Wage deductions are extraordinary, and are prohibited unless:

- (1) A court has ordered or allowed the employer to make the deduction. Examples include court ordered wage garnishments and orders to pay child support.
- (2) The Commissioner of the Maryland Division of Labor and Industry has allowed the deduction to offset or "pay for" something of value the employee has received. Examples include long-distance telephone calls on the employer's business phone, personal loans, wage advances, etc.
- (3) Allowed by some law or regulation of the government. Examples include state and federal taxes.
- (4) The employee has given express written authorization to the employer to make the deduction. This should take the form of a separate and distinct statement, signed by the employee, concerning only the deduction and nothing more. Even with a proper authorization, however, employers must still pay at least the federal minimum wage in the case of a deduction made to offset a loss to the employer due to the admitted or court determined fault or negligence of an employee (for example, careless damage to the employer's truck). If the deduction is made to offset something the employee received or retained from the employer which had monetary value (for example, personal loan, use of long-distance telephone line, materials, etc.), the deduction may reduce the employee's wages below the minimum wage. Finally, an authorized deduction may be invalid if it violates or is inconsistent with other federal or state laws or

regulations.”

**Practice Tip:** Some employers regularly violate this section of the law by illegally deducting from employees’ pay. Illegal deductions include those for uniforms when not authorized; deductions for “breakage, spoilage,” and other undocumented costs; and workers’ compensation insurance payments.  
See [www.dllr.state.md.us/](http://www.dllr.state.md.us/).

## Salary Transparency

Maryland employers are prohibited from taking any adverse employment action against an employee who inquires about the employee’s own wages or another employee’s wages. Under the law an employer may not prohibit an employee from: inquiring about, discussing, or disclosing the wages of the employee or another employee; or requesting that the employer provide a reason for why the employee’s wages are a condition of employment. Nor can employers require an employee to sign a waiver or any other document that purports to deny the employee the right to disclose or discuss the employee’s wages. Md. Labor and Employment Code Ann. § 3-304.1

Employers are prohibited from taking any adverse employment action against an employee for inquiring about the employee’s wages or another employee’s wages; disclosing the employee’s own wages; discussing another employee’s wages if those wages have been disclosed voluntarily; asking the employer to provide a reason for the employee’s wages; or aiding or encouraging another employee’s exercise of rights under this section. If an employer violates these provisions, affected employees can seek injunctive relief, recovery of actual damages and an additional equal amount as liquidated damages, and attorney’s fees. *Id.* at § 3-307.

## Remedies & Enforcement

### Remedies

#### ***Maryland Minimum Wage & Overtime Violations***

If the employer pays the worker less than the minimum wage, the worker may bring an action against the employer for the amount due and reasonable attorneys’ fees and costs. Attorneys’ fees and costs, however, are not mandatory. *See* Md. Code Ann., Labor & Empl. § 3-427(a). An agreement to pay the worker less than the minimum wage is not a valid defense to the action. *Id.* at 3-427(c). The act also provides for a criminal penalty of a fine up to \$1,000. *Id.* at 3-428(c).

## ***Maryland Wage Payment Violations***

If the employer has not paid the worker, the worker can bring an action two weeks after he or she should have been paid. The worker may recover the amount owed, and if the wages were not withheld “as a result of a bona fide dispute,” up to three times the amount of the wages owed, plus attorney’s fees and costs. *See* Md. Code Ann., Labor & Empl. § 3-507.<sup>21</sup>

In addition, an employer who willfully violates the Maryland Wage Payment Act is guilty of a misdemeanor and may be fined as much as \$1,000. A worker who knowingly makes a false statement to a government official in connection with an investigation under this subtitle is guilty of a misdemeanor and may be fined as much as \$500. *See* Md. Code Ann., Labor & Empl. § 3-508.

Finally, notwithstanding an employee’s claim, the Commissioner of Labor and Industry may enforce the provisions of the Maryland Wage Payment Act by (a) trying to informally mediate any dispute; or (b) with the written consent of the employee, asking the Attorney General to bring an action on behalf of the employee. *See* Md. Code Ann., Labor & Empl. § 3-507. As in an employee suit, the court may award up to three times the deserved wage, and reasonable counsel fees and other costs. Under current practice, the Commissioner is underfunded and not enforcing the Wage Payment Act through this government power.

It is now settled that the MWPCCL may be used to recover wages owed under the MWHL and FLSA, and that it is within the discretion of the court to award damages for those unpaid wages pursuant to the remedies available under the MWPCCL. *Peters v. Early Healthcare Giver, Inc.* 97 A.3d 621, 439 Md. 646 (2014). This decision rejects U.S. district court decisions which held to the contrary. *See e.g., McLaughlin v. Murphy*, 372 F. Supp. 2d 465 (D.Md. 2004).

## ***Attorneys’ Fees and Costs***

A worker who wins his or her lawsuit under either the MWHL or MWPCCL may seek **reasonable attorneys’ fees** and other costs, though the award of costs and fees is not mandatory. As stated in *Friolo v. Frankel*, 373 Md. 501 (2003), the lodestar approach (multiplying the reasonable number of hours worked times a reasonable hourly rate of the attorney, then considering case-specific adjustments) applies under both the MWHL and MWPCCL. The court specified that in all instances, a case-by-case analysis will be done to reach a final award of attorneys’ fees. *See also* Md. Code Ann., Labor & Empl. § 3-507.1.

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<sup>21</sup> The Maryland Court of Appeals has interpreted this language to mean whether the employer had “acted in good faith” in withholding the wages owed. *See Admiral Mortgage v. Cooper*, 357 Md. 533, 543 (2000).

**Practice Tip:** Under the FLSA, an award of attorneys' fees to a prevailing plaintiff is mandatory. Thus, if bringing a claim under MWHL and/or MWPCl, the attorney should analyze whether there is a claim under the FLSA (which is likely if there is a MWHL claim) and also plead the FLSA if it is important to be able to recover attorneys' fees.

### **Enforcement**

**Practice Tip:** Sometimes workers will not know the name or address of their employer, information necessary to write a demand letter or file a complaint. See "Practice Tip: Finding information on an employer" on page 5 to learn more about how to locate a Maryland employer using online public records.

### ***Private Lawsuits***

Both the MWHL and MWPCl allow for private parties to bring suit. Lawsuits can be brought in state District Court for claims less than \$30,000. The District Courts conduct bench trials only. Claims valued at \$5,000 or less are considered "small claims"; in small claims court there is no discovery and the rules of evidence generally do not apply. The state Circuit Court has jurisdiction for claims more than \$5,000. Either plaintiff or defendant can request a jury. If a plaintiff files a claim in district court that is valued over \$15,000, a defendant can request the case be transferred to Circuit Court by requesting a jury.

Pursuant to its supplemental jurisdiction, a federal court may hear a case in which claims are brought pursuant to the FLSA and state law.

**Practice Tip:** Both the MWHL and the MWPCl allow for, but do not require, the prevailing plaintiff to be awarded attorneys' fees. State court judges do not generally have the same familiarity with trying cases under fee-shifting statutes as do federal judges. This should be taken into account when determining in which forum to file suit.

### ***Wage Liens***

Effective October 1, 2013, Maryland's Unpaid Wage Lien Law permits victims of wage theft to file pre-judgment liens against the **personal or business property** of employers in Maryland. Md. Code Ann. Labor & Empl. § 3-1101 *et. seq.* Ideally, this method is faster than a court case and less complicated than a mechanics' lien, and will put pressure on the employer to promptly pay owed wages or negotiate a settlement.

### ***Notice***

Unpaid workers seeking to file a lien must first send notice to the employer of the pending lien, listing the worker's name, the employer's name, the property on which the

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lien will apply, the dates worked when wages are due, and the amount of unpaid wages and damages (including attorneys' fees) due. This notice must be delivered in person, to a person of suitable age at the person's home, or via certified mail, restricted delivery. COMAR 09.12.39.02.

Once the employer receives the notice, it has 30 days to file a complaint in the Circuit Court in the county where the property is located. The complaint must list when the employer received the notice, and explain why the wages claimed are not due or are otherwise controverted. The employee must receive a copy of the complaint. COMAR 09.12.39.03. Once the employer files a complaint, a formal court case can commence concerning the work performed and the wages owed.

### ***Wage Lien Statement***

If, following receipt of the notice, the employer does not file a complaint (or loses following adjudication on the merits), the unpaid worker must then record the lien to enforce it. For real property, the worker must file a Wage Lien Statement with the Circuit Court where the to-be-liened property is based. The Wage Lien Statement must, at minimum, include a description of the property, the name of the property owner, and the monetary amount of the lien. COMAR 09.12.39.04. For personal property (vehicles, equipment, etc.), the worker should record a filing statement with the Maryland State Department of Assessments and Taxation (SDAT), containing the same information as that required for real property.

### ***Enforcement***

Ideally, the employer will seek to settle the case when it receives notice of the pending lien. If no settlement can be reached to clear the lien from the property, the employer must clear the lien before the property can be sold or transferred. In practice, such a limitation may only be enforceable on real property or vehicles owned by the employer. It may be nearly impossible to prevent or revoke the sale of other personal property lacking an enforceable title system.

The statute does, however, permit execution on an established lien "in the same manner as any other judgment under State law." Md. Code Ann. Labor & Empl. § 3-1106(a). State law does permit sale of property under post-judgment levy and other remedies. Md. Code Ann. Cts. & Jud. Proc. § 2-644. Such a forced sale has not yet been tested, and attempting it may require significant up-front expense.

### ***Administrative Complaints***

In addition to the private cause of action afforded employees under both of Maryland's wage statutes, **complaints for violations of the state minimum wage and wage payment laws** may be submitted to the Maryland Division of Labor and Industry, **Employment Standards Division at 410-767-2357**; Monday-Friday, 8 a.m.-5 p.m. The

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division suggests, but does not require, that the employee send a demand letter to the employer prior to filing of a complaint with the agency. The Maryland Wage Complaint Form, to be sent to the agency, may be found in Spanish and English at <http://www.dllr.state.md.us/labor/wages/essclaimform.shtml>. Generally, the Division of Labor & Industry will not investigate claims of less than \$200, and focuses much of its efforts on contractors working under state construction and service contracts.

Correspondence may be sent to 1100 North Eutaw St., Room 607, Baltimore, MD 21201. The division will send the employee a claim form to be completed and returned. Upon receipt of a claim form, the Employment Standards Division will assign an investigator to the case and seek to resolve the claim for unpaid wages with the employer. If these efforts fail, the case may be referred to the Attorney General's office for filing of a lawsuit on behalf of the employee.

This office is understaffed. The office strongly prefers that complainants attempt a demand letter before filing a claim. If a complainant can secure private counsel, the agency will generally stop its investigation.

Complaints of overtime violations and federal wage and hour law violations should be submitted to the U.S. Department of Labor Baltimore District Office Wage and Hour Division at 1-866-487-9243 or (410) 962-4984. Because the federal standards are more comprehensive and protective than the state's standards, DLLR refers persons complaining of overtime violations to the federal agency.

### ***Criminal Complaint for Theft of Services***

Another possible avenue of relief for an employee who has not received earned compensation within the legally mandated time frame is the filing of a criminal charge under the Maryland Theft of Services statute. *See* Md. Crim. Law, § 7-104(d). This statute makes it a crime to obtain compensable services of another "by deception." This crime is a felony when value of the services involved are worth \$500 or more. It carries a potential penalty of up to 15 years imprisonment, a fine not exceeding \$25,000, or both, and orders of restitution.

### ***Bad Check Relief***

In some instances employees with unpaid wage claims will have been issued checks with insufficient funds by their employer. In such instances, in addition to remedies available through the wage payment (and wage and hour laws), the employee may have a remedy under Maryland's "Bad Check" law. *See* Md. Code, Comm. Law Art., §§ 15-801-4. Under this statute, when the maker of a bad check does not remedy the bounced check within 10 days after the bad check has been "dishonored," the holder of the bad check may send a written notice of dishonor to the maker and demand payment for the face amount of the check and a collection fee of up to \$35. After 30 days from the date the written notice of dishonor was sent, if the maker of the bad check continues to fail to make good on the

failed check, the holder may be entitled to additional damages for an amount up to two times the amount of the check, but not in excess of \$1,000. The written notice of dishonor shall be sent by mail to the last known address of the maker, and must substantially comply with the form prescribed by § 15-803(a) of the Commercial Law Article.

### ***Mechanics' Liens***

Under Maryland's mechanics' lien statute, Maryland Code Ann. Real Property § 9-101 *et seq.*, all new private construction projects and projects in which existing structures are renovated to the extent of 15% or more of their value are usually subject to attachment of a mechanics lien to cover debts incurred by subcontractors, including individual laborers working for subcontractors, for work performed (and materials provided) to the construction project. This is a relatively underutilized tool for recovering unpaid wages and is likely to be particularly effective on prominent construction projects.

For a laborer to obtain a mechanics' lien, he or she must give written notice of an intention to claim a lien to the owner of the property on which the work was performed. This notice must be provided within 120 days after performance of the work. (Each paycheck is a separate occurrence of debt. The 120 days runs against each pay period, including the first workweek, and does not run from the end of the project.) The written notice must be in the form set out in the Mechanics Lien statute (§ 9-104) and needs either to be hand-delivered to the owner of the property or sent by registered or certified mail, return receipt requested.

Section 9-104 provides the following approved language:

Notice to Owner or Owner's Agent of  
Intention to Claim a Lien

\_\_\_\_\_ (Subcontractor) did work or furnished material for or  
about the building generally designated or briefly described as

\_\_\_\_\_  
\_\_\_\_\_

The total amount earned under the subcontractor's undertaking to the date hereof is \$ ..... of which \$ ..... is due and unpaid as of the date hereof. The work done or materials provided under the subcontract were as follows: (insert brief description of the work done and materials furnished, the time when the work was done or the materials furnished, and the name of the person for whom the work was done or to whom the materials were furnished).

I do solemnly declare and affirm under the penalties of perjury that the contents of the foregoing notice are true to the best of the affiant's knowledge, information, and belief.

---

(Individual)  
on behalf of  
(Subcontractor)  
(Insert if subcontractor is not an individual)

After notice has been properly given and if payment has not been made, the contractor or employee must file a petition in the Circuit Court in that county where the real property at issue is located. The petition must be filed within 180 days after completion of the performance of work (or the furnishing the materials). The court will then order the property owner to show cause why the mechanics lien should not attach. The court is authorized to enter a final order granting the lien to the petitioner if the owner fails to respond to the show cause order, or fails to show cause why the lien should not attach. An evidentiary hearing will be scheduled if the property owner presents evidence of a legitimate dispute concerning petitioner's claim to a lien.

### ***Little Miller Act Claims***

The Miller Act is a federal statute that requires general contractors to purchase a payment bond on federally funded construction contracts (of \$100,000 or greater value) for construction or renovation of public property in lieu of a mechanics lien remedy since such is not available against government property. Many states have passed what are called "Little Miller" acts providing similar requirements and remedies for construction projects on state property. Maryland's "Little Miller Act" is codified at Md. Code Ann., State Fin. & Procurement § 17-101 *et seq.* and covers construction projects on state property where the contract is valued at \$100,000 or greater. (Sub-state jurisdictions may impose similar requirements for contracts valued between \$25,000 and \$100,000.)

The contractor is required to provide "payment security" typically in the form of a bond for 50% of the value of the contract. Persons who have supplied labor ("suppliers") under the project but who have not received their earned wages are entitled to sue for their unpaid wages against the payment security. A supplier who does not have a direct contractual relationship with the contractor (that is, someone who worked for a subcontractor) must give written notice to the contractor by certified mail of his or her intent to sue, within 90 days after furnishing labor or materials to the project. The notice must include detail as to the amount of the debt, the cause of the underlying debt (*e.g.*, unpaid wages for labor performed and on what dates), and the identity of the subcontractor who has failed to compensate the claimant for his or her labor. A supplier who does have a direct relationship with the contractor may file directly without giving notice of the intent to sue. Suit must be filed within one year of when the state accepts the construction project as complete.

## **Retaliation**



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The MWHL states that an employer may not discharge an employee because the employee has (1) complained to the employer or the state agency that the employee has not been paid in accordance with the act's minimum wage and overtime provisions; (2) brought an action under the act; or (3) testified in an action brought under the Act. *See* Md. Code Ann., Labor & Empl. § 3-428(a)(3). The Maryland Wage Payment and Collection Law does not contain an explicit retaliation provision. Claims under that statute, however, are generally allowed.

### **Virginia Wage & Hour Law**

#### **PRACTICE ALERT**

Virginia's workers' rights law are in constant flux. 2021 advancements in workers' rights under Gov. Northam's administration were rolled back in early 2022 under Gov. Youngkin. Manual information is current through December 2022. Practitioners should be aware of the possibility of future changes to Virginia's workers' rights protections.

### **Minimum & Overtime Wage**

Prior to May 1, 2021, employers were required to pay each of their employees' wages at a rate not less than the federal minimum wage of \$7.25. 2020 legislative changes to the Virginia Minimum Wage Act put Virginia on the path to gradually increasing the state minimum wage to \$15.00 per hour by 2027. Beginning January 1, 2022, employers are required to pay employees wages at a rate not less than the greater of \$11.00 per hour or the federal minimum wage. The minimum wage in Virginia will rise to \$12.00 per hour from January 1, 2023 until January 1, 2025. The table below shows the rising minimum rates over the next several years. *See* Va. Code Ann. §40.1-28.10. Virginia adopts the overtime standards of the Fair Labor Standards Act. *See* Va. Code Ann. §40.1-29.2-3. For overtime claims, workers can pursue claims in state court, under state law, federal law, or both. *Id.*

<b>Start Date</b>	<b>End Date</b>	<b>VA Minimum Wage</b>	<b>VA Min. OT Rate</b>
Prior to May 1, 2021		\$7.50/hour	\$11.25/hour
May 1, 2021	Jan. 1, 2022	\$9.50/hour	\$14.25/hour
Jan. 1, 2022	Jan. 1, 2023	\$11.00/hour	\$16.50/hour
Jan. 1, 2023	Jan. 1, 2025	\$12.00/hour	\$18.00/hour
Jan. 1, 2025	Jan. 1, 2026	\$13.50/hour	\$20.25/hour
Jan. 1, 2026	Jan. 1, 2027	\$15.00/hour	\$22.50/hour

### **Record-keeping Requirements**

On each regular pay date, employers must provide employees written statements, such as a paystub, that includes the employer's name and address; the number of hours worked during the pay period *if* the employee is paid based on hours worked or paid a salary below the federal overtime exemption threshold; the rate of pay, gross wages earned in the pay period; and the amount and purpose of any deductions. Wage statements must include enough information to enable the employee to determine how their gross and net pay were calculated. *See* Va. Code Ann. § 40.1-29(c).

### **Exempt Workers**

There are numerous exceptions to the Virginia Minimum Wage Act, including but not limited to the following:

- Farm laborers and workers;
- Persons acting for an educational, non-profit, religious, or charitable organization where the employee-employer relationship does not exist or where the services are done on a volunteer basis;
- Golf course caddies
- Baby-sitters (for fewer than 10 hours per week)
- Persons working for a summer camp for boys, girls, or both boys and girls;
- Traveling salesmen or outside salesmen working on a commission basis;
- Taxi drivers and operators
- All persons younger than 16, and all persons younger than 18 who are employed by a parent or legal guardian;
- Persons paid pursuant to 29 U.S.C. § 214(c) of the Fair Labor Standards Act as amended;
- Persons confined in any penal, corrective, or admitted to a state hospital or training center operated by the Department of Behavioral Health and Developmental Services.
- Persons who normally work and are paid based on the amount of work done
- Students and apprentices in a bona fide educational or apprenticeship program
- Persons younger than 18 currently enrolled in any secondary school, higher education institution, or trade school and employed 20 hours or less a week
- Persons enrolled full-time in any secondary school, higher education institution or trade school and in a work-study program or its equivalent at the institution where they are enrolled
- Persons participating as an au pair in the U.S. Department of State's Exchange Visitor Program governed by 22 C.F.R. 62.31
- Persons employed as a temporary foreign worker as governed by 20 C.F.R. Part 655

*See* Va. Code Ann. §40.1-28.9(B).

## **Remedies and Penalties**

**Practice Tip:** Sometimes workers will not know the name or address of their employer, information necessary to write a demand letter or file a complaint. To learn more about how to locate a Virginia employer using online public records, see “Practice Tip: Finding information on an employer” on page 5.

Employers who “knowingly and intentionally” pay workers less than the required minimum wage are punishable by a fine of at least \$10 and not more than \$200. *See* Va. Code Ann. § 40.1-28.11. Additionally, the employer must pay the worker the balance of the unpaid minimum wages, plus interest at eight percent per annum accruing from the date the wages were due to the worker. The court also may require the employer to pay the worker’s reasonable attorneys’ fees. *Id.* at § 40.1-28.12.

## **Virginia’s Prevailing Wage Law**

Virginia’s prevailing wage laws govern an employee’s rate of pay, benefits, and other remuneration on public contracts for public works for which the state expends more than \$250,000. For projects covered by this law, all contractors and subcontractors on the job must pay the prevailing wage rate as determined by the DOLI Commissioner, based on the U.S. Department of Labor’s Davis-Bacon Act Rates, Va. Code Ann. § 40.1-6(6), to all mechanics, laborers, or workers employed, retained, or otherwise hired to perform services in connection with the project. Contractors or subcontractors who pay below the prevailing wage rate will be liable for wages owed plus eight percent interest, and will also be disqualified from bidding on public contracts until full restitution is paid. *See* Va. Code Ann. § 2.2-4321.3. Current Virginia prevailing wage rates can be found here: [WEBSITE-Virginia-Prevailing-Wage-Rates-8.23.2.xlsx \(live.com\)](#).

## **Alexandria City’s Living Wage Policy**

Alexandria City has a “living wage” ordinance, which requires companies holding service contracts performed for city-owned or city-controlled property to pay workers **\$15.00/hour**. Construction contracts for more than \$50,000 that are formally solicited are exempt under the ordinance. All contractors awarded a contract requiring the Living Wage are required to provide quarterly and annual reports of wages paid to the city. If an employee believes he is entitled to the Living Wage and he is not receiving it, the worker should contact the city’s Purchasing Agent. The Purchasing Agent has the authority to terminate the contract and debar the contractor from doing business with the city. For more information, contact the Purchasing Division at (703) 746-4946, at Suite 301, 100 North Pitt St., Alexandria, VA 22314.

## **Misclassification of Workers**

An individual who has not been properly classified as an employee may bring a civil action for damages against his employer for failing to properly classify the employee if the employer had knowledge of the individual's misclassification. An individual's representative may bring the action on behalf of the individual. If the court finds that the employer has not properly classified the individual as an employee, the court may award the individual damages in the amount of any wages, salary, employment benefits, including expenses incurred by the employee that would otherwise have been covered by insurance, or other compensation lost to the individual, a reasonable attorney fee, and the costs incurred by the individual in bringing the action. *See* Va. Code Ann. § 40.1-28.7:7. The statute of limitations for misclassifications is three years. Va. Code Ann. § 8.01-243.

The law also prohibits retaliation against an individual who has reported or “plans to report” a misclassification or is requested or subpoenaed by an appropriate authority regarding a misclassification investigation, hearing, inquiry, or court action. Retaliation claims are enforced by the Commissioner, who may seek reinstatement, lost wages, and a civil penalty equal to lost wages. Va. Code Ann. § 40.1-33.1. There is currently no private right of action for misclassification-related retaliation claims.

## **Salary Transparency**

Virginia employers are prohibited from discharging or retaliating against employees for inquiring about or discussing the employee's wages or the wages of another employee. Employers who violate these prohibitions can be subject to a civil penalty not to exceed \$100 for each violation. Va. Code Ann. § 40.1-28.7:9.

## **Wage Payment and Collection Rules**

### **Wages Must Be Paid At Least Twice a Month**

Employers must establish regular pay periods for workers, with salaried workers paid at least once a month and workers who are paid on an hourly rate paid at least once every two weeks or twice a month. Students enrolled in a work-study program at a secondary school, trade school, or institution of higher education may be paid once a month at the option of the hiring institution, as may workers with weekly wages of more than 150 percent of Virginia's average weekly wage,<sup>22</sup> upon agreement by the worker. *See* Va. Code Ann. § 40.1-29(A). Only executives are exempted from these requirements. *Id.*

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<sup>22</sup> The Virginia Employment Commission most recently listed the Average Weekly Wage at \$994. *See* Virginia Employment Commission, *Quarterly Census of Employment and Wages*, 4th Quarter 2009.

### **Wages Must Be Paid Quickly After Termination or Quitting**

If a worker is terminated or quits, the employer must pay all wages or salary due for work performed up to the termination, on or before the next regular payday, or the day on which the worker would have been paid had employment not been terminated. *See Va. Code Ann. § 40.1-29(A).*

### **Vacation Time When Workers Leave Employment**

Virginia does not require that employers pay out departing employees for accrued, unused vacation time. However, employers may be required to pay accrued leave where it is part of a contract, or the employer has a policy or practices of doing so. Method of Payment

Wages may be paid in U.S. dollars, by check payable at face value in U.S. dollars, by prepaid debit card, or by direct deposit into an account designated by the worker. *See Va. Code Ann. §40.1-29(B).*

### **Withholdings**

With the exception of payroll, wage, and withholding taxes, employers may not withhold any part of a worker's wages without the written and signed consent of the worker. Employers are required to provide workers with a written statement of gross wages earned for any given pay period and the amount and purpose of any deductions from these wages upon the request of the worker. *See Va. Code Ann. § 40.1-29(C).* Additionally, employers may not require workers to forfeit wages as a condition of employment or the continuance of employment, nor may the employer require a worker to sign an agreement providing for such forfeiture. *Id. § 40.1-29(D).* (Workers who are considered executive personnel are an exception to this rule). However, wages may include the employer's reasonable costs of furnishing lodging and/or meals to the worker if such are both customarily provided by the employer and used by the worker. *Id. § 40.1-28.9(A).*

### **Remedies**

Employers who violate the Virginia Wage Payment Act are liable for the full amount of wages due to the worker plus interest at eight percent per annum from the date the wages were due, and an additional equal amount as liquidated damages. *See Va. Code Ann. § 40.1-29(G).* Employers who knowingly withhold wage payments or fail to make timely payments also may be subject to a civil penalty of up to \$1,000 for each violation. *Id. § 40.1-29(H).* For a knowing violation, an employee can recover an amount equal to triple the amount of wages due plus reasonable attorney's fees and costs. *Id. § 40.1-29(J).* Employers who willfully violate this law with intent to defraud a worker also are guilty of a misdemeanor for claims less than \$10,000, and, for claims of at least \$10,000, employers are guilty of a class 6 felony. *Id. at 40.1-29(E).*

### **Statute of Limitations**

The statute of limitations for a wage payment action is three (3) years. *Id.* at 40.1-29(L). The filing period for a lawsuit is tolled upon the filing of an administrative complaint until the action is resolved or the complaint is withdrawn, whichever happens first. *Id.*

### **Retaliation**

It is unlawful for Virginia employers to discharge, discipline, threaten, discriminate against, or penalize an employee or independent contractor who has reported, or plans to report, an employer for failure to properly classify an individual as an employee or pay required benefits or other contributions, or participated in an investigation, hearing, or inquiry. Employees can file a complaint with the Commissioner of the Department of Labor and Industry, however the anti-retaliation provision does not provide for a private right of action. Potential remedies include: reinstatement, recovery of lost wages, and civil penalties. *See* Va. Code. Ann. § 40.1-33.1.

### **Filing a Wage & Hour Claim**

#### **Administrative Complaints**

Wage and hour claims arising in Virginia may be filed with the Virginia Department of Labor and Industry (DOLI). The DOLI assists in the collection of unpaid wages, but can only collect wages for time worked; they do not collect fringe benefits. For more information, please see the agency website: [www.doli.virginia.gov](http://www.doli.virginia.gov).

Federal wage and hour complaints (such as complaints about overtime violations) in Virginia must be filed with the U.S. Department of Labor, Wage-Hour Division, in the District Office location nearest the worker's business or job location. Workers in Northern Virginia should file in the Baltimore District Office: 2 Hopkins Plaza, Room 601, Baltimore, MD 21201. Those in Southwestern Virginia should file in the Charleston Area Office: 500 Quarrier St., Ste. 120, Charleston, WV 25301. Complaints in the remainder of the Commonwealth should be filed in the Richmond District Office: 400 N. 8<sup>th</sup> St., Room 416, Richmond, VA 23219. The Wage and Hour Division also may be reached by phone at 1-866-4-USWAGE.

#### **Wage & Hour Actions in Court**

As of July 1, 2020, Virginia employees now have a private right of action to sue their employers directly for nonpayment of wages—as opposed to pursuing wage claims through an administrative claim. *See* Va. Code Ann. § 40.1-29(J). Employees can file suit

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individually, jointly, with other aggrieved employees, or on behalf of similarly situated employees as a collective action consistent with the collective action procedures of the Fair Labor Standards Act. There is no requirement to exhaust administrative remedies prior to filing a lawsuit. Remedies include: wages owed, plus liquidated damages, prejudgment interest accruing at an eight percent annual rate from the time the wages were due, reasonable attorneys' fees, and costs. *Id.* If the court finds that the employer knowingly failed to pay wages, it will award the employee treble damages. *Id.*

## **Wage and Hour Related Issues**

### **Undocumented Workers**

Documentation status is irrelevant to the right to be paid for work performed. *In re Reyes*, 814 F.2d 168, 170 (5<sup>th</sup> Cir. 1987) *cert denied* 487 U.S. 1235, 108 S.Ct. 2901 (1988); *Montoya et al. v. S.C.C.P. Painting Contractors, Inc., et al.* 530 S.Supp. 2d 746 (D.Md. 2008). Although it is possible that the employer will try to report the worker to the Department of Homeland Security and have the worker deported, immigration laws also provide for fines against employers who hire undocumented workers. This risk on both sides means that many employers who threaten to report workers will not actually follow through on their threats.

**Practice Tip:** There is no duty to report undocumented persons to the Department of Homeland Security. If a client tells her attorney that she is undocumented, the attorney-client privilege protects the information and the attorney has an ethical obligation to not disclose it to a third party.

### **Immigration Status is Irrelevant to a Claim for Wages or Damages**

Undocumented workers are not barred from recovering unpaid wages under federal or state law, despite the Supreme Court's holding in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (the court held that, in an action under the NLRA, undocumented workers could not recover back pay from employers who fired workers in retaliation for attempting to organize a union). The *Hoffman* decision did not apply, however, to back pay for work actually performed, and is strictly limited to remedies under the NLRA.

Many lower courts have since explained that *Hoffman* did not undermine the rights and remedies that undocumented workers have under the FLSA. *See Zavala v. Wal-Mart Stores*, 393 F. Supp. 2d 295, 321-25 (D.N.J. 2005) (noting that even after *Hoffman*, the Department of Labor interprets the FLSA to include undocumented workers; distinguishing back pay for work actually performed from the type of back pay at issue in *Hoffman*; citing

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the broad definition of “employee” in the FLSA; and noting that enforcing wage and hour laws with regard to undocumented workers is not inconsistent with immigration policy); *Singh v. Jutla & C.D. & R's Oil, Inc.*, 214 F. Supp. 2d 1056, 1060-62 (N.D. Cal. 2002).

Employers continue to try to argue that undocumented immigrants do not qualify for FLSA protection by virtue of their undocumented status. Once a plaintiff has proven the amount of unpaid wages, the FLSA provides for an award of that sum plus an equal amount in liquidated damages. In *Ulin v. Lovell's Antique Gallery*, 2010 WL 3768012 (N.D. Cal. 2010), the defendant employer argued that *Hoffman* precluded an award of liquidated damages because liquidated damages were “akin to back pay for work not performed.” The court rejected this argument, stating that “liquidated damages are a form of compensation for time worked that cannot otherwise be calculated.”

The bottom line: Employers have to pay employees for work performed and immigration status is irrelevant to that protection.

### **Advising on and Reducing Risk of Immigration Action**

At least one federal court has held that it is illegal under the FLSA to report a worker to the immigration authorities as retaliation for his wage-hour complaint. *See e.g., Contreras v. Corinthian Vigor Insurance Brokerage, Inc.*, 25 F. Supp. 2d 1053, 1056-60 (N.D. Cal. 1998). Attorneys representing undocumented workers also might be able to obtain a protective order to protect information related to the worker's immigration status. *See Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1063-64 (9th Cir. 2004) (upholding a protective order as “justified because the substantial and particularized harm of the discovery – the chilling effect that the disclosure of plaintiffs' immigration status could have upon their ability to effectuate their rights – outweighed NIBCO's interests in obtaining the information at this early stage in the litigation”).

The D.C. Office of Wage-Hour does not share information with the Department of Homeland Security. The Office of Wage-Hour does not require social security numbers to process a claim or recover wages. The U.S. Department of Labor (DOL) entered into a Memorandum of Understanding with the DHS (formerly INS) to encourage undocumented workers to report workplace abuses. DOL investigators are not supposed to inquire into a worker's immigration status or to inspect the employer's immigration status verification procedures when investigating labor standard violations. *See* BCIS Memorandum of Understanding to Enhance Worksite Enforcement Sanctions and Labor Standards (Nov. 23, 1998) at [www.dol.gov](http://www.dol.gov).

For more information about the rights and remedies available to undocumented workers under federal and local employment laws, see the [Immigration & Employment](#) chapter, below.

<b>Practice Tip:</b> On court filings and demand letters, it may be advisable for the attorney to
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use his or her office address as the address for undocumented workers who are their clients, to protect their confidentiality.

## **Home Health Care Aides**

### **Treatment under Federal Law**

In September 2013, the DOL issued new regulations regarding the treatment of home health aides under the FLSA, significantly narrowing the application of the “companionship” exemption. These regulations went into effect on October 13, 2015. *Please see* previous section regarding [Home Care Workers](#).

This companionship exemption applies to care in private homes, but it does not apply to aides in assisted-living or nursing home facilities. 29 C.F.R. § 552.3.

### **Treatment under D.C./State Law**

D.C.’s living wage law, which requires hourly pay of \$16.10 as of July 1, 2022, applies to home health aides employed by a managed-care organization or by a private home. However, the living wage law exempts Medicaid contracts if direct care services are not provided by a home care agency, a community residence facility, or a group home for mentally disabled persons. These provisions have not been fully litigated, however, and so their full application is unclear. 7 DCMR § 1007.

Under Maryland law, home health aides must be paid minimum wage, and most must receive overtime. Md. Code Ann., Labor & Empl. § 3-415. Home health aides working for non-profit organizations are exempt from Maryland’s overtime pay requirement, and those providing on-premises care for the disabled may be paid an overtime premium at 48 – not 40 – hours per week. *Id.* Under Maryland’s Living Wage Law, although home health aides and other caregivers are not expressly exempted, it is possible that the law may not apply to the employer’s contract with the state, due to the contract’s value or purpose.

Under Virginia law, home health aides are generally exempt from the state’s minimum wage and overtime requirements. Many, if not most, home health aides working in Virginia would be protected by the new federal minimum wage and overtime regulations, however.

For more information on the application of state and federal wage and overtime law to home health aides, visit [www.dol.gov](http://www.dol.gov).

## **Employee vs. Independent Contractor**

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Unscrupulous employers sometimes try to classify their employees as “independent contractors” in order to take advantage of the exemption of independent contractors from minimum wage, overtime pay, and other benefits required for employees. The definition of employee under the FLSA is very broad: an employee is anyone whom an employer “suffers or permits” to work. 29 U.S.C. § 203(g). The law does not define “independent contractor.”

D.C., Maryland, and Virginia have statutes designed to prevent the knowing misclassification of employees as independent contractors. For state-specific information, see the D.C., Maryland, and Virginia sections of this chapter.

### Policy Watch!

In 2022, DOL issued a [notice of proposed rulemaking](#) with revised guidelines for determining independent contractors and employees under the FLSA. A final rule is pending. Attorneys should confirm current status DOL guidance on this issue.

The question of whether a worker is an employee or an independent contractor is very fact-specific. There is no single rule or test for determining independent contractor versus employee classification under the FLSA. Several courts use an “**economic realities**” **approach**, looking at the employment relationship as a whole, with emphasis on economic realities. *See e.g. Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947). **How an employer refers to its workers is not a variable in the determination of whether they are employees or independent contractors.**

Factors under the test include:

- whether the “employer” has the power to hire and fire the purported contractor;
- whether the employer supervises and controls employee work schedules or conditions of employment;
- whether the worker performs a task integral to the employer’s business;
- whether the employer determines rate and method of payment;
- whether the employer maintains employment records;
- whether the employer owns equipment necessary for the job; and
- the degree of skill required for a job (the more skilled, the more likely someone is an independent contractor).

## Joint Employers

A worker can also have “joint employers”; that is, two entities that are each his or her employer under the economic realities test, each of which is jointly and severally liable for unpaid wages. *See* 29 C.F.R. § 791.2. If a worker has joint employers, all his work during the week is considered one job for purposes of minimum wage and overtime.

A test determining joint employment for purposes of the FLSA, which looks at the relationship between the putative employers, not each individual employee and the

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putative employer, is articulated in *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125 (4<sup>th</sup> Cir. 2017) and *Hall v. DirectTV LLC*, 846 F.3d 757 (4<sup>th</sup> Cir. 2017). Those decisions look to whether formally or as a matter of practice, the employment of the employee by one employer is not completely disassociated from employment by another employer.

There is also a test for who is a joint employer, which considers:

- whether employers are not completely disassociated with respect to the employment of a particular worker and may be deemed to share control of the employee (29 C.F.R. § 791.2);
- whether the employee's work simultaneously benefits two or more employers or he regularly works for two or more employers during the same week (29 C.F.R. § 791.2(b));
- whether there is an arrangement between employers to share the worker's services, for example, to exchange employees (29 C.F.R. § 791.2(b));
- whether one employer acts in interest of other employer in relation to the employee (29 C.F.R. § 791.2(b));
- who owns the property and facilities where the work occurred;
- what is the degree of skill required to perform the job;
- who has made an investment in equipment and facilities;
- whether the nature of the employment is permanent and exclusive;
- the nature and degree of control of the workers;
- the degree of supervision, direct or indirect, of the work;
- who has the power to determine the pay rates or the methods of payment of the workers;
- who has the right, directly or indirectly, to hire, fire or modify the employment conditions of the workers; and
- who prepares payroll and payment of wages.

### Horizontal Joint Employment Scenarios:

An employee is employed at two locations of the same restaurant brand. The two locations are operated by separate legal entities (Employers A and B). The same individual is the majority owner of both Employer A and Employer B. The managers at each restaurant share the employee between the locations and jointly coordinate the scheduling of the employee's hours. The two employers use the same payroll processor to pay the employee, and they share supervisory authority over the employee. These facts are indicative of joint employment between Employers A and B.

In contrast, an employee works at one restaurant (Employer A) in the mornings and at a different restaurant (Employer B) in the afternoons. The owners and managers of each restaurant know that the employee works at both establishments. The establishments do not have an arrangement to share employees or operations, and do not otherwise have any common management or ownership. These facts are **not** indicative of joint employment between Employers A and B.

### Vertical Joint Employment Scenarios:

A laborer is employed by ABC Drywall Company, which is an independent subcontractor on a construction project. ABC Drywall was engaged by the General Contractor to provide drywall labor for the project. ABC Drywall hired and pays the laborer. The General Contractor provides all of the training for the project. The General Contractor also provides the necessary equipment and materials, provides workers' compensation insurance, and is responsible for the health and safety of the laborer (and all of the workers on the project). The General Contractor reserves the right to remove the laborer from the project, controls the laborer's schedule, and provides assignments on site, and both ABC Drywall and the General Contractor supervise the laborer. The laborer has been continuously working on the General Contractor's construction projects, whether through ABC Drywall or another intermediary. These facts are indicative of joint employment of the laborer by the General Contractor.

In contrast, a mechanic is employed by Airy AC & Heating Company. The Company has a short-term contract to test and, if necessary, replace the HVAC systems at Condor Condos. The Company hired and pays the mechanic and directs the work, including setting the mechanic's hours and timeline for completion of the project. For the duration of the project, the mechanic works at the Condos and checks in with the property manager there every morning, but the Company supervises his work. The Company provides the mechanic's benefits, including workers' compensation insurance. The Company also provides the mechanic with all the tools and materials needed to complete the project. The mechanic brings this equipment to the project site. These facts are **not** indicative of joint employment of the mechanic by the Condos.

## Personal Liability for Individual Employers

The D.C. Acts and the FLSA all define "employer" to include individuals, so employees may maintain actions against not only their companies but also sometimes against their employers as individuals. The D.C. Court of Appeals addressed an employer's individual liability under D.C.'s wage payment law in *Sanchez v. Magafan*, 892 A.2d 1130, 1131-32 (D.C. 2006). In this case, an employee sued the owner of the restaurant where he worked for failure to pay wages earned under an oral employment agreement. Rejecting the owner's argument that the restaurant, not the owner himself, was the only "employer" under the Act, the court of appeals reversed the grant of summary judgment. *Id.* at 1132-34.

Additionally, federal courts of appeals have interpreted the FLSA to provide for the personal liability of individuals who constitute employers, holding individuals liable when an "economic reality" test shows them to have exercised sufficient control to be considered employers. See *e.g.*, *Baystate Alternative Staffing, Inc., v. Herman*, 163 F.3d 668, 677-78 (1st Cir. 1998) ; *U.S. Dep't of Labor v. Cole Enters.*, 62 F.3d 775, 778 (6th Cir. 1995) ("A corporate

officer who has operational control of the corporation's covered enterprise is an 'employer' under the FLSA."); *Carter v. Dutchess Community College*, 735 F.2d 8, 12 (2d Cir. 1984) ("[To] determine[e] whether an employment relationship exists for purposes of the FLSA, [courts] must evaluate the 'economic reality' of the relationship.").

Under the economic reality test, the relevant factors that tend to demonstrate that an individual is an employer include the power to hire and fire the employees; control over the schedules or conditions of employment, rates of pay and method of payment, and other significant functions of business; a significant ownership interest in the corporation; and maintenance of the employment records. *Cole Enters.*, 62 F.3d at 778; *Carter*, 735 F.2d at 12; *see also Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132 (2d Cir. 1999).

**Practice Tip:** Whenever possible, name individuals as defendants in addition to the corporate entity. Establishing liability of individuals and the entity increases the chances of collecting on a judgment, and also increases the pressure on the defendants to settle the case.

## Collecting a Judgment & the Bankrupt Employer

In D.C. Superior Court (civil division or small claims), there is a special procedure to get information about a defendant's ability to pay. Under D.C. Code § 16-3908 and Small Claims Rule 18, when a judgment is entered in a wage matter, the worker can file a motion asking the Court to order the defendant to appear for oral examination under oath as to his financial status and ability to pay the judgment. This can be done as often as once a week for four weeks. After the oral examination, the judge can issue supplementary orders "as seems just and proper" to make sure the judgment is paid "upon reasonable terms." Whether or not the defendant appears for the oral examination, the plaintiff can attempt to collect through wage garnishment, attachment of a bank account (examine the employer's pay checks for account information), and liens on real property.

If an employer has filed for bankruptcy, all secured debts of that employer are paid first. After all secured claims are paid, priority goes first to unsecured claims for domestic support obligations, then to certain administrative expenses owed to trustees, and then to "wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual" within the 180 days before the filing of the bankruptcy petition (capped at \$10,000 for each individual or corporation to whom pay is owed). *See* 11 U.S.C. § 507(a). Wages are entitled to priority of payment over contributions to employee benefit plans, unsecured creditors, and taxes. *Id.* While this is a fairly high priority level, it is important to remember that because secured claims get paid first, there might not be anything left to pay for wages. The employee will have to file a "Proof of Claim" (Form B10) in the bankruptcy proceeding to recover unpaid wages earned prior to the filing of the bankruptcy proceeding. For wages earned after the filing of the bankruptcy petition, the employee will have to file a "Request for Administrative Expenses" pursuant to 11 U.S.C. § 503.

## Bad Checks

Employers sometimes issue bad checks to their workers. Under D.C. Code § 22-1510, it is illegal to write a check “with intent to defraud” knowing that the bank account does not have sufficient funds. If the check amount is \$1,000 or more, it is a felony punishable by a \$3,000 fine and three years in jail. Writing a bad check for an amount less than \$100 is a misdemeanor, punishable by a \$1,000 fine and 180 days in jail.

In Virginia, an employer who knowingly writes a bad check of \$1,000 or more to an employee is guilty of a felony. *See* Va. Code Ann. § 18.2-182. The employer is guilty of a Class 1 misdemeanor if the employer knowingly writes a bad check of less than \$1,000 to an employee. *Id.* at § 18.2-182. If the employee is not paid within 30 days of making a written demand, the employer may also be liable for punitive damages up to \$250. *Id.* at §§ 8.01-27.1 to -27.2.

**Note:** “Intent to defraud” is easily established when the check bounces because of insufficient funds, the employer is notified of the insufficient funds, and the employer does not pay the required amount within five days. *Id.*

**Practice Tip:** When a worker receives a bad check, immediately send a letter to the employer **certified, return receipt requested**, notifying the employer of the bad check and requesting payment in five days. Cite the criminal code and penalties listed above. If payment is not made in five days, consider counseling the worker to file a police report at any police station. For D.C., call 202-727-1010 to find the location of police stations.

## Wage Garnishment

There are two types of garnishment situations that commonly arise. In one instance, an employer will garnish wages that it believes the employee owes to the employer (*e.g.*, as a result of breakage). In the second instance, the employer will garnish wages that the employee may owe to a third party (*e.g.*, child support).

In the case of garnishment for the benefit of a third-party creditor, employers are prohibited from deducting from an employee’s wages unless the alleged debt has been properly reduced to a court judgment and wage garnishment as described in D.C. Code § 16-572. *See* D.C. Code § 16-583 (except as provided in the District of Columbia Child Support Enforcement Amendment Act of 1985 or as provided in the D.C. Code, section 16-916, before entry of a judgment in an action against a debtor, the creditor may not obtain an interest in any property of the debtor by garnishment proceedings). It is not clear whether Section 16-572 requires an employer to seek an order before withholding wages from an employee for breakages or other debts that the employee may owe to her

employer.

Both D.C. and federal law limit the amount that can be garnished when garnishment is proper. Under both D.C. and federal law, the maximum garnishment is 25% of disposable wages for the week in question, or the amount “by which [the employee’s] disposable wages for that week exceed 30 times the federal minimum hourly wage,” whichever is less. 15 U.S.C. § 1673(a); D.C. Code § 16-572. Only one attachment upon the wages of a judgment debtor can be made at a time. D.C. Code § 16-572. D.C. Code § 1-629.03 and § 1-629.04 cover debt collection from D.C. government employees for debts to the D.C. government.

D.C. law does not contain any exceptions to the limitations set forth in Section 16-572; however, the federal provisions do contain several exceptions. In the case of an order for the support of another person (e.g., child support, alimony), up to 50 or 60% of disposable wages can be garnished. 15 U.S.C. § 1673(b). Although federal law allows for garnishing these amounts, employers in the District of Columbia could still violate D.C. law for excessive garnishment, as the federal law does not displace more generous state laws. 15 U.S.C. § 1677; *see also* 28 U.S.C. § 3101 *et seq.* for federal procedures for collecting a debt (*i.e.*, debts owed to the federal government).

Assistance in collecting judgments in Maryland is available from the manual published by the Public Justice Center.

[http://www.publicjustice.org/uploads/file/pdf/MD\\_Wage\\_Collection\\_Judgment\\_Enforcement\\_Guide\\_PJC\\_FINAL.pdf](http://www.publicjustice.org/uploads/file/pdf/MD_Wage_Collection_Judgment_Enforcement_Guide_PJC_FINAL.pdf)

Maryland law ensures that deductions from wages may only be made for certain reasons. *See* Md. Code Ann., Labor & Empl. § 3-503. Virginia protects against excessive garnishments. *See* Va. Code Ann. § 34.29. For more information about wage garnishment in Virginia, consult Legal Services of Northern Virginia’s website: [www.lsnv.org](http://www.lsnv.org).

An employer may not terminate a worker because his or her wages are being garnished. *See* 15 U.S.C. § 1674. There is, however, no private cause of action by which an employee may challenge a wrongful termination under this section. *See LeVick v. Skaggs Cos.*, 701 F.2d 777 (9th Cir. 1983); *Smith v. Cotton Bros. Baking Co.*, 609 F.2d 738 (5th Cir. 1980). Virginia law also protects against termination based on an employee’s wage garnishment. *See* Va. Code Ann. § 34.29(f).

## Child Labor

A combination of federal and D.C. laws limit the amount and types of work that minors can perform. *See* D.C. Code §§ 32-201 *et seq.*, 29 C.F.R. § 570 *et seq.* It is unlawful to employ children 13 and younger, except in limited circumstances. *See* D.C. Code §§ 32-

## Wage and Hour

201.<sup>23</sup> Workers aged 14 and 15 have limits on hours of work and conditions under which they can work.<sup>24</sup> They may only be employed outside of school hours; when school is not in session, the maximum workweek is 40 hours, with no more than eight hours per day. *See* 29 C.F.R. § 570.35. When school is in session, children can work no more than 18 hours per week, with a maximum of three hours per day. *Id.* Work must occur between 7 a.m. and 7 p.m. except in the summer, where children 14-15 can work until 9 p.m. *Id.* Children 16 and 17 years old cannot work in certain industries.<sup>25</sup> Children 16 and 17 can work only between 6 a.m. and 10 p.m., no more than 48 hours per week, no more than eight hours a day, and no more than six consecutive days. *See* D.C. Code § 32-202. For those 18 and older, no restrictions apply.

A combination of federal and Maryland laws limit the amount and types of work that minors can perform. *See* Md. Code Ann., Labor & Empl. § 3-201 *et seq.*; 29 C.F.R. § 570 *et seq.* Generally, the most protective standards, whether state or federal, are those that govern. It is unlawful to employ children 13 and younger, except in limited circumstances. *See* Md. Code Ann., Labor & Empl. § 3-203.<sup>26</sup> Minors between the ages of 14 and 17 may only work under certain restrictions, and then, only with a work permit. The Maryland Division of Labor and Industry explains Maryland standards:

“Minors 14 and 15 years of age may not be employed or permitted to:

- work more than four hours on any day when school is in session
- work more than eight hours a day on any day when school is not in session
- work more than 23 hours in any week when school is in session
- work more than 40 hours in any week when school is not in session
- work before 7 a.m. or after 8 p.m. Minors may work until 9 p.m. from Memorial Day to Labor Day.
- work more than five consecutive hours without a non-working period of at least 30 minutes.”

“Minors 16 and 17 years of age:

- May spend no more than 12 hours in a combination of school hours and work hours each day.

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<sup>23</sup> Exceptions include newspaper deliverers; actors and performers; children employed by parents for housework or agricultural purposes. Children 10 years or older may be employed outside of school hours in distributing newspapers on fixed routes, but not stuffing (for which the minimum age is 16). Children 12 years or older may sell newspapers on the street. *See* D.C. Code §§ 32-215 – 32-221.

<sup>24</sup> Children 14 to 15 cannot work in manufacturing, in hazardous occupations, or on motor vehicles, railroads, trucks, airplanes, boats, pipelines, warehousing or storage, communications or public utilities, or construction. *See* 29 C.F.R. § 570.33. Office work in any of these industries is acceptable.

<sup>25</sup> Including working with or manufacturing small arms, ammunition or explosives, operating a motor vehicle or acting as an outside helper, coal mines, logging, bakery machines, paper products and others. *See* 29 C.F.R. § 570.51 - 570.68.

<sup>26</sup> Including newspaper delivery; children employed by parents or a person standing in the place of a parent; domestic work in or around a home, caddying on a golf course; instructing on an instructional sailboat; work performed as a counselor or instructor at a Maryland Youth Camp; or work performed for a non-profit organization (under certain conditions).



## Wage and Hour

- Must be allowed at least eight consecutive hours of non-work, non-school time in each 24 hour period.
- May not be permitted to work more than five consecutive hours without a non-working period of at least 30 minutes.

Under federal law, youth must be 14 years of age to work in any non-agricultural employment. Fourteen- to 15-year-olds may work subject to the following restrictions:

- during non-school hours;
- a maximum of three hours on school days;
- a maximum of 18 hours during the school week;
- a maximum of eight hours on non-school days;
- a maximum of 40 hours during non-school weeks; and
- between 7 a.m. and 7 p.m. (except from June 1 through Labor Day, when evening hours are extended to 9 p.m.)

There are exceptions for youth who are **14 and 15 years old if they are** enrolled in an approved [Work Experience and Career Exploration Program](#) (WECEP). Through this program, youth may work up to 23 hours during school weeks and three hours on school days (including during school hours). The FLSA does not limit the number of hours or times of day for workers **16 years and older**. However, youth who are 16 and 17 years old cannot work in certain industries considered unsafe for that age group.<sup>27</sup>

For further information on the employment of minors in Maryland, please see the Maryland Division of Labor and Industry, Employment of Minors Fact Sheet, found online at [www.dlir.state.md.us](http://www.dlir.state.md.us). For additional information about employment of minors by employers regulated by the FLSA, please see [www.dol.gov](http://www.dol.gov). Enforcement of federal child labor laws is handled through the U.S. Department of Labor's district offices. Issues arising in Maryland are handled by the Baltimore District Office:

### **Baltimore District Office**

U.S. Dept. of Labor  
ESA Wage & Hour Division  
Room 207 Appraisers Stores Building  
103 S. Gay St.  
Baltimore, MD 21202-4061  
Phone: 1-866-4-USWAGE (1-866-487-9243)

## **Human Trafficking**

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<sup>27</sup> Including working with or manufacturing small arms, ammunition or explosives, operating a motor vehicle or acting as an outside helper, coal mines, logging, bakery machines, paper products, and others. See 29 C.F.R. 570.51 through .68.

## Wage and Hour

Of course, slavery is illegal. Yet, slavery comes in many guises: for example, workers may be forced into slavery, involuntary servitude, or peonage in private homes as domestic servants, on farms as agricultural labor, or in sweatshops. Others are undocumented workers, trafficked into or within the country and forced into labor in private homes, factories, fields, or in brothels.

The Thirteenth Amendment provides that slavery and involuntary servitude are illegal. Those provisions are also codified at 18 U.S.C. § 1584, which further provides for criminal penalties. The U.S. Code provisions do not specify what constitutes “involuntary servitude,” but that term has been interpreted by the First Circuit to mean that a worker was required to work against his or her will as a result of (1) physical restraint; (2) legal coercion; or (3) plausible threats of physical harm or legal coercion. *See United States v. Alzanki*, 54 F.3d 994 (1st Cir. 1995). The worker must have a reasonable subjective belief that there was no alternative but to work for the perpetrator. The Supreme Court has stated that threats of deportation could constitute legal coercion. *See United States v. Kozminski*, 487 U.S. 931 (1988). Mere psychological coercion has been held insufficient to create involuntary servitude. *Id.* However, the *Victims of Trafficking and Violence Protection Act of 2000* added the crime of “forced labor” w to to cover cases where people are kept in “involuntary servitude” situations through the use of psychological coercion. Pub. L. No. 106-386, 114 Stat. 1464, § 102(b)(13) & (14) (codified as amended at 22 U.S.C. § 7101(b)(13) & (14) and 18 U.S.C. § 1589. Thus, an individual who “knowingly provides or obtains the labor or services of a person by any one of, or by any combination of . . . (1) by means of forced, threats of force, physical restraint, or threats of physical restraint to that person or another person; (2) by means of serious harm or threats of serious harm to that person or another person; (3) by means of the abuse or threatened abuse of law or the legal process; or (4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint” can be fined or imprisoned up to 20 years. *See* 18 U.S.C. § 1589.

Former President Clinton signed the *Victims of Trafficking and Violence Protection Act of 2000* into law in October 2000. This law allows individuals who are (1) victim[s] of severe forms of trafficking; (2) physically present in the United States on account of such trafficking; (3) complying with any reasonable request for assistance in investigation or prosecution of acts of trafficking, or have not attained 15 years of age; and, (4) and would suffer extreme hardship involving unusual and severe harm upon removal to apply for a nonimmigrant visa, known as a “T” visa, to remain in the U.S. *Victims of Trafficking and Violence Protection Act of 2000 (TVPA)*, Pub. L. 106-386, 114 Stat. 1464, Sec 107(e)(1)(T)(i)(I)-(IV) (codified at 8 U.S.C. § 1101 (a)(15)(T)) (hereinafter VTVPV; 8 CFR § 214.11(a)); *see also* 8 C.F.R. § 212.16.).

The National Human Trafficking Hotline connects survivors of sex and labor trafficking with services and support. Toll-free phone and SMS text lines and live online chat function are available 24 hours a day, 7 days a week, 365 days a year in English, Spanish, and more than 200 additional languages through an on-call interpreter. Call: 1-

## Wage and Hour

888-373-7888. Text: 233733. Chat: <https://humantraffickinghotline.org/chat>. Hearing and speech-impaired individuals can contact the Hotline by dialing 711.

If you have a suspected case of sex or labor trafficking, local legal service providers can be found at: <https://humantraffickinghotline.org/training-resources/referral-directory>.

# **UNEMPLOYMENT**

# **COMPENSATION**

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**Table: Sources of Law - Unemployment Compensation**

Federal Statutes	42 U.S.C. §§ 501-504 (state law requirements) 26 U.S.C. §§ 3301-3311 (taxing scheme)
D.C. Statute	D.C. Code § 51-101 <i>et seq.</i>
D.C. Regulations	7 DCMR §§ 300-399.1 (CDCR 7-300 <i>et seq.</i> in Lexis database)
Federal Employees	D.C. Code § 51-101 <i>et seq.</i>
D.C. Employees	D.C. Code § 51-101 <i>et seq.</i>
West Key© System	Social Security & Public Welfare, Unemployment Compensation (356A, VIII)

**Background**

Generally, workers who have lost their jobs can receive unemployment compensation, a weekly wage replacement benefit, unless their employer can show that the employees were exempt, voluntarily resigned without good cause connected to the work, were fired for misconduct or gross misconduct, or lost their jobs due to a labor dispute. Each of these issues is addressed in detail below.

The amount of unemployment compensation that a worker receives is based on the worker's wages (approximately half). A worker can get unemployment for a maximum of six months (26 weeks) if she follows all program requirements, sends in claim cards, and reports to the local office if requested to do so. In times of high unemployment, Congress may step in and provide additional weeks of emergency unemployment benefits.

Unemployment compensation insurance (UI) programs are typically state-run. But since states (and D.C.) receive grants from the federal government to run these programs, they must follow federal guidelines.

In addition to federal grants, each covered employer must pay a premium, like an insurance premium, to the government agency charged with administering the unemployment compensation program. The premium amount is based on the number of workers an employer employs and the employer's experience rating, which means that the amount an employer has to pay increases as its number of successful unemployment compensation claims goes up. This is generally why employers challenge the unemployment compensation claims filed by employees.

## **Unemployment Compensation in D.C.**

In D.C., the Department of Employment Services (DOES) runs the unemployment compensation program. Workers may file their claims online at the website for the Department of Employment Services (select “Unemployment” then “Unemployment Compensation Process” then “Start your Unemployment Compensation Process”) or over the phone at: (202) 724-7000 or (877) 319-7346. Workers may file their claims in person at local DOES offices and American Job Centers located throughout the city. See the [Claims and Appeals Process](#) section below.

### **Coverage & Exemptions**

Employers must pay into the UI fund if they employ a worker entirely within D.C. or mostly within D.C. (if the services performed by the worker outside of D.C. are “incidental” to the services performed within D.C.). See D.C. Code § 51-101(2)(B)(ii).

**Note:** The worker need not be a resident of D.C. to receive D.C. UI benefits; residents of Virginia and Maryland may be eligible for benefits if they worked in .DC.

#### **Exempt Employees**

The following workers represent most of the individuals who are exempt from (will not receive) unemployment compensation benefits:

- employees of religious organizations;
- participants in rehabilitation workshops, such as programs run by Goodwill or sheltered workshop trainees;
- persons in federal or other government-sponsored work training programs;
- inmates;
- baby-sitters under the age of 18;
- casual laborers;
- any worker employed by his or her parent, child or spouse;
- undocumented workers;<sup>28</sup> and
- independent contractors who meet the common law definition of independent contractor.<sup>29</sup>

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<sup>28</sup> Undocumented workers are not eligible for unemployment compensation. See D.C. Code § 51-101(2).

Benefits are calculated using Social Security numbers. Lawful permanent residents, however, are eligible for unemployment, as is anyone lawfully admitted for the purpose of their employment. *Id.* at § 51-109(9)(A).

<sup>29</sup> Watch out for employers who classify employees as independent contractors to avoid unemployment and other types of liability. See *Rosexpress, Inc. v. DOES*, 602 A.2d 659 (1992). For a discussion of the distinction between “employees” and “independent contractors” see the [Wage and Hour](#) chapter.



See D.C. Code § 51-101(2).

### **D.C. and Federal Government Employees**

No special standards apply when dealing with D.C. and federal government employees. These employees are eligible for benefits under the same terms and conditions as private employees.

## **Establishing Eligibility for Benefits**

### **Resigning from or Quitting a Job**

A worker who **voluntarily** separates from his or her job without good cause connected to the work is not eligible for unemployment compensation. See D.C. Code § 51-110(a); 7 DCMR § 311.

### ***The Standard for Voluntary Separation***

Leaving is presumed to be involuntary. Thus, unless the worker admits that she quit voluntarily, the employer has the burden of proving that the worker left voluntarily. 7 DCMR § 311.3. For example, in *Washington Chapter of the American Institute of Architects v. DOES*, 594 A.2d 83 (1991), an executive vice president was judged to have left her employment involuntarily when she was forced to choose between signing a letter of resignation presented to her or told to “stay and be miserable.” She was allowed to collect benefits.

If a worker resigns under “threat of imminent termination,” the leaving is considered a constructive discharge for misconduct, and thus, involuntary. 7 DCMR § 311.8. However, the employer then will have the opportunity to prove that the imminent termination – if it had occurred – would have been for simple or gross misconduct. *Id.*

### ***What is Good Cause to Resign?***

Whether a worker had good cause connected with the work to support leaving voluntarily is determined by the following test: “What would a reasonable and prudent person in the labor market do in the same circumstances?” 7 DCMR § 311.5.

The regulations state that **good cause connected to the work** includes, but is not limited to:

- racial discrimination or harassment;
- sexual discrimination or harassment;
- failure to provide remuneration for the employee’s services;

## Unemployment Compensation

- being required to work in unsafe locations or under unsafe conditions;
- illness or disability caused or aggravated by the work (provided the worker previously has supplied the employer with a medical statement); or
- transportation problems arising from the employer's relocation .

See 7 DCMR § 311.7.

A significant reduction in wages also may constitute good cause to quit. See *Consumer Action Network v. Tielman*, 49 A.3d 1208 (D.C. 2012). The worker should present evidence of the reduction in wages and his or her personal living expenses to prove economic hardship. See *Id.* at 1214.

In addition, the 2010 Unemployment Compensation Reform Amendment Act expands eligibility to those who leave their jobs for compelling family reasons. Under the 2010 updates, a worker may be qualified to receive unemployment benefits for the following reasons:

- a spouse or domestic partner's employment requires a transfer to a location that makes it impractical to commute to her current employment (e.g., military orders for transfer resulting in need to relocate). D.C. Code § 51-110(d)(4);
- to care for a family member<sup>30</sup> who is ill or disabled; or
- due to domestic violence against the worker or against a member of his/her immediate family. D.C. Code § 51-131.

**Note:** If an individual voluntarily quits to care for an ill/disabled family member, she won't immediately be eligible to receive unemployment because she cannot satisfy the "available to work" requirement. However, as soon as that period of care is over, the worker would be eligible to receive benefits.

The regulations state that the following circumstances constitute resignations **without good cause:**

- Refusal to obey reasonable employer rules;
- Minor reduction in wages;
- Transfer from one type of work to another which is reasonable and necessary;
- Marriage or divorce resulting in a change of residence;
- General dissatisfaction with the work;
- Resignation to attend school or training; or
- Personal or domestic responsibilities, unless related to care of an ill or disabled family member, or to relocate with a spouse or domestic partner (effective July 22, 2010).

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<sup>30</sup> The definition of "family member" mirrors the definition in the D.C. Human Rights Act. D.C. Code § 51-110(d)(5).

See 7 DCMR § 311.6.

In addition, the courts have found the following resignations to be **without good cause**:

- Quitting after being told to “shape up or ship out;”<sup>31</sup>
- Leaving to accept a job that does not come to fruition;<sup>32</sup>
- Resignation due to non-work-related health problem, including pregnancy;<sup>33</sup>
- Voluntary change from full-time to on-call status, and subsequently offered no work;<sup>34</sup>
- Resignation due to illness, absent medical support stating that it is related to or aggravated by the work;<sup>35</sup> or
- Resignation due to stress and psychological disorders, absent medical support stating that it is caused or aggravated by the job.<sup>36</sup>

### ***Resigning Due to Illness or Disability Connected to the Work***

The regulations state that a worker has good cause to resign if she quits a job because of a disability caused or aggravated by the work. See 7 DCMR § 311.7. The claimant, however, must have provided a medical statement to her employer that indicates a need for accommodations or recommends that the employee resigns before she quits.<sup>37</sup>

In *Hill v. DOES*, 467 A.2d 134 (D.C. 1983), a claimant was denied unemployment benefits when the court ruled that she had voluntarily quit, even though her resignation had been in response to an involuntary psychiatric evaluation and retirement proceeding. The court found that the claimant had failed to show that the psychiatric ailment was connected to her work, thus eliminating disability as good cause for resignation. The court further found that a decision to retire voluntarily to avoid the stigma of publicly airing a psychiatric problem did not constitute good cause “in light of the private nature of the involuntary retirement proceeding.” *Id.*

### ***Resigning under Threat of Discharge***

Resigning under the threat of discharge is not voluntary. See *Green v. DOES*, 499

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<sup>31</sup> See *Bowen v. DOES*, 486 A.2d 694 (D.C.1985).

<sup>32</sup> See *Gomillion v. DOES*, 447 A.2d 449 (D.C.1982); *Gopstein v. DOES*, 479 A.2d 1278 (D.C.1984).

<sup>33</sup> See *Hockaday v. DOES*, 443 A.2d 8 (D.C. 1982).

<sup>34</sup> See *Freeman v. DOES*, 568 A.2d 1091 (1990).

<sup>35</sup> See *Hill v. DOES*, 467 A.2d 134 (D.C.1983).

<sup>36</sup> See *Bublis v. DOES*, 575 A.2d 301 (D.C.1990).

<sup>37</sup> See *Branson v. District of Columbia Dep't of Empl. Servs.*, 801 A.2d 975, 979, n. 2 (D.C. 2002) (Employee must provide employer with a “medical statement” before resigning so that the employer will have the opportunity to verify the condition and to make necessary accommodations. A “medical statement” according to the regulations, is “a physician’s statement or equivalent documentation.”).

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A.2d 870 (1985).<sup>38</sup> The threat of discharge, however, must be “real and imminent” for the resignation to be judged involuntary for purposes of collecting unemployment. *See Perkins v. DOES*, 482 A.2d 401 (D.C. 1984).

If the worker resigns under threat of imminent termination for misconduct, the hearing examiner must make a separate determination regarding whether misconduct is proved. *See* 7 DCMR § 311.8.

### ***Worker Voluntarily Changes Status to On-Call***

If a worker voluntarily changes his or her work status to “on-call,” and the employer subsequently has no work available, the worker’s decision will be treated as a voluntary resignation, and s/he will be disqualified from collecting unemployment. *See Freeman v. DOES*, 568 A.2d 1091 (1990) (holding that an employee who fails to take all necessary and reasonable steps to preserve employment is deemed to have brought about voluntary termination of employment for unemployment compensation purposes).

### ***Members of the Military who are Discharged from Service***

Eligibility for unemployment benefits for those leaving the military is authorized under 5 U.S.C. § 8521 *et seq.* A service man or woman who has completed an active term of military service and who does not request re-enlistment is not eligible to receive unemployment benefits under the above federal statute. *See Wells v. DOES*, 513 A.2d 235 (1986). This is tantamount to a voluntary resignation from the military.

### **Involuntary Terminations**

A worker who is involuntarily terminated from his or her job is generally eligible to receive unemployment benefits unless that termination was due to the worker’s **simple misconduct or gross misconduct**. A finding of simple misconduct will result in an eight-week disqualification from receiving benefits, while a finding of gross misconduct will result in a total disqualification from receiving benefits.<sup>39</sup>

It is the employer who bears the burden of proving misconduct. When the case is being heard before an administrative law judge (ALJ), the ALJ can only deny unemployment compensation on the misconduct theory promulgated by the employer. The ALJ may not rule against the employee based on an independent theory of misconduct not argued by the

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<sup>38</sup> Pregnancy, by statute, is treated like any other reason for leaving a job. *See* D.C. Code § 51-110(h); 7 D.C.MR § 311.11. There is no presumption that a pregnant person is physically unable to work.

<sup>39</sup> If, however, the employee engages in the misconduct because of domestic abuse she suffered, then she may still be able to collect unemployment benefits despite the misconduct. *See E.C. v. RCM of Washington*, 92 A.3d 305, 309 (D.C. 2014). To qualify for this exemption, an employee must demonstrate (1) that she suffered domestic violence that qualifies as an “intrafamily offense” under the Intrafamily Offenses Act and (2) that the domestic violence played a “substantial factor” in the involuntary termination. *Id.*

employer. *See Lynch v. Masters Sec.*, 93 A.3d 668, 675 (D.C. 2014).

### ***Gross Misconduct***

“Gross misconduct,” as defined in 7 DCMR § 312, results in disqualification for unemployment until the worker has worked at another job for 10 weeks and 10 times the weekly benefit has accumulated. *Id.* at § 51-110(b)(1).<sup>40</sup>

Gross misconduct is defined as “an act which deliberately or willfully violates the employer’s rules, deliberately or willfully threatens the employer’s interests, shows a repeated disregard for the employee’s obligation to the employer, or disregards standards of behavior which an employer has a right to expect of its employee.” *See* 7 DCMR § 312.3. Examples of behavior that can constitute gross misconduct include, but are not limited to:

- Sabotage;
- Unprovoked assaults or threats;
- Arson;
- Theft or attempted theft;
- Dishonesty;
- Insubordination;
- Repeated disregard of reasonable orders;
- Intoxication, use or possession of drugs<sup>41</sup>;
- Willful destruction of property; or
- Repeated absence or tardiness following warning.

*See* 7 DCMR § 312.4.

*See also R.B. v. Environmental Protection Agency*, 31 A.3d 458 (D.C. 2011), construing the regulations for proof of misconduct in 7 DCMR 312.9 and 312.10, and reversing a finding of gross misconduct in the absence of availability for cross-examination of the person (R.B.’s wife) who made statements that were being used to prove misconduct.

### ***Simple Misconduct***

Simple misconduct is something less than gross misconduct, and it results in an eight- week disqualification. *See* D.C. Code § 51-110(b)(2). The worker is disqualified for the first eight weeks of benefits claimed, but will receive the remaining 18 weeks of

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<sup>40</sup> If a worker finds a job at the same rate of pay, in most cases it will take five weeks to earn enough money to overcome the disqualification; however, the worker will still have to wait for 10 weeks to elapse before becoming eligible for unemployment again.

<sup>41</sup> *But see Johnson v. So Others Might Eat*, 53 A.3d 323 (D.C. 2012) (holding that a positive drug-test from off-duty marijuana use was, in and of itself, insufficient proof of misconduct). To prove misconduct, an employer must show some nexus between the off-duty drug use and the employment to prove a “reasonable and discernible effect on the employers’ ability to carry on its business or on the employee’s ability to perform his or her duties.” *Id.*

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benefits if otherwise eligible.

The following are examples of behavior that can constitute simple misconduct:

- minor violations of employer rules;
- conducting unauthorized personal activities during business hours;
- absence or tardiness where the number of instances or their proximity in time does not rise to the level of gross misconduct; or inappropriate use of profane or abusive language.

See 7 DCMR § 312.6.

In short, simple misconduct includes acts that are not as severe as gross misconduct or where mitigating circumstances do not support a finding of gross misconduct. 7 DCMR § 312.5.

### ***Determining Whether Violation of an Employer's Rule is Misconduct***

If the employer alleges that the worker was fired because she violated one of the employer's rules, the employer must show that the worker knew of the employer's rule, that the rule is reasonable, and that the rule was enforced consistently. See 7 DCMR § 312.7.<sup>42</sup>

In addition, under some circumstances, the violation of a rule may not be enough to disqualify a worker from the receipt of benefits on the grounds of misconduct. In *Green v. D.C. Unemployment Compensation Bd.*, for example, a worker was fired for violating the employer's rule against unsupervised, at-home, overtime work. The worker was nevertheless allowed to collect unemployment benefits because the violation did not reach the level of "wanton or willful disregard of the employer's interest." 346 A.2d 252 (1975). In *Marshall v. D.C. Unemployment Compensation Bd.*, 377 A.2d 429 (1977), the court suggested in dicta that if the employer's rule was put in place after the worker was hired, the employer would need to show that the worker must have been able to meet the physical and educational requirements of the rule.

### ***Intent is Required for a Finding of Misconduct***

D.C. courts have reinforced the requirement of evidence of willful or deliberate actions on the part of the employee and required proof from the employer that the behavior was more than an isolated incident, or that the claimant's actions negatively impacted the employer. See e.g., *Hamilton v. Hojeij Branded Food, Inc.*, 2012 D.C. App. LEXIS 143, at \*28 (D.C. Apr. 12, 2012) (no finding of misconduct because intent was not proven, where claimant was fired for excessive absences caused by circumstances beyond the

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<sup>42</sup> Notwithstanding this 3-part test for rule violation, some ALJs will find misconduct even where the test is not met, relying on *Hegwood v. Chinatown CVS, Inc.*, 954 A.2d 410, 412 (D.C. 2008).

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claimant's control); *Taj Gilmore v. Atlantic Services Group*, 17 A.3d 558 (D.C. 2011) (no misconduct by claimant who was fired due to absences from unforeseen incarceration, where claimant took steps to try to notify the employer); *Larry v. National Rehabilitation Hospital*, 973 A.2d 180, 183 (D.C. 2009); *Odeniran v. Hanley Wood, LLC*, 985 A.2d 421, 430 (D.C. 2009). Ordinary negligence does not constitute misconduct. *See e.g., Lynch v. Masters Sec.*, 93 A.3d 668, 675 (D.C. 2014); *Capitol Entm't Servs., Inc. v. McCormick*, 25 A.3d 19, 24 (D.C. 2011) (school bus driver who was fired for three relatively minor accidents did not commit misconduct).

### **Loss of Job Because of Labor Dispute**

**Involvement in most labor disputes**, such as a strike, disqualifies a person from unemployment benefits for the duration of the dispute. *See* D.C. Code § 51-110(f); *Barbour v. DOES*, 499 A.2d 122 (1985).

When a person will not cross a picket line because of a reasonable fear of violence, however, they may receive unemployment compensation. *See Washington Post Co. v. District Unemployment Compensation Bd.*, 377 A.2d 436 (D.C. 1977).

When an employer institutes a lockout of the workers as part of a labor dispute, a worker may receive unemployment compensation. A worker cannot, however, convert a strike into a lockout by returning to work. *See NBC v. DUCB*, 380 A.2d 998 (D.C. 1979). If a lockout occurs, the court still will determine eligibility "on the basis of the initial cause of the interruption of employment," and if that cause is a voluntary strike, the workers will not be eligible for benefits. *See American Broadcasting Companies, Inc., v. D.C. Dep't of Empl. Servs.*, 822 A.2d 1085 (D.C. 2003).

### **Victims of Domestic Violence**

In 2004, D.C. signed into law the *Unemployment Compensation and Domestic Violence Amendment Act of 2003*, which expanded unemployment compensation coverage for domestic violence victims who lose their jobs as a result of the violence. *See* D.C. Code § 51-101 *et seq.*). The act is similar to legislation enacted in 24 states across the country, which allows domestic violence victims to receive unemployment compensation if they establish that they quit or were fired because of domestic violence. For example, if a domestic violence victim quits to go into hiding from her batterer, or is fired because of excessive absenteeism because of the abuse, these reasons for separation from employment no longer will prevent an employee from receiving benefits. *See* D.C. Code § 51-131.

To receive unemployment compensation, domestic violence victims must produce the same paperwork required of all other applicants for unemployment compensation. Additionally, domestic violence victims must offer some sort of proof that they are victims of domestic violence. Proof can include the following:

- (1) A police report or record;

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- (2) A court record, such as a Temporary Protection Order or Civil Protection Order;
- (3) A governmental agency record such as a report from Child Services; or
- (4) A written statement affirming that the victim has sought services from a shelter official, social worker, counselor, therapist, attorney, medical doctor, or cleric.

D.C. Code § 51-132.

The employer, however, will not be charged for the provision of benefits.<sup>43</sup> Instead, the benefits will come from D.C.'s general funds. In 2010, legislation went into effect that expands eligibility further. Under the new law, DOES is prohibited from denying benefits because an individual separated from employment due to domestic violence not only against the individual **but also against any member of her immediate family**. See D.C. Code § 51-131. See D.C. Code § 51-131.

## Monetary Eligibility and Amount of Benefits

To receive benefits, a worker must have monetary eligibility. Monetary eligibility is established through the worker's earnings history during the relevant base period. Essentially, the worker must have earned a certain amount during the period leading up to the time the claim is filed. The amount the worker earned during that period also will determine the amount of the weekly benefit the worker will receive from the unemployment compensation program.

### **Required Worker Earnings in the "Base Period"**

In order to meet the requirements for monetary eligibility, the **worker must have earned at least \$1,950 in wages in the applicable "base period."** Of those wages, \$1,300 must have been within any one quarter (three-month period) of the base period and all earnings cannot have been earned in one calendar month. Jobs can be stacked; that is, prior jobs can be used to determine eligibility. Jobs from any state also can be used to determine eligibility.

### ***Regular Base Period***

The regular base period is a 12-month period of earnings that includes the first four of the last five completed calendar quarters. It is determined based on the date that the claim was filed. See D.C. Code § 51-101(6)-(9).

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<sup>43</sup> The only exception is where the employer is the District of Columbia or a non-profit organization that has opted-out of the experience rating system. See D.C. Code § 51-133.



### ***Alternative Base Period (ABP)***

If a worker is not eligible under the regular base period, the worker may be eligible under the alternative base period. The ABP is defined as the last four completed calendar quarters. The Alternative Base Period legislation was passed in an effort to address the fact that under the traditional base period, up to six months of the worker's most recent wages are ignored. Under the ABP, only between zero and three months of recent wages are ignored. Again, the ABP period is triggered only when an individual is not eligible under the regular base period. Claimants cannot invoke the ABP to get a higher benefit amount.

### ***Example to Help Determine Claimant's Monetary Eligibility***

Assuming that the claimant filed his or her claim for benefits between April and June of 2016, the chart below represents the claimant's regular base and alternative base periods.

<b>First Quarter January - March 2015</b>	<b>Second Quarter April-June 2015</b>	<b>Third Quarter July - September 2015</b>	<b>Fourth Quarter October - December 2015</b>	<b>Fifth Quarter January - March 2016</b>	<b>Quarter in Which Claim Is Filed April - June 2016</b>
←←←←← REGULAR BASE PERIOD →→→→→					
	←←←←← ALTERNATIVE BASE PERIOD →→→→→				

To determine if the claimant has earned enough during the relevant base period, ask the following questions:

- (1) Did the claimant earn at least \$1,950 during the relevant base period?
- (2) Was a total of \$1,300 (of the minimum \$1,950) earned in any one of the four quarters of the relevant base period?
- (3) Did the claimant earn some wages in at least two of the quarters in the relevant base period?
- (4) Is the claimant's total base period income, plus \$70, equal to at least one and a half times her income in her highest-earning quarter?

If the answer to all four questions is yes, then the claimant has established monetary eligibility for benefits.

A Form UC 400, Notice of Monetary Determination will be mailed to the worker within seven days after she files the claim indicating the worker's weekly and total benefit amounts. The form will list the wages reported under the worker's name and Social Security number during the base period by all the employers who are covered by the District of Columbia's Unemployment Compensation Program. Workers should check the form carefully for the following information:

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- Wages not included for an employer that employed the worker within the base period.
- Wages included for employers for whom the worker did not work.

If the worker is not monetarily eligible, the notice of Monetary Determination will indicate what requirement(s) the worker did not meet.

### **Amount of Benefits**

Generally, benefits are 50 percent of the average weekly wage earned during the base period. See D.C. Code § 51-107(b)(2)(B)(iii). The minimum benefit is \$50 a week or approximately \$215 a month. Effective October 1, 2016, the maximum benefit is \$425 a week (approximately \$1,700 a month), and may be adjusted for inflation in the future. Benefits can be collected for a maximum of 26 weeks (approximately six months).<sup>44</sup>

If the claimant believes the amount in the Notice of Monetary Determination is incorrect, the claimant should report to a DOES office or American Job Centers immediately and request a re-determination – or file an appeal within 15 days of the date of mailing of the monetary determination. The claimant should bring check stubs, W-2 forms and other proof of wages in an effort to successfully challenge the monetary determination.

### ***Reduction in Benefits for Wages, Pensions, Annuities or Public Benefits***

If a claimant earns **wages** from another source while collecting benefits, those gross wages must be reported to DOES to determine the worker's continued eligibility for benefits and the amount of benefits to which the claimant is entitled. The formula used to adjust benefits when there are wages from work is the following:

$$(\text{Weekly Benefit Amount} + \$50) - 66\% \text{ of weekly earnings} = \text{Benefit Due}$$

See D.C. Code § 51-107(e).

The amount of any pension or annuity (for example, a public or private retirement plan such as a union member's pension) collected by the worker will be deducted from the weekly UI benefit amount dollar for dollar. See D.C. Code § 51-107(c); 7 DCMR § 317. However, D.C. Code § 51-107(c)(2) states that, while "benefits payable ... shall be reduced

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<sup>44</sup> Extended benefits are allowed when the national unemployment rate is high and the number of claimants is significantly on the rise. Although the D.C. unemployment rate is higher than the national average (source: <http://stats.bls.gov/lau>), benefits have not been extended. See D.C. Code §§ 51-107(g)(1)(B)-(C) (calculating unemployment by taking the number of claimants for unemployment compensation divided by total number of people employed, the result must be greater than 120 percent of previous unemployment and greater than 5 percent). During recessions, look for the federal government to approve extensions and make sure that DOES complies with the extension.

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...by any amount received ...under a public or private retirement plan[,] ... no reduction shall be made under this sentence for any amount received under Title II of the Social Security Act.” See D.C. Code § 51-107(c)(2). Title II includes Social Security Income and Disability Benefits. On its own, therefore, the receipt of SSI (Supplemental Security Income) or SSDI (Social Security Disability Insurance) from the federal government will not preclude the worker from receiving unemployment benefits. To ultimately qualify, however, the worker still will be required to show she is “available for work,” which could be a challenge for disabled individuals. The salient issues will be whether the prospective claimant can work with reasonable accommodations, and to what extent she can work.

### ***Severance Pay***

Claimants are required to report the receipt of severance pay on their initial claim form. Employers report the payment of any severance as well once they are notified that a claim has been filed.

Severance pay is treated by the UI system as a continuation of pay. Therefore, if a claim for UI is filed during the period that a worker is receiving severance, UI will be delayed for the duration of the severance pay. Employers usually frame severance pay by number of weeks or months of pay (e.g., three months of severance pay). Questions, however, are raised when employers do not specify the period of time for the severance pay and just present the worker with the pre-calculated amount of money. In these cases, the claimant should argue that the amount received is a lump-sum payment that should only delay one week of UI (the week in which the severance pay was received). It is likely, however, that the severance pay will be divided by the worker’s regular weekly wage to determine the length of the delay.

### ***Pension & Annuities***

A claimant may be disqualified from receiving unemployment benefits if (a) she receives a retirement pension or annuity under a plan to which the employer contributed during the claimant’s base period (not Social Security) and (b) the amount received exceeds the total amount of the benefits to which she would otherwise be entitled in the same period. D.C. Code § 51-107(c); *Rogers v. District of Columbia Unemployment Compensation Bd.*, 290 A.2d 586 (D.C. 1972) (upholding denial of UI benefits to a recently-retired U.S. Postal Service employee after a finding that the annuity he received from USPS exceeded his potential weekly benefit amount).

### **If the Employer Has Not Reported Wages or Paid into the System**

Employers are required to report the wages of their employees and to make periodic payments into the unemployment compensation system for each worker. Some employers neglect to make these payments to save money. If this happens, the initial claims examiner is supposed to conduct an investigation. As a part of the investigation, **the worker should submit pay stubs and other evidence of the amount of money earned.**

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If the worker ultimately is denied unemployment on this basis, she should file an appeal of the claims examiner's determination. On appeal, she should submit any and all pay stubs. She also will need the name of the employer and, if possible, the employer's Federal Taxpayer Identification number, which should be on the worker's pay stub. The worker also must be prepared to demonstrate that she was an employee and not an independent contractor.

The worker also should push to make DOES enforce the employer's legal obligations to report wages and pay into the system. DOES has broad collection authority. It can, for example, seize assets, including real property and tax refunds, or revoke licenses or government contracts. *See* D.C. Code § 51-104(e) through (h). In some circumstances, the claimant may be paid unemployment benefits from a special fund and the District will pursue the unpaid taxes from the recalcitrant employer.

### **Benefits are Taxable**

Benefits are taxable as income for both federal and D.C. tax purposes. *See* 26 U.S.C. § 85; D.C. Code § 47-1803.2. DOES reports unemployment compensation to the IRS and D.C. taxing authority. Workers now may choose not to have D.C. taxes withheld from their unemployment benefits; however, even if they choose not to have the taxes withheld, they will remain liable to pay them.

For most workers, unemployment benefits do not count as earned income for purposes of the D.C. or federal earned income tax credit. *See* Publication 596, "Earned Income Tax Credit," U.S. Internal Revenue Service.

## **Claims and Appeals Process**

### **Filing the Initial Claim**

When a worker loses or quits a job, she may file a new claim online at: <http://www.dcnetworks.org> or over the phone at (202) 724-7000 or (877) 319-7346. Workers may go to American Job Centers to attend an information session or meet with a claims examiner and file a claim. Workers may file a claim any time during the American Job Center's office hours, but should arrive early to have adequate time to file the claim. If a worker calls DOES, she should be prepared for long periods on hold. Because not all of the American Job Centers offer comprehensive UI services, workers may want to file at a DOES office.

<b>American Job Centers Offices to File UI Claims</b>
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**American Job Centers - Northwest**, Frank D. Reeves Municipal Center, 2000 14<sup>th</sup> Street, NW, 3<sup>rd</sup> Floor, Washington, D.C. 20009

Hours: M-TH 8:30 a.m.-4:30 p.m., F 9:30 a.m. - 4:30 p.m., Phone (202) 442-4577

**American Job Centers - Northeast**, CCDC.-Bertie Backus Campus, 5171 South Dakota Ave, NE, 2<sup>nd</sup> Floor, Washington, D.C. 20011

Hours: M-TH 8:30 a.m.-4:30 p.m., -F 9:30 a.m. - 4:30 p.m., Phone (202) 576-3092

**American Job Centers - Southeast**, 2330 Pomeroy Road, SE, Washington, D.C. 20020

Hours: M-TH 8:30 a.m.-4:30 p.m., F 9:30 a.m. - 4:30 p.m., Phone (202) 741-7747

**American Job Centers - National Harbor**, 6800 Oxon Hill Road, Ste 298, National Harbor, MD 20745

Hours: M-F 8:00 a.m.-5:00 p.m., Phone (310) 968-1658

At the office, the worker fills out a claim form with general information and information about why she lost or left her job. **There is no time limit for the application, but because eligibility for unemployment is determined from past wages, the past wages may “disappear” if the worker waits too long to file.**

### **Claims Examiner’s Initial Determination**

When a claim is filed, it is assigned to a claims examiner at the local office. The claims examiner is required to promptly make an initial determination about the reason for the termination or resignation. The claims examiner is supposed to interview the worker and then the employer to get each side’s story. Either side may submit a written statement, but this examination is conducted mostly by in-office appointments and by telephone. The claims examiner then declares in writing whether the worker is eligible for benefits. Either side may appeal the claims examiner's determination. *See* D.C. Code § 51-111(c).

### **Appealing the Claims Examiner’s Determination**

**The time limit for appeal is very short – 15 calendar days from mailing**, not receipt, of the notice of eligibility. For this reason, **workers should save envelopes to prove actual mailing dates (which is often one to two days after the date on the letter) and hand-deliver their hearing request form.** If the 15-day filing deadline falls on a Saturday, Sunday or a legal holiday, the deadline is extended to the next business day.

Under the 2010 *Unemployment Compensation Reform Amendment Act*, the 15-calendar day appeal deadline may be extended for “good cause” or “excusable neglect.” *See* D.C. Code § 51-111(b). This means that if the claimant had a good reason for filing her appeal late, OAH may excuse the lateness and consider the appeal. To determine if a claimant missed a deadline due to “excusable neglect” or “good cause”, D.C. has adopted a four-factor test against which each case is weighed. The four factors weighed by the courts

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are: (1) the danger of prejudice to the opposing party, (2) the length of the delay and the potential impact of that delay on court proceedings, (3) the reason for the delay (including whether or not it was within reasonable control of the claimant), and (4) whether or not the claimant acted in good faith.<sup>45</sup> **Workers should save all documents and envelopes** that may explain why she filed the appeal late and give copies to OAH.

### *How to File a Hearing Request*

If the claimant seeks to appeal a denial of benefits, she must file an appeal (also called a hearing request) by mail, fax or in person with the Office of Administrative Hearings (OAH). Directions on filing an appeal should be included with the claims examiner's determination, but if no other information is given, a claimant may file an appeal in one of the following ways:

- **In person:** The claimant may fill out a hearing request form in person at the OAH, 441 4th Street, NW, Suite 450-North, Washington D.C. 20001, from 9 a.m. to 5 p.m., Monday through Friday. The claimant will need photo identification to enter the building. The OAH has a Pro Se Resource Center to assist claimants with filing their documents.
- **By mail:** The claimant may mail a hearing request to the OAH at the address above. The U.S. Postal Service postmark will be considered in deciding whether the claimant met the filing deadline, but generally, the document is “filed” on the date that it is actually received by the OAH.
- **By fax:** The claimant may fax a hearing request to the OAH at (202) 442-9451. A hearing request faxed after 5 p.m. is stamped as “filed” on the next business day. The claimant may confirm the receipt of the fax by contacting the OAH Clerk’s Office at (202) 442-8167 or (202) 442-9094.
- **Email and Filing Documents Online:** The claimant may email a PDF of all forms and Claims Examiner Determinations to [oah.filing@dc.gov](mailto:oah.filing@dc.gov). A claimant also may file documents online at <http://oah.dc.gov>. As e-filing is a relatively new technology and thus subject to change, claimants should check the latest OAH Rules on e-filing on the OAH website.

The claimant should submit a Hearing Request Form ([available](#) in both English and Spanish at the OAH website, then “Filings and Forms” then “Variety of Forms” then “UI Request for Hearing to Appeal a Determination by a Claims Examiner Involving Unemployment Benefits”); claimants should not include any facts or argument in this request. The request for a hearing also should include a copy of the claims examiner’s determination, all the pages the claimant received with the claims examiner’s determination, and the envelope in which it was mailed to the claimant.

The OAH will accept the hearing request for filing even if the claimant does not have the determination, but will then mail an order for more information or order to show cause

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<sup>45</sup> See *Admasu v. 7-11 Food Store*, 108 A.3d 357, 362 (D.C. 2015).

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to ask the claimant to submit a copy before a hearing is scheduled. The claimant must respond to these orders. A copy of the determination may be obtained from the DOES. If the claimant is unable to obtain a copy of s/he determination by a claims examiner, or otherwise provide the information requested by the order to show cause, s/he must tell the OAH in writing what s/he cannot obtain and why. Once the information is provided, a judge will decide whether there is a basis upon which a hearing can be scheduled.

### *Requesting an Interpreter*

A claimant with **limited English proficiency** should request an interpreter in writing before the hearing. He or she should follow up the request with a separate letter and telephone call. *See* 1 DCMR § 2823. The OAH is required to provide an in-person interpreter or telephonic language interpretation service to parties with limited English proficiency who request interpretation services.

### *How to Prepare for an Unemployment Hearing*

The scheduling order will instruct the claimant to send a list of witnesses (other than the claimant) and copies of any documents she wants to present as evidence to the OAH and the employer three business days before the hearing. *See* 1 DCMR § 2985.1. Claimants should comply with this requirement so that the judge does not exclude witnesses or documents. *See* 1 DCMR § 2821.3.

If the claimant asks someone to appear as a witness or produce written documents and that person refuses, the claimant can use a subpoena form to require the witness to attend the hearing or the employer to produce relevant documents at the hearing. *See* 1 DCMR § 2984. Each party has three pre-authorized subpoenas to use for each hearing. *See* 1 DCMR § 2984.1. The claimant may pick up her three pre-authorized subpoenas at the clerk's office of the OAH. Witnesses requested through the pre-authorized subpoena must have direct knowledge of the claimant's separation from employment. *Id.* Documents requested must be not more than six months old and must relate directly to the claimant's separation from employment. *Id.* Subpoenas for witnesses must be personally served on the witness at least two calendar days before the hearing. *See* 1 DCMR § 2984.2. If either party wishes to subpoena witnesses or obtain documents not authorized by these provisions, they may follow the standard rules for subpoenas at OAH. *See generally* 1 DCMR § 2824.

Parties and witnesses may appear by telephone but representatives and attorneys are usually required to appear in person. *See generally* 1 DCMR § 2821.8. To request to participate by telephone, the worker should first try to contact the employer to see if the employer will agree to the worker or witness appearing by telephone. Even if the employer does not agree, the worker can still request a telephone appearance by submitting a document to the OAH explaining the reasons why the worker or witness must appear by telephone and the efforts the worker made to contact the employer. A motion for appearance by telephone form is available online in English, Spanish, and Amharic at

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<https://oah.dc.gov/publication/request-participate-telephone>. The worker should send a copy of this request to the employer as well.

If the worker cannot make it to the scheduled hearing, s/he should first try to contact the employer to see if the employer will agree to change the hearing date, and then request a continuance with the OAH in writing. A motion for a continuance form is available online in English, Spanish, and Amharic at <https://oah.dc.gov/publication/request-different-hearing-date>. The writing should explain the reasons the worker wants to change the hearing date and the efforts she made to contact the employer.

An employer also can appeal a claims examiner's determination to grant benefits to the employee. If the employer appeals, the worker will receive a notice with the time and date of the hearing in the mail. If the worker cannot make it to the scheduled hearing, she should request a continuance in the process described above. Benefits must continue to be paid pending the outcome of the appeal. *See* D.C. Code § 51-111(b). These benefits, however, are subject to recoupment if it is later determined that the claimant was ineligible for benefits. (*See* "Overpayments" below.) Call (202) 442- 9094, or visit <http://www.oah.dc.gov> for further information concerning an unemployment insurance appeal at the OAH.

### **Appeals Hearings**

The appeal is a *de novo* hearing, i.e., the administrative law judge must hear testimony from both sides and make an independent review of the record, without regard to the claims examiner's decision. Hearings usually are scheduled two to three weeks after filing the hearing request. The parties may be represented at the hearing by attorneys or non-attorneys. *See generally* 1 DCMR § 2835.

The hearings are held "on the record" and are recorded to a digital sound recording, which may be purchased by contacting the OAH Clerk's Office. The **employer always has the burden of proof**, regardless of who appealed. Because of this, claimants should be counseled *not to testify on the circumstances surrounding their job loss* if the employer does not appear at the hearing. The employer presents her side first, unless there is a jurisdictional question regarding late filing, in which case, the claimant will need to address this issue first. Written documents, testimony, and witnesses are allowed.

Usually, the main issues in a hearing are: (1) whether the appeal is timely; (2) whether the worker quit; and (3) if the worker did not quit, whether the worker was discharged for misconduct or gross misconduct.

The worker should be prepared to present all of his or her available evidence. Evidence not presented at this stage of the appeals process will generally not be considered in the later stages of an appeal. The administrative law judge will require any evidence presented to be reasonably reliable and helpful in resolving the case. The hearsay rules of



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evidence do not apply. *See* 1 DCMR § 2821.12. However, for misconduct cases especially, direct testimony is given precedence over hearsay testimony. *See Coalition for the Homeless v. District of Columbia Dep't of Empl. Servs.*, 653 A.2d 374, 377 (D.C. 1995) (noting that “hearsay evidence is not the kind of ‘substantial evidence’ on which the agency can base its resolution of directly conflicting testimony”) (citing *Jadallah v. District of Columbia Department of Employment Services*, 476 A.2d 671, 676-77 (D.C. 1984)). For this reason, some workers win these hearings simply because the employer does not bring the people with firsthand knowledge of the situation. *See* 7 DCMR § 312.9, 312.10.

The OAH generally will mail a final order to each party and to DOES within 30 days of the date a party files a hearing request, or approximately one to two weeks after the hearing. A claimant may call the OAH three weeks after the hearing to ask whether a final order has been issued. If compelling financial circumstances exist (i.e., the claimant is at risk of eviction), and the claimant has not received a final order for several weeks after the hearing, the claimant may file a motion to expedite which describes the compelling financial circumstances. DOES will begin processing UI benefits after it receives a final order from the OAH. Claimants may contact DOES at (202) 724-7000.

The claimant may request that the administrative law judge reconsider the final order under limited circumstances, usually only if there is newly discovered evidence or law that was not available at the time of the hearing. The claimant must file a request for reconsideration within 15 days of the mailing date of the final order either in person at the OAH or by faxing it to (202) 442-9451. The claimant also can file a motion for relief from the final order up to 120 days after the final order is issued. DCMR 1-2828. However, whereas the motion for reconsideration tolls the deadline for filing an appeal at the D.C. Court of Appeals, the motion for relief does not toll the deadline.

A final order may be appealed by either party to the D.C. Court of Appeals within 30 calendar days from the date it is mailed to the parties. *See* D.C. Code § 51-112. The process for doing this is described in the final order, on a separate page called “Petition for Review.” In addition, attorney’s fees and costs may be available for claimants who prevail at the D.C. Court of Appeals. *See* 42 U.S.C. § 503(b) (“[Any] costs may be paid with respect to any claimant [whose question of entitlement is decided by the highest judicial authority under a state unemployment law] by a State and included as costs of administration of its law.”).

### **General Timeline for UI Process**

**Apply for UI ►** If deemed eligible, the worker should start receiving benefits within one month.

**If denied ►** Upon receipt of a denial notice, the worker has **15 calendar days** from the postmark date of the notice to appeal to the Office of Administrative Hearings (OAH). If the worker misses this 15 calendar day deadline, OAH may still consider her appeal if there was good cause or excusable neglect for the late filing.

**IMPORTANT! Advise the worker to keep the envelope enclosing the claims determination to show the postmark date in case a dispute arises.** If an employee preserves her/his right to appeal by mail, the unemployment compensation office is supposed to consider items filed on the date they are postmarked, not the date they are received. *See* 7 DCMR § 302.3.

**Appeal to OAH ►** After filing an appeal to OAH, it usually takes two to three weeks before the hearing takes place before an administrative law judge. (During this time, enlist free help from the AFL-CIO Claimant Advocacy Program. *See* information below.)

**Decision from OAH ►** Once a hearing is held, it will generally take **30 days** from the filing of the hearing request for the administrative law judge to render a final order. A claimant may call the OAH three weeks after the hearing to ask whether a final order has been issued. DOES will begin processing UI benefits after it receives a final order from the OAH.

**Motion for Reconsideration to the OAH ►** This is only successful under limited circumstances, e.g., if there is newly discovered evidence or law that was not available at the time of the hearing. The worker may file a Motion for Reconsideration with the OAH within **15 days** of the mailing of the administrative law judge's final order.

**Appeal to D.C. Court of Appeals ►** A final order may be appealed to the D.C. Court of Appeals within 30 calendar days from the date it is mailed to the parties. The process for doing this is described in the final order, on a separate page called "Petition for Review."

### **Free Attorney Representation**

By law, the **Community Services Agency of the Metro Washington AFL-CIO, Claimant Advocacy Program (CAP)**, provides free representation to workers on a case-by-case basis in unemployment compensation hearings. The CAP, however, only provides representation in potentially meritorious cases; it may assist some additional individual claimants with filing appeals on their own. All claimants can receive free legal counseling services in English and Spanish. CAP is located at 888 16th Street, NW, Suite 520, 20006, (202) 974-8150. No walk-ins are accepted. The worker must call the office to set up an appointment.

## **Requirements While Receiving Benefits**

### **Claim Cards**

While claimants are receiving benefits, they are required to submit claim cards every week which (1) identify the amount of any gross wages earned during that one-week period; (2) confirm that the claimant is able and available for work; and (3) confirm that the claimant is looking for work. In addition, DOES can require workers to attend training classes and to accept suitable employment.

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**Practice Tip:** When submitting claim cards, claimants should keep a copy of each card or submit online (does.dc.gov) or via telephone at (202) 724-7000. There have been numerous problems with submitting claim cards via U.S. mail. If a claimant does not receive a check or a new claim card she should go immediately to a local office to ask about it. **It is very important for workers to send in claim cards while they are waiting for their unemployment compensation appeals hearings, even if they are not receiving benefits during that time.** If claim cards stop coming in the mail, the worker should report immediately to the local office. Failure to do so may result in a hollow victory at the appeals hearing, where eligibility is established but no back benefits are awarded.

### **Workers Must be Available for Work and Seeking Employment**

The worker must be physically able to work, “available” for work and actively seeking employment. The claimant must make a minimum of two job contacts each week, but DOES may excuse a failure to do so. *See* D.C. Code § 51-109(4)(B). Job contacts are demonstrated by mail-in cards, which are usually white cards with blue ink, although sometimes they are photocopied in black and white.

**Practice Tip:** Where relevant, claimants should be counseled that they certify in their weekly claims cards that they are “physically able to work” – so if at any point that is not true, they should answer truthfully and not collect UI for that week. They also should be told that if DOES finds they are not “able to work,” their benefits will be terminated while they are asked to submit a physician’s certificate from their doctor, certifying that they can work.

Claimants who are full-time students are not considered available for work. *See Dunn v. DOES*, 467 A.2d 966 (D.C. 1983); *Wood v. DOES*, 334 A.2d 188 (1975); *Barber v. DOES*, 449 A.2d 332 (D.C. 1982). There is no presumption that a person is unavailable for work because she is **pregnant**, even when the pregnancy was at issue with respect to the reason for unemployment. *See* D.C. Code §§ 51-110(h), 51-109(1)-(4).

**Alert:** Sometimes the staff at the unemployment office tells a claimant that if she is disabled, she cannot receive unemployment. Indeed, one requirement of continued eligibility for unemployment is that the worker is physically able to work. The 1990 Americans with Disabilities Act, however, requires recipients of federal funds, such as the D.C. unemployment compensation program, to reasonably accommodate persons with disabilities. **This means a worker cannot be denied unemployment just because of a disability. The Unemployment Office must make some inquiry into whether the person can work with a reasonable accommodation.**

### **Workers Must Accept Suitable Work**

The failure to apply for suitable work when notified it is available, or the failure to

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accept a suitable job when offered, results in disqualification for further benefits. What is suitable is based on a number of factors, including the claimant's physical fitness; prior training, experience and earnings; distance from home to work; and risk to health, safety, or morals.

A person can refuse work for the following reasons: the vacancy is created by a strike or other labor dispute; the wages are less than the prevailing wages for similar work; the work requires resigning or refraining from union membership or requires joining a "company union."

The longer the person is unemployed, the more suitable otherwise "unsuitable" work becomes. *See Johnson v. District Unemployment Compensation Bd.*, 408 A.2d 79 (D.C. 1979).

### **Attending Trainings**

With the approval of the Director of DOES, a claimant may receive benefits while attending a training or re-training course. *See* D.C. Code § 51-110(d)(2). In some cases, a claimant is required to attend recommended training. Regulations specify what constitutes good cause for refusing to attend a training recommended by DOES. *See* D.C. Code § 51-110(e); 7 DCMR § 314. DOES rarely recommends trainings.

The 2010 Unemployment Compensation Amendment Act added a provision allowing a claimant who has exhausted all regular unemployment benefits and is enrolled in and making satisfactory progress in a training program to be eligible for training extension benefits if the director determines the following criteria have been met:

- The training program shall prepare the claimant for entry into a high demand occupation, if the director determines that the claimant has separated from employment in a declining occupation or has been involuntarily and indefinitely separated from employment as a result of a permanent reduction of operations at the claimant's place of unemployment; or if the director determines the training will increase the employability of such claimant in the D.C. labor market;
- The claimant is making satisfactory progress to complete the training as determined by the director, including the submission of written statements from the training program provider; and
- The claimant is not receiving similar stipends or other training allowances for non-training costs.

The total amount of training extension benefits payable to a claimant shall not exceed 26 times the claimant's weekly benefit amount of the most recent benefit year.

## Overpayments

Workers sometimes are assessed overpayments. The most common situation is where the worker is declared eligible initially by the claims examiner, receives benefits for several weeks, but then is declared ineligible after a hearing. The benefits are considered to have been received in error and an overpayment is assessed.

DOES is prohibited from collecting any overpayment from future benefits if the benefits were received by the worker “without fault on his part” and recoupment would “defeat the purpose of [the unemployment act] or would be against equity and good conscience.” D.C. Code § 51-119(d)(1).

When an overpayment is assessed, DOES is supposed to send a notice of overpayment. This notice can be appealed.<sup>46</sup> In addition, **DOES can waive any overpayment amount.** Workers can present arguments for a waiver at the appeals hearing, but it is best to send in a letter requesting a waiver as soon as the worker knows there might be an overpayment. The letter requesting the overpayment should explain why the claimant is without fault and should provide details about the claimant’s financial condition to demonstrate that she is unable to repay the amount in question.

If an overpayment is assessed and upheld, DOES will accept payment plans for a fixed amount per month.

**Practice Tip:** Inquiries and waiver requests for UI overpayments can be directed to:

Benefit Payment Control  
4058 Minnesota Ave NE  
Suite 3100  
Washington, D.C. 20019

## Welfare to Work

The federal unemployment system allows states to exclude persons participating in work relief or work training programs. *See* 26 U.S.C. § 3309(b)(5). D.C. has adopted this exclusion.

The U.S. Department of Labor’s guidance, UIPL No. 30-96 (Aug. 8, 1996), states that for the exclusion to apply, the work relief or work training program must have the following characteristics:

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<sup>46</sup> Unless the overpayment is being recouped from future benefits, OAH is limited in its ability to waive any portion of the overpayment. The OAH may, however, assess the accuracy of the overpayment and adjust the overpayment amount accordingly. *See District of Columbia Dep’t of Empl. Servs. v. Smallwood*, 26 A.3d 711 (D.C. 2011).

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- The employer-employee relationship is based more on the needs of the participants and community needs than on normal economic considerations such as increased demand or the filling of a bona fide vacancy; and
- The products and services are secondary to providing financial assistance, training or work experience to individuals...even if the work is meaningful or serves a useful public purpose.

In addition, work relief and work training programs must meet one or more of the following criteria:

- The wages, hours and conditions are not commensurate with those prevailing in the locality for similar work;
- The jobs did not, or rarely did, exist before the program began, and there is little likelihood they will be continued when the program is discontinued;
- The services furnished, if any, are in the public interest and are not otherwise provided by the employer or its contractors; or
- The jobs do not displace regularly employed workers or impair existing contracts for services.

### **D.C. Unemployment Compensation Case Summaries**

Following are some summaries of useful cases that may be cited by a claimant in support of his or her case, by issue:

#### **Standard of Review**

The court must defer to the agency's reasonable construction of the agency statute, but the court can set aside any action or findings and conclusions that the court determines are not rationally based on and supported by reliable, probative, and substantial evidence to convince reasonable minds of its adequacy. *See Hawkins v. Unemployment Compensation Bd.*, 381 A.2d 619, 622 (D.C. 1977); *Citizens Ass'n of Georgetown, Inc. v. Zoning Comm'n*, 402 A.2d 36, 41-42 (D.C. 1979).

Sworn testimony is required in all contested unemployment insurance cases. Furthermore, the agency must make a finding of fact on each material issue of fact, and those findings must be supported by substantial evidence. Where there is a failure to make appropriate findings or where they are unsupported by the evidence, the Court of Appeals must reverse. *See Curtis v. DOES*, 490 A.2d 178 (D.C. 1985).

## **Purpose**

“The statutory purpose of unemployment benefits is to protect employees against economic dependency caused by temporary unemployment.” *Chase v. DOES*, 804 A.2d 1119, 1123 (D.C. 2002).

## **Timeliness of Appeal**

DOES is required to give notice that reasonably is calculated to apprise the parties of the decision of the claims examiner. The notice can be given by mail, but, in order to raise the jurisdictional defense that the party did not file a timely appeal, DOES must present satisfactory proof that the notice was in fact mailed to the correct address. A date stamp is not enough, but a certificate of service is sufficient. *See Kidd Int’l Home Care, Inc. v. Dallas*, 901 A.2d 156 (D.C. 2006).

## **When Should a Worker File for UI Benefits in D.C. vs. in another State?**

### **Private Employer Workers**

If the work is not localized in any state and not covered under the unemployment compensation law of any state, the worker is covered in D.C. if the services were “directed or controlled” in D.C. *See* D.C. Code § 51-101. The phrase “directed and controlled” encompasses more than decisions as to working hours and other personnel matters; it requires that decisions regarding the merits of work performed be made in D.C. A claimant who received job training in D.C. and obtained technical direction regarding performance of her contract from the Department of Labor met the “directed and controlled” requirement, despite the fact that she resided in Idaho and that some scheduling matters (like overtime) were handled by a California office. *See Haugness v. District Unemployment Compensation Bd.*, 386 A.2d 700 (D.C. 1978).

A claimant who had been employed as an airline pilot with Allegheny Airlines and whose base of operations was Washington National Airport, located in Virginia, was not eligible for benefits in D.C. The District’s Unemployment Compensation Act covers employment of an officer or crewmember of an American vessel or aircraft only if the operations of such vessel or craft are ordinarily and regularly supervised, managed, directed, and controlled from an office within D.C. Because all claimant’s services were performed from a base of operations in Virginia, his employment was not covered by the Act. *See Bryan v. District Unemployment Compensation Bd.*, 342 A.2d 45 (D.C. 1975).

## **Employees of the Federal Government**

Under a 1966 Act of Congress, federal employees whose services have been terminated by the federal government are eligible for payments under state unemployment compensation laws in the state where they last worked for the federal government – the federal employee’s last station. To remedy the unfair burden imposed on state funds as a result of the federal government’s exemption from state taxation, Congress included in the act a provision assigning credit for a claimant’s federal service and wages to the state of claimant’s last official federal work station, and reimbursing that state for the cost of satisfying the claim. *See* 5 U.S.C. § 8504 *et. seq.*

A Department of Defense employee whose last official station was determined by the DoD to be the Pentagon was not eligible for benefits in the District because the Pentagon is located in Arlington, VA. The fact that the letterhead of the Defense secretary has a Washington, D.C. postal code was irrelevant, as the District does not include land beyond the high-water mark of the Potomac on which the Pentagon is located. The District considers itself bound by a federal employing agency’s findings regarding the last official station of a federal claimant. *See Hemenway v. District Unemployment Compensation Bd.*, 326 A.2d 776 (D.C. 1974).

## **Voluntary Resignation & Quitting**

### **What Constitutes Quitting?**

#### ***Voluntary switch to “on-call”***

The prevailing interpretation of D.C. Code § 51-110 is that if an employee voluntarily changes her status to “on-call” and the employer subsequently has no work available, the employee is disqualified from receiving unemployment benefits on the theory that she voluntarily quit employment. The rationale for this ruling is that an employee who fails to take all necessary and reasonable steps to preserve her employment will be deemed to have brought about voluntary termination of employment, which disqualifies the employee from receiving unemployment benefits. By voluntarily assuming risk of unemployment due to unavailability of work, the employee set into motion a process that caused her unemployment and failed to take reasonable actions necessary to preserve her employment. *See Freeman v. DOES*, 568 A.2d 1091 (D.C. 1990).

#### ***Changing mind after quitting does not negate the quit***

Once an employee voluntarily resigns from her job, an employer’s decision not to accept subsequent withdrawal of that resignation does not transform employee’s act into involuntary one, for purposes of unemployment benefits. *See Wright v. DOES*, 560 A.2d 509 (D.C. 1989).



***Not re-enlisting in military is quitting***

Claimant, who completed his term of active military service but did not ask to re-enlist at the time of separation, voluntarily left the service and thus was disqualified from receiving unemployment benefits under the 1981 federal statute pertaining to ex-service members. *See* 5 U.S.C.A. § 8521(a)(1)(B)(ii). The claimant was, however, entitled to receive unemployment benefits for ex-service members under a 1982 federal statute for unemployment after October 25, 1982. *See Wells v. DOES*, 513 A.2d 235 (D.C. 1986).

**Was the Quitting Voluntary?**

***General standard of voluntariness***

Decision to leave work is considered voluntary if it is based on a volitional act of a claimant, rather than compelled by an employer. *See Lyons v. DOES*, 551 A.2d 1345 (D.C. 1988).

Evaluation of voluntariness must be made from all circumstances surrounding the departure decision. *See Coalition for the Homeless v. DOES*, 653 A.2d 374 (D.C. 1995); *Hockaday v. DOES*, 443 A.2d 8 (D.C. 1982).

The test of voluntariness for leaving work is whether or not it appears that, from all circumstances surrounding the departure decision, the employee's decision was voluntary in fact, within the ordinary meaning of the word "voluntary." Specifically, an employee's resignation is voluntary if it was based on his own volition, and not compelled by his employer. *See Cruz v. DOES*, 633 A.2d 66 (D.C. 1993).

An inquiry into whether or not a resignation was for "good cause" is factual in nature and should be judged by standard of a reasonably prudent person under similar circumstances, in the same labor market. *See Selk v. DOES*, 497 A.2d 1056 (D.C. 1985); *Cruz v. DOES*, 633 A.2d 66 (D.C. 1993).

A determination of "voluntariness" presents a mixed question of fact and law, so the court owes less than total deference to the agency's finding of voluntariness. *See Thomas v. District of Columbia Dep't of Labor*, 409 A.2d 164, 169 (D.C. 1979).

***Quitting after being told "quit or be fired" – the quitting may not be voluntary***

An employee's separation from employment will be treated as a constructive discharge if the employee resigned under threat of immediate termination; if the employer asserts that there were grounds for discharge for misconduct, a separate finding on the question of misconduct must be made and the employer bears the burden of proof. *See*

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*Green v. DOES*, 499 A.2d 870 (D.C. 1985).

There must be a real and factual prospect of imminent termination for a claimant's resignation to be judged involuntary for purposes of collecting unemployment. *See Perkins v. DOES*, 482 A.2d 401 (D.C. 1984).

Though an employee's resignation, offered in lieu of termination by the employer, may exist, it is not proper to take it out of its context and without further inquiry as dispositive evidence of a voluntary resignation. It is immaterial that the employer may have a regular practice of discharging its employees in this way. The claimant, an employee of a federal agency, had been advised to resign by her union because there was an active proposal to remove her which she would not be able to resist; she chose resignation after being threatened with discharge by her employer. Her disqualification from collecting unemployment benefits was overturned. *See Thomas v. District of Columbia Dep't of Labor*, 409 A.2d 164 (D.C. 1979).

The fact that a claimant had, under union rules, a right to a hearing upon termination did not mean that her resignation in lieu of outright discharge was voluntary and thus merited disqualification from receiving benefits. Instead of adopting a per se rule on voluntariness, the District Unemployment Compensation Board is obligated to find reliable and substantial evidence of voluntary resignation and apply the appropriate regulations. *See Thomas v. District of Columbia Dep't of Labor*, 409 A.2d 164 (D.C. 1979).

There are some circumstances in which a resignation from employment should be characterized as involuntary separation. *See Thomas v. District of Columbia Dep't of Labor*, 409 A.2d 164 (D.C. 1979).

If a claimant's departure from his job was compelled by his employer, he may collect benefits. But if a claims examiner finds that the claimant was not threatened with imminent discharge at the time of his resignation, the claimant's resignation may be judged voluntary, thus disqualifying the claimant from receiving unemployment benefits. Before the appeals examiner, the claimant stated that he and his supervisor "worked out an agreement" in which he would resign "for medical and personal reasons," but admitted that he was not threatened with "imminent" but only eventual discharge. Claimant's disqualification from receiving benefits was upheld. *See Bowen v. DOES*, 486 A.2d 694 (D.C. 1985).

An executive vice president left employment involuntarily when she signed a letter of resignation (drafted by her employer without her input) and was told in effect that she could quit or "stay and be miserable." There also was an implied threat that she could be fired in the future if she again stepped out of line. *See Washington Chapter of American Institute of Architects v. DOES*, 594 A.2d 83 (D.C. 1991).

A claimant may not claim he or she resigned under imminent threat of discharge even when an employer initiated an involuntary psychiatric disability retirement

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proceeding against the claimant prior to his or her resignation. *See Hill v. DOES*, 467 A.2d 134 (D.C. 1983).

Whether or not resignation was “voluntary” depends on the ordinary meaning of the word – the absence of affirmative compelling acts by the employer. Though an employer may say “This saves me the trouble of firing you” when the claimant walked off the job, such a remark is generally construed as an afterthought, not a demonstration of a good cause resignation. The claimant had, moments earlier, been asked to resolve certain personality conflicts in order to continue employment. Absent any finding that the employer compelled the claimant to leave work, the claimant was denied unemployment compensation. *See Harris v. DOES*, 476 A.2d 1111 (D.C. 1984).

When an employer offers an employee a choice of either quitting or being fired for poor job performance and the employee chooses to quit to avoid the taint of a less-than-perfect work record, the board may not treat such a “quit” as dispositive on the issue of voluntariness. Rather, the board also must take into account the imminence of the threatened discharge. Hence, the board erred in summarily concluding that the resignation of a former hospital switchboard operator in a “quit-or-be-fired” situation was voluntary, as there was substantial evidence that she had resigned after consulting her union representative who informed her that an active proposal not likely to be successfully challenged was already in place for her removal. *See Thomas v. District of Columbia Dep’t of Labor*, 409 A.2d 164, 169 (D.C. 1979).

A claimant’s choice to resign *may* overcome the involuntariness presumption if the quit followed a warning from her employer that she would be fired unless she improved her performance. The presumption also may be overcome if there is clear evidence that the employer’s reason for seeking to terminate the employee in a “quit-or-be-fired” situation lacks legitimacy and could be challenged at a termination hearing available to the employee by right. However, the simple fact that the former switchboard operator was entitled to a termination hearing does not amount to reliable, probative, and substantial evidence of voluntariness in the face of clear evidence that claimant’s termination for absenteeism and poor job performance was imminent. *See Thomas v. District of Columbia Dep’t of Labor*, 409 A.2d 164, 169 (D.C. 1979).

### **Good Cause Connected to the Work**

Perceived animosity between an employer and employee is not sufficient to generate good cause for resignation for purposes of receiving unemployment benefits. A reading and basic math instructor for disadvantaged youths resigned due to personal conflicts with a supervisor and was denied unemployment compensation. *See Wright v. DOES*, 560 A.2d 509 (D.C. 1989).

What constitutes “good cause” is not defined in the act but is a question of fact to be judged according to the standard of a reasonably prudent person under similar circumstances. *See Kramer v. D.C. Dep’t of Empl. Servs.*, 447 A.2d 28 (D.C. 1982).

### ***Illness and disability***

A claimant may not claim that she voluntarily resigned for good cause connected with the work, even when an employer initiated an involuntary psychiatric disability retirement proceeding against the claimant prior to his or her resignation. This was because the claimant could not demonstrate that her psychiatric disability was connected with her work – thus eliminating disability as a possible “good cause.” A decision to voluntarily resign in order to avoid stigma of publicly airing a psychiatric problem also does not constitute good cause in light of the ‘private nature’ of the involuntary retirement proceedings. *See Hill v. DOES*, 467 A.2d 134 (D.C. 1983).

A worker must submit a “medical statement” under 7 DCMR § 311.7(e) to claim a work-related disability excuse. For example, a worker was granted unemployment benefits even though she provided a statement from her physician about the need for medical leave that did not reference the job-related nature of the disability, when the worker told the employer the disability (stress and depression) was job-related and the employer did not request more information. *See Bublis v. D.C. Dep’t of Empl. Servs.*, 575 A.2d 301 (D.C. 1990).

To be eligible for unemployment benefits, the claimant must have provided a medical statement to the employer before quitting, if he seeks to justify voluntarily quitting for good cause connected to the work due to illness or disability. *See Couser v. DOES*, 744 A.2d 990 (D.C. 1999).

Petitioner testified that a severely increased workload as a secretary at the Internal Revenue Service led to an ulcer and nervous condition that required medical attention, that she sought a transfer, and that her boss knew of her medical problems. But her doctor had not recommended she resign, so benefits were refused. *See Hockaday v. D.C. Dep’t of Empl. Servs.*, 443 A.2d 8 (D.C. 1982).

Under the D.C. Workers’ Compensation Act, a claimant who left her employment voluntarily for health reasons may be deemed to have left her employment for “good cause connected with the work” and so remain eligible for benefits if she receives medical advice to leave her work upon consulting a physician about the job-connected condition. An IRS employee who left her employment after developing an ulcer and a nervous condition due to overwork, was found ineligible for benefits, although she had consulted a physician about her job-related conditions, because the doctor had not advised her to leave work. *See Hockaday v. D.C. Dep’t of Empl. Servs.*, 443 A.2d 8 (D.C. 1982).

### ***Working conditions***

The D.C. Court of Appeals has left open the possibility that continued harassment and degrading treatment of an employee may be sufficient to provoke voluntary resignation for good cause connected with the work. The petitioner had been subjected to

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repeated verbal abuse and demands that he submit written descriptions of his actions. After orally protesting this treatment, the employee was told, "If you don't like it, you can leave." He spoke with an employee at the personnel department of his employer, who agreed that the treatment was unfair and encouraged him not to quit but suggested he go home to "cool off." He did so, and later was told not to report to work any longer. Factual disputes arose over virtually every aspect of this case, however, and the D.C. Court of Appeals remanded to have the record more clearly decided. No further determinations were made. *See Guntz v. DOES*, 524 A.2d 1192 (D.C. 1987).

### ***Incorrect payment of wages & overtime***

A claimant who resigned from his job at a male bathhouse because his employer required tardy employees to collect overtime pay for additional hours worked as a result of another employee's tardiness from the late co-worker rather than the employer, remained eligible for benefits despite his voluntary departure from work. The refusal to pay overtime combined with the employer's practice of requiring employees who worked a shift in which insufficient monies were taken in to make up the deficiency from their pay constituted "good cause" for the claimant's resignation. *See Kramer v. DOES*, 447 A.2d 28 (D.C. 1982).

### ***Higher wages elsewhere***

A concrete finisher left his job to take an offer for higher wages at another company that was later withdrawn, leaving him unemployed. The board concluded that the withdrawn offer of higher wages from another employer was not a cause for departure "connected with" the claimant's initial employer. The D.C. Unemployment Compensation Act requires that the "cause" of the claimant's voluntary departure be connected with the claimant's most recent work in order to justify eligibility. The court therefore affirmed the board's decision denying unemployment benefits. *See Gomillion v. DOES*, 447 A.2d 449 (D.C. 1982).

**Note:** A 1979 amendment to the Act removed language stating that the "good cause" requirement would not be confined to causes solely connected with the employment itself and left to the board's discretion the establishment of regulations for determining what would constitute "good cause connected with the work." Until July 7, 1980, the board issued no regulations to clarify the language of the statute, such that two interpretations of the "good cause" requirement remained reasonable: (i) there was something bad about the first job that affirmatively drove claimant away; or (ii) there was some "content-neutral" employment-based reason for the claimant's departure connected with, but not necessarily arising from the first job. Even after new board regulations came into effect in November 1981, applying a "reasonable and prudent person in the labor market" standard for determining "good cause connected with the work," the second, broader interpretation was not excluded. Although the board applied the former, narrower interpretation in *Gomillion*, neither the statutory language nor the terms of the board's own regulations applying the statute compels this interpretation. *See Gomillion*, 447 A.2d at 449.

### ***Pregnancy***

A pregnant claimant who left her work as a security officer voluntarily because the equipment she was required to wear pressed on her stomach and made her sick was ineligible for benefits because she resigned for “personal reasons” not “connected with the work.” Nothing in the work itself gave the claimant cause for leaving, and her pregnancy could not be deemed a “work-related” illness, nor does the D.C. Code permit a presumption that a pregnant individual is physically unable to work. Because claimant presented no medical evidence and made no effort to seek a transfer to a different position to accommodate her condition, the court found no basis for concluding that the board’s denial of benefits did not have substantial support in the evidence. *See Brooks v. DOES*, 453 A.2d 812 (D.C. 1982).

### ***Job transfer & transportation problems***

A claimant who injured her back while at her job as a corrections officer and resigned when she was subsequently transferred to a new corrections facility on grounds that the long commute would exacerbate her back injury was ineligible for benefits because she voluntarily quit without good cause. Because her willingness to accept the transfer was a condition of the claimant’s employment, the DOES regulation recognizing as “good cause connected with work” a voluntary resignation due to transportation problems arising from transfer of an employee did not apply in this case. *See Botts v. D.C. Dep’t of Empl. Servs.*, 473 A.2d 382 (D.C. 1984).

Unemployment benefits will not be conferred on a claimant if she voluntarily quit to move out of state to be closer to her family. *See Giesler v. DOES*, 471 A.2d 246 (D.C. 1983).

### ***Other***

A claimant who left his position as a law clerk at a D.C. law firm and went to New York to study for the bar exam after being informed that he would not be offered a full-time associate’s position was denied unemployment benefits because the board found that his voluntary departure was not for a “good cause connected with the work.” Although the claimant had discussed with a partner of his employer the possibility that he might be hired as a full-time associate if the claimant took the New York bar and the firm followed through on its tentative plans to open a New York office, this “offer” was clearly conditional on uncertain plans, which the law firm in fact ultimately abandoned. The claimant’s decision to move to New York and take the New York bar in reliance on this contingency cannot be considered “good cause” connected with the work. *Gopstein v. District of Columbia Dep’t of Empl. Servs.*, 479 A.2d 1278 (D.C. 1984).

## **Misconduct**

### **General Definition of Misconduct**

Misconduct must be an act of wanton or willful disregard of the employer's interest, deliberate violation of employer's rules, disregard of standards of behavior which the employer has the right to expect of his employee, or negligence in such degree or recurrence as to manifest culpability, wrongful intent, or evil design, or show intentional and substantial disregard of the employer's interest or employer's duties and obligations to employer. *See Hawkins v. District Unemployment Compensation Bd.*, 381 A.2d 619 (D.C. 1977).

The misconduct provision of the Unemployment Compensation Act is intended to prevent the dissipation of funds by denying benefits to those who are unemployed through their own disqualifying act rather than the unavailability of suitable job opportunities. *See Jadallah v. DOES*, 476 A.2d 671 (D.C. 1984).

Denial of unemployment compensation benefits because of discharge for misconduct may proceed only if the appeals examiner determines whether the particular reason given by employer for discharge was in fact the basis of the employer's decision to fire the worker. In determining whether denial of unemployment benefits on grounds of misconduct was warranted, the appeals examiner was required to determine if the employer's reasons for firing employee were independent grounds (meaning that any individual reason adequately justifies disqualification from receiving benefits) or if only all the reasons together justified the discharge. *See Smithsonian Inst. v. DOES*, 514 A.2d 1191 (D.C. 1986).

In hearings presided over by administrative law judges (ALJ), the judge may only consider theories of misconduct that are promulgated by the employer. The ALJ may not deny benefits to a claimant based on misconduct not cited by the employer, even if that misconduct took place and would be grounds for proper termination. The burden lies on the employer to put forth an acceptable theory of misconduct. *See Lynch v. Masters Sec.*, 93 A.3d 668, 675 (D.C. 2014).

A claimant's ordinary negligence as an employee in disregarding the employer's standards or rules cannot alone disqualify him or her from benefits for misconduct. *See Keep v. DOES*, 461 A.2d 461 (D.C. 1983).

### **Employer's Findings Regarding Misconduct**

A federal agency's findings regarding the reason for termination is not binding on the unemployment compensation system unless the claimant had an opportunity for a fair hearing. However, the District must accept the military's reason for termination. *See Smith v. District Unemployment Compensation Bd.*, 435 F.2d 433 (1970).

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Claimant who was dishonorably discharged from federal military service was rightly denied unemployment compensation benefits by DOES, even though he had petitioned the federal military agency for correction of the type of discharge at the time of his DOES hearing. The agency is permitted but not required by federal regulations to grant a stay of its eligibility determination pending the outcome of applicant's petition for modification of the type of discharge. *See Strother v. District of Columbia Dep't of Empl. Servs.*, 499 A.2d 1225 (D.C. 1985).

### **Violation of Employer's Express Rule**

Violation of an employer's rules does not constitute misconduct per se for the purposes of the unemployment compensation statute. *See Butler v. DOES*, 598 A.2d 733 (D.C. 1991); *see also* section on Absence, *supra*.

Disqualification because of misconduct for rule violation is valid only when the rule is reasonable, its existence has been made available to the employee before the alleged violation, and the rule has been consistently enforced. *See Curtis v. DOES*, 490 A.2d 178 (D.C. 1985).

### ***Rule must be reasonable***

For a claimant to be denied unemployment benefits on misconduct grounds because of the violation of an employer's rule, the rule in question must be judged reasonable. The rule in question did not allow unsupervised, at-home, paid overtime work; but this rule was held not to reach the level of "wanton or willful disregard of employer's interest, deliberate violation of employer's rules," or any of the several other possible regulatory reasons for disqualification. *See Green v. D.C. Unemployment Compensation Bd.*, 346 A.2d 252 (D.C. 1975).

For a claimant to be denied unemployment benefits on grounds of misconduct because of violation of an employer's rule, the rule in question must be reasonable, not by reference to business interest but to "statutory insurance purpose." Those purposes are "to alleviate the shock of unemployment, to increase continuity of employment, and to aid in the stabilizing of consumption." *See Hickenbottom v. D.C. Unemployment Compensation Bd.*, 273 A.2d 475 (D.C. 1971).

Claimant, suffering from a severe toothache such that he was unable to continue work, left on the advice of the company nurse after attaching a sick slip to his timecard. Claimant did not return to work the next day, but visited a dentist, and was discharged the following weekday when he arrived at work. Claimant could not produce proof that he had indeed visited a dentist and was discharged for this reason; this rule was deemed unreasonable in that the employer admitted it only was applied during labor disputes. Though demanding proof for medical leave during a labor dispute may be sound business practice, its violation does not disqualify claimant from receiving benefits. *See*



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*Hickenbottom v. D.C. Unemployment Compensation Bd.*, 273 A.2d 475 (D.C. 1971).

Claimant's alleged participation in an "unauthorized demonstration," though valid reason for dismissal, is not a valid reason for disqualification from unemployment insurance benefits when it cannot be shown that the claimant participated in the demonstration and when the claimant was already in suspended work status at time of demonstration. *See Hickenbottom v. D.C. Unemployment Compensation Bd.*, 273 A.2d 475 (D.C. 1971).

### ***Employee must be on notice of rule's existence***

The critical question in a misconduct inquiry is whether a claimant was on notice that she could be discharged for the misconduct. The examiner originally found two independent grounds for denying unemployment compensation: (1) failure to follow a check-cashing policy, and (2) allowing an unauthorized individual into the cashier's cage. The Court of Appeals reversed, arguing that these grounds are not sufficient to justify discharge such that unemployment benefits may be denied. *See Jones v. DOES*, 558 A.2d 341 (D.C. 1989); *see also Colton v. DOES*, 484 A.2d 550 (D.C. 1984).

Where an employee handbook provided that discharge without warning was permitted with one or two weeks' severance pay if employee's department head felt immediate discharge would be in the best interest of the hospital, and where the defendant's supervisor warned claimant that the claimant's action in leaving work four hours early would constitute abandonment of his job, the claimant had sufficient notice that leaving the job without permission would constitute misconduct justifying discharge. *See Jones v. D.C. Unemployment Compensation Bd.*, 395 A.2d 392, appeal after remand 451 A.2d 295 (D.C. 1978).

### ***Rule must be consistently enforced***

Disqualification because of misconduct for rule violation is valid only when the rule is reasonable, its existence has been made available to the employee before the alleged violation, and the rule has been consistently enforced. *See Curtis v. DOES*, 490 A.2d 178 (D.C. 1985).

An employee cannot be fired for "good cause" merely for violating a rule that the employer typically enforces haphazardly. This is true even if the employee is aware of the rule and the hypothetical possibility of discharge for violating it. *See Freeman v. DOES*, 575 A.2d 1200 (D.C. 1990).

To be disqualified from receiving unemployment benefits because of discharge for violating an employer's rule, two independent requirements must be met. First, the employee must have had prior knowledge that the rule existed and that he could be fired for violating it. Second, the employer must have consistently enforced the rule in the past. *See Freeman v. DOES*, 575 A.2d 1200 (D.C. 1990).

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A claimant's failure to follow an employer's check cashing policy was held not to be misconduct disqualifying the claimant from receiving unemployment compensation because the employer enforced the policy inconsistently. The rule concerned unauthorized admittance to a cashier's cage on the premises. *See Jones v. DOES*, 558 A.2d 341 (D.C. 1989).

### ***Claimant must be able to meet physical and educational requirements of rule***

Persons forced out of their jobs because of an inability to meet new standards beyond their physical or educational qualifications would not be disqualified for unemployment compensation as termination of their employment was not due to any fault of their own. *Id.*

### **Specific Types of Misconduct**

#### ***Absences***

When an employee worked two jobs at the same time, claimant claimed there was an "understanding" which permitted his conduct. The court held that the hearing examiner and in-house appeal failed to make a finding of fact on whether the employee had permission to leave his first job and conduct other duties as part of a second job during his lunch break. The court remanded for further proceedings. *See Smithsonian Inst. v. DOES*, 514 A.2d 1191 (D.C. 1986).

When the absent employee personally did not telephone the job site to report absences, but reported through a co-worker, this was not misconduct sufficient to disqualify the employee from unemployment compensation. Employer must show that workplace had established a specifically-required procedure that was to be followed to notify the employer when the employee was unable to report to work. *See Hawkins v. District Unemployment Compensation Bd.*, 381 A.2d 619 (D.C. 1977).

Repeated absence is grounds for discharge for misconduct; failing to call in and report one's absence for five consecutive days, coupled with previous instances of tardiness, was enough to constitute misconduct such that unemployment benefits were denied. However, because the record was insufficient, this case left unanswered the question of whether the excessive tardiness was due to a work-related injury and whether that fact possibly mitigated the charge of misconduct. *See Butler v. DOES*, 598 A.2d 733 (D.C. 1991).

The court has reversed and remanded OAH when it failed to consider the claimant's reason(s) for absenteeism in order to determine willful or deliberate actions, notwithstanding the existence of prior disciplinary action for absenteeism. *See Larry v. National Rehabilitation Hospital* 973 A.2d 180 (D.C. 2009).

### ***Poor job performance***

In determining whether an employee has engaged in misconduct disqualifying him from unemployment compensation benefits, DOES cannot simply consider the justifiability of the employee's discharge, but must apply a higher standard. The types of misconduct for which the benefits penalty may be imposed suggest existing knowledge of the worker that, should he proceed, he will damage some legitimate interest of his employer for which he could be discharged. *See Jadallah v. DOES*, 476 A.2d 671 (D.C. 1984).

Disqualification for receiving unemployment benefits because of misconduct is appropriate only when the employee intentionally disregarded the employer's expectations for performance. *See Jadallah v. DOES*, 476 A.2d 671 (D.C. 1984).

When the claimant, a night youth care specialist, failed to remain alert and vigilant throughout the work shift to protect teenage youths housed in facility, he was disqualified from receiving unemployment benefits. Employer alleged that the claimant had twice been found sleeping on the job. *See Grant v. DOES*, 490 A.2d 1115 (D.C. 1985).

Unsatisfactory work performance may amount to 'misconduct' in some instances. Implicit in this court's definition of 'misconduct' is that the employee intentionally disregarded the employer's expectations for performance. Ordinary negligence in disregarding the employer's standards or rules will not suffice as a basis of disqualification for misconduct. *See Keep v. DOES*, 461 A.2d 461, 463 (D.C. 1983).

An employee was fired for poor performance at work. The employee testified that by most standards, his work had been adequate but that his complaint to a supervisor about infighting and conflicting directions from various supervisors had invited "scapegoating" in retaliation for standing up to the abuse. The employer had charged the claimant with missing a staff meeting and deadlines, faulting others for his own deficiencies, and displaying a negative attitude, among others. These reasons, the Appeals Court suggested, were at best ordinary negligence in disregarding the employer's rules. *See Washington Times v. DOES*, 724 A.2d 1212 (D.C. 1999).

### ***Harming a legitimate interest of the employer***

When an employee threw a flashlight through a customer's glass storm door when he was safely beyond the closed door and separated from the customer's dog, he was disqualified from receiving unemployment based on misconduct. The claimant's act was destructive toward the customer's property, and personal injury to the customer was a possible consequence. However, legally adequate provocation may excuse the claimant's alleged misconduct and require reversal or reduction of his disqualification from unemployment benefits. In this case, a customer spoke to the claimant in a derogatory manner and failed to restrain her growling dog as the claimant entered the customer's

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house to read the meter. An argument developed over the dog, whereupon the customer “slurred his [claimant’s] mother.” Incensed by that comment, the claimant abruptly left the customer’s home without reading the meter. Once outside, he threw his flashlight at the storm door and broke three panes of glass. The board reduced the examiner’s proposed disqualification of claimant from benefits from eight weeks to five weeks, based on the finding of legally adequate provocation; the Court of Appeals upheld the ruling. *See Williams v. District Unemployment Compensation Bd.*, 383 A.2d 345 (D.C. 1978).

Retaliation by an employer for a claimant’s attempts to obtain overtime compensation does not shield the claimant from being disqualified from receiving unemployment benefits where the claimant was fired for sleeping on the job. *See Grant v. DOES*, 490 A.2d 1115 (D.C. 1985).

After refusing on several occasions to follow the employer’s rule against writing, co-authoring, or signing memoranda critical of the employing firm, the employee was fired and appropriately denied unemployment benefits for misconduct. *See Dyer v. D.C. Unemployment Compensation Bd.*, 392 A.2d 1 (D.C. 1978).

### ***Military discharge***

A military claimant must be honorably discharged from the armed forces to be eligible for unemployment benefits. *See Strother v. District of Columbia Dep’t of Empl. Servs.*, 499 A.2d 1225 (D.C. 1985).

## **Gross Misconduct Not Found**

D.C. Court of Appeals reversed and remanded DOES’ finding that a claimant was discharged for gross misconduct because the claims examiner’s decision suggested that the claimant’s failure to perform in a satisfactory manner was merely because of negligence; a finding of gross misconduct required that the claimant’s conduct be more than negligent, it had to be deliberate or willful. *See Chase v. DOES*, 804 A.2d 1119 (D.C. 2002).

D.C. Court of Appeals reversed and remanded OAH’s finding that the claimant was discharged for gross misconduct because the evidence failed to show that the claimant’s actions were repetitive or negatively impacted the employer. Proof of willful or deliberate actions alone is not enough. *See Odeniran v. Hanley Wood, LLC*, 985 A.2d 421 (D.C. 2009).

## **Labor Disputes**

Under the unemployment compensation statute in effect in 1973, claimants seeking unemployment benefits were disqualified if their unemployment was the direct result of a labor dispute. *See D.C. Code § 51-110(f)*. The act in its present form offers no examples to clarify the definition of the term “labor dispute.” Whether unemployment resulting from a

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labor dispute is characterized as a lockout by the employer or a strike by the employees, is thus irrelevant for purposes of disqualification under this section of the act, although such a distinction might affect the determination of “availability for work” for purposes of initial eligibility. *See National Broadcasting Co., Inc. v. District Unemployment Compensation Bd.*, 380 A.2d 998, 999, n.2 (D.C. 1977).

Members of the National Association of Broadcast Employees and Technicians (NABET) who went on strike upon the expiration of their collective-bargaining agreement with their employer, NBC, but offered a week later to return to work pending a new agreement, were disqualified from receiving benefits under the act despite the fact that they remained unemployed as a result of NBC’s refusal of their offer to return to work. Whether the circumstances of the claimants’ unemployment were characterized as a strike or a lockout, the unemployment was nevertheless a direct result of a labor dispute and hence disqualifying under §10(f) of the act. *See National Broadcasting Co., Inc. v. District Unemployment Compensation Bd.*, 380 A.2d 998, 999 n.2 (D.C. 1977).

**Note:** Under § 51-110(f) of the D.C. Code, claimants can be eligible for benefits when they are unemployed because of a “lockout.”

When a claimant is unemployed as a “direct result of a labor dispute, other than a lockout, still in active progress” at the claimant’s place of employment, he is ineligible for unemployment compensation regardless of whether the “labor dispute” occurs during or after the term of the collective bargaining agreement. Cement company employees who went on strike after the end of the term of the collective bargaining agreement between the company and their union were ineligible for benefits during the period of the strike because their unemployment was a direct result of an active labor dispute. The court relied on the common meaning and ordinary sense of the terms in the statute in finding that a strike was a labor dispute even if it occurred after the collective bargaining agreement expired. *See Barbour v. District of Columbia Dep’t of Empl. Servs.*, 499 A.2d 122 (D.C. 1985).

Unemployment resulting from an employer’s reduction in the number of workers it demands from a union may be deemed “a direct result of a labor dispute” if this change in employer policy is intended to undermine an advantage accruing to the union under the terms of the collective bargaining agreement. For example, under the terms of a collective bargaining agreement between the *Washington Post* and pressmen’s union, the union was permitted to replace requested workers who failed to report for work with more senior pressmen who could demand overtime pay. To prevent exploitation of this seniority-replacement, overtime compensation system, the *Post* reduced the overall number of pressmen it demanded of the union and hence the number of possible senior replacements that the union could make. Although the senior pressmen seeking benefits asserted that this action was motivated primarily by the *Post*’s financial hardship, the court found no substantial evidence to that effect. Instead, the change in employer policy and the resulting unemployment of senior pressmen was deemed a result of a labor dispute over the terms of employment under the collective bargaining agreement, disqualifying the pressmen from benefits. *See Washington Post Co. v. District Unemployment Compensation Bd.*, 377 A.2d

436 (D.C. 1977).

When there are two independent groups of workers at a single place of employment under different locals of the same union, the decision of one group not to report to work in support of a strike by the other group may constitute participation in a labor dispute under the act. Under § 51-110(f) of the D.C. Code, an individual is ineligible for benefits for any period of unemployment directly resulting from an ongoing labor dispute at his workplace, unless: (1) the claimant is not participating or directly interested in the dispute; and (2) the claimant does not belong to a class of workers employed at the same workplace before their strike. D.C. Code § 51-110(f). Hence, claimant-members of the Paper Handlers who did not return to work after workers affiliated with the same international union but a different local damaged company property and went out on strike were ineligible for unemployment benefits during the strike period. Although the damage done by the striking workers temporarily prevented both groups of workers from reporting to work, the non-striking paper handlers failed to return to work even after the company resumed its operations. *See Adams v. District Unemployment Compensation Bd.*, 414 A.2d 830 (D.C.1980).

A claimant who worked as an administrative clerk for the *Washington Post* was deemed ineligible for unemployment benefits when he refused to cross the picket line of striking workers who were members of a different local of the same international union to which the claimant himself belonged. The court found the claimant ineligible for benefits because he *voluntarily* continued to follow the union's directive even after he received notice that he would be permanently replaced if he did not return to his job, and, hence, his unemployment was a direct result of his participation in a labor dispute. *See Washington Post Co. v. District Unemployment Compensation Bd.*, 379 A.2d 694 (D.C. 1977).

## Overpayments & Recoupment

If DOES identifies that a claimant was overpaid benefits, they can seek direct repayment, recoupment of current or future benefits, or interception of tax refunds. D.C. Code § 51-119(d)(1). DOES must notify the claimant with a Notice of Determination of Overpayment. If the claimant is without fault for the overpayment, or recoupment would be "against equity and good conscience," they can request a waiver of overpayment. The deadline to request the waiver is **30 days** from the date of the notice of determination. The form is available [here](#).

If recouping unemployment benefits, DOES is required to notify the recipient in writing with a Notice of Requirement, which includes information on the right to appeal. The deadline to appeal is **15 days**. Grounds for appeal include: lack of fault or

### **! Action Item!**

Unfair overpayment recoupment practices are an ongoing workers' rights issue in D.C. Workers who receive an offset notice or notice of determination of overpayment should connect with Legal Aid DC: (202) 628-1161 or <https://intake.legalaiddc.org/>.

financial inability to have DOES recoup current unemployment benefits. DOES can only recoup up to 50% of current unemployment benefits.

### **Suitability of & Availability for Work**

DOES determined that the claimant, who had been previously employed as a counselor at a university, had been unemployed for four months and was offered a two-month temporary job at a rate of pay approximately 15 percent below his prior income, was properly disqualified from unemployment benefits for an eight-week period because he refused to accept suitable work and limited his job search to colleges and universities. The court further held that the claimant has the burden of showing that she is “genuinely attached to the labor market.” *See Johnson v. District Unemployment Compensation Bd.*, 408 A.2d 79 (D.C. 1979).

### **Side Agreements**

It is the claims examiner’s responsibility to assess a claimant’s eligibility for unemployment benefits; agreements between employer and employee over unemployment benefits are immaterial. *See Thomas v. District of Columbia Dep’t of Labor*, 409 A.2d 164 (D.C. 1979).

### **School Employees on Summer Break**

As a result of the 1986 amendment to the D.C. Unemployment Compensation Act, non-academic employees of institutions of higher education are excluded from receiving benefits between school years. D.C. Code § 51-109 (7)(c)(i) (1986 Supp.). For a denial of benefits to be valid under this provision of the act, (1) a petitioner must have been an employee of an institution of higher education during an academic year or term, and (2) there must have been “reasonable assurance” that petitioner would continue to perform services in the academic year or term immediately following. For example, in one case, the petitioner, who had worked as a baker for University Student Services, Inc. owned by American University, was rightly deemed ineligible for benefits during the university’s summer vacation period because she received a lay-off notice that included a promise of reemployment on or before the start of the next academic year. *See Dowdy v. DOES*, 515 A.2d 399, 401 (D.C. 1986).

In its present form, the act denies unemployment benefits generally to teachers and other educational personnel during summer recess. This provision of the act applies to substitute as well as full-time teachers. Hence, a substitute teacher of social studies in the D.C. public schools who was notified of her temporary reappointment after she responded affirmatively to an employment questionnaire asking if she wished to be reconsidered for employment during the following year was deemed ineligible for benefits. On petitioner’s

appeal of the Department of Employment Services' denial, the appeals examiner ruled that, although the "employment questionnaire" was not in itself "reasonable assurance" of continued employment, the questionnaire taken together with the "temporary appointment" letter received thereafter did constitute reasonable assurance for purposes of the act. Hence, benefits were appropriately denied from the date of receipt of the temporary appointment letter. *See Davis v. DOES*, 481 A.2d 128 (D.C. 1984).

## **Unemployment Compensation in Maryland**

### **Eligibility**

Individuals who work on a full-time or part-time basis for at least 20 hours per week are eligible for benefits. While a worker fired for simple misconduct may receive delayed unemployment benefits, a worker fired for gross misconduct or aggravated misconduct may not receive benefits at all.

### **Effect of Termination for Misconduct**

Termination for **simple misconduct** bars the claimant from receiving benefits for 10 to 15 weeks after the claimant's last day of work. Example of simple misconduct: A truck driver fired for negligence following two different accidents was deemed to have been fired for simple misconduct. *See Kidwell v. Mid-Atlantic Hambro, Inc.*, 119-BH-86.

**Gross misconduct** includes "deliberate and willful disregard of standards of behavior that an employing unit rightfully expects and that shows gross indifference to the interests of the employing unit, or repeated violations of employment rules that prove a regular and wanton disregard of the employee's obligations." *See* Md. Code Ann., Labor & Empl. § 8-1002(a)(1)(i)-(ii). Employees discharged for gross misconduct will be unable to claim benefits until they are re-employed and earn at least 20 times their weekly benefit amount.

**Aggravated misconduct** includes "behavior committed with actual malice and deliberate disregard for the property, safety or life of others that affects the employer, fellow employees, subcontractors, invitees of the employer, members of the public, or the ultimate consumer of the employer's products or service." *See* Md. Labor & Empl. Code Ann. § 8-1002.1(a)(1)(i)-(ii).

If a worker **voluntarily quits or resigns** from a job because she becomes self-employed, to accompany or follow a spouse to a new location, or to attend school, she is not qualified for unemployment compensation. *See* Md. Labor & Empl. Code Ann. § 8-1001(c)(2)(d).



## **Effect of Other Income Sources**

**Income from additional/independent contractor work:** Claimants must declare on their application reports any gross income from self-employment or independent contractor work. Any payments from such work should be included as an addendum.

**Severance pay:** Severance pay is considered allocated on the last day of work. Benefits are prohibited for the week in which the severance was allocated.

**Practice Tip:** Maryland has a detailed and comprehensive digest of unemployment appeals decisions on its website, which is very useful for finding analogous cases. Visit the Digest at: <http://www.dllr.state.md.us/uiappeals/decisions/>

## **Applying for UI**

### **Filing via Internet**

Potential claimants can file for unemployment compensation over the Internet or by phone. Claimants may file a claim online at: <https://secure-2.dllr.state.md.us/NETCLAIMS/Welcome.aspx>. To file a claim online, the claimant must NOT have:

- Worked and earned wages from a state other than Maryland in the last 18 months.
- Worked for the federal government in the last 18 months.
- Worked for more than three employers in the last 18 months.
- Filed for unemployment insurance in another state in the last 18 months.

If a claimant is not eligible to file online, then she should file over the phone.

### **Filing over the Phone**

To file a claim by phone, claimants should call (800) 827-4839 or call the local office directly. The direct dial number for the College Park Claim Center (serving Montgomery and Prince George's counties) is (301) 313-8000 or (877) 293-4125 (toll free in Md. only).

Maryland Legal Aid can assist workers in Montgomery, Howard, and Prince George's counties with appeals of denials of unemployment benefits. Statewide number: (410) 951-7777; Montgomery County Office: (240) 314-0373; Howard County Office: (410) 480-1057; Prince George's County Office: (301) 560-2100. Spanish-speaking staff members are generally available to conduct intakes during these hours.

## Maryland UI Appeals Process

A claimant for unemployment insurance who has been denied benefits may file an appeal of that denial to the Appeals Division. An employer also may appeal a determination granting benefits to a former employee. The appeal must be filed in writing **within 15 calendar days** from the date the determination was mailed. The claimant's signature must be included on the request for appeal. All appeals must be submitted by mail or fax, and may not be filed by e-mail. The last date to file an appeal, as well as the address to which the appeal should be filed, is printed on both monetary and non-monetary determinations.

Once an appeal is filed, a hearing will be held by a hearing examiner, who will then issue a written decision. That decision is appealable by a claimant, an employer, or the Department of Unemployment Compensation to the Board of Appeals. Appeals from initial benefit determinations may not be filed directly to the Board of Appeals.

More information may be found at: <http://www.dllr.state.md.us/uiappeals/>.

## Overpayments

The Department of Unemployment Compensation may seek to recover benefits that were erroneously paid to the claimant, in which case, the department must notify the claimant of the overpayment and the claimant's right to request waiver of recovery of the overpayment. Claimant has **30 days from the date of the overpayment notice to request a waiver**. A waiver will be granted if the overpaid claimant is without fault and is unable to repay the benefits. A waiver may be granted when the overpaid claimant is without fault and agency error exclusively caused the overpayment. COMAR 09.32.07.05.

## Worker Misclassification

The Department of Labor, Licensing, and Regulation administers Maryland's unemployment insurance law. If the secretary of Labor, Licensing, and Regulation finds that a worker has been misclassified as an independent contractor, the employer must make any unpaid contributions to the state unemployment insurance trust fund within 45 days. After 45 days, any remaining unpaid contributions "accrue interest at a rate of 2 percent per month." See Dep't of Legislative Serv., Md. Gen. Assembly, Fiscal and Policy Note for Workplace Fraud Act of 2009, 6 (2009).

If the secretary determines that the employer knowingly misclassified the worker, the employer is also subject to a civil penalty of up to \$5,000 for each misclassified worker. *Id.*

## Unemployment Compensation

Employers can avoid paying back unemployment contributions only if they can satisfy the DLLR's "ABC" test, which determines whether a worker was properly classified as an independent contractor. To establish that a worker is an independent contractor, the employer must show that:

- 1) The employer does not direct and control the worker's performance, does not train the worker, set his work hours, or provide direct orders regarding the manner in which the work is performed;
- 2) The work is outside the usual course of business for the employer; and
- 3) The worker runs an independently-established business that complies with all applicable tax and licensing laws. *Id.* at 6.

## Maryland UI Phone Numbers

- **College Park Claim Center:** 301-313-8000, 1-877-293-4125 (Calvert, Charles, Montgomery, Prince George's, and St. Mary's)
- **Cumberland Claim Center:** 301-723-2000, 1-877-293-4125 (Allegany, Frederick, Garrett, Washington)
- **Salisbury Claim Center:** 410-334-6800, 1-877-293-4125 (Caroline, Dorchester, Kent, Queen Anne's, Somerset, Talbot, Wicomico, Worcester)
- **Towson Claim Center:** 410-853-1600, 1-877-293-4125 (Anne Arundel, Baltimore City & County, Carroll, Cecil, Harford, Howard)

**For Spanish speakers:** 301-313-8000 or 1-877-293-4125

## **Unemployment Compensation in Virginia**

A claim for unemployment compensation benefits may be filed by a resident of Virginia who was employed in another state (or the District of Columbia) or by a resident of another jurisdiction who was employed in Virginia. With interstate claims (either the work or the worker are outside the Commonwealth), the Employment Commission will determine whether the adjudication of a contested claim will be handled by the Virginia agency or referred to the other jurisdiction. Residents of D.C. or Maryland should seek advice to determine if they may be eligible for higher benefits by filing claims in their

residence jurisdiction.

## **Filing a Claim**

### **Filing via Internet**

Potential claimants can file for unemployment compensation with the Virginia Employment Commission over the Internet, by phone, or in person. Claimants may file a claim online at: <http://www.vec.virginia.gov/vecportal/unins/insunemp.cfm>. The site contains a Spanish language option as well. If the claim is approved, claimants also can file their weekly claims for benefits over the Internet. Many claimants in Northern Virginia speak languages other than English, and the Employment commission can access translation services for multiple languages. Spanish-speaking staff members are generally available in the commission's Alexandria and Fairfax offices.

### **Filing over the Phone**

To file a new claim by telephone, claimants should call (866) 832-2363 Monday through Friday from 8:15 a.m. to 4:30 p.m. To file a weekly claim by telephone, claimants should call (800) 897-5630.

### **Filing in Person**

The Commission's Alexandria office (inside the Beltway, off of Edsall Road and Interstate 395) is closest to the District and Maryland. Typical hours of operation are weekdays from 8:30 a.m. to 4:30 p.m. Claimants should bring two forms of identification: one with a photo ID and one with a Social Security number (or Taxpayer ID).

The commission's Northern Virginia offices are at the following locations:

- 5520 Cherokee Ave., Alexandria, VA 22312 Tel: (703) 813-1300
- 2100 Washington Boulevard, Arlington, VA 22206 Tel : (703) 228-1400
- 10304 Spotsylvania Avenue, Suite 100, Fredericksburg, VA 22408 Tel : (540) 322-5757

For additional information, a handbook and guide for claimants is available online at: <https://www.vec.virginia.gov/unemployed/Claimant-Handbook>.

## **Eligibility**

To be eligible for unemployment compensation in Virginia, the worker must have worked for 30 days or 240 hours for the employer. *See* Va. Code § 60.2-618(2). The 30 days do not have to be consecutive. A minimum earnings test looks at wages earned during a one-year period (four calendar quarters); wages earned in the calendar quarter in which

## Unemployment Compensation

the application is filed and wages from the preceding calendar quarter are not considered, i.e., Virginia has no Alternative Base Period. Eligibility for benefits and the amount of benefits are determined by taking the two calendar quarters with the highest earnings.

Ordinarily, the Employment Commission issues a monetary determination within about one week of application, explaining financial eligibility for benefits. The notice provides an opportunity for the claimant to supplement the earnings record if it is incomplete (an employer cannot defeat a claim by failing to pay unemployment compensation taxes that are required to be paid under federal law). State law allows a worker who was previously disqualified from receiving benefits to overcome the disqualification (if there is still a relevant earnings record) by working for a minimum of 30 days or 240 hours for a Virginia employer. *See* Va. Code § 60.2-618(2). The 30 days do not have to be consecutive. *Id.* at § 60.2-618(2).

A claimant will not be eligible for benefits if the deputy finds that the claimant either (1) quit the job without good cause or (2) was fired from the job as a result of misconduct in connection with work. The case law in Virginia makes clear that more than simple acts of misconduct must be shown to warrant a disqualification; the claimed wrongdoing of the employee must amount to willful misconduct. Some examples of willful misconduct include: positive test for controlled substance use, if there was a known workplace drug testing policy in place, *see* Va. Code § 60.2-618(2)(b)(1); the worker made an intentionally false or misleading statement in relation to a past criminal conviction on a written job application, *id.* at § 60.2-618(2)(b)(2); when a worker either deliberately violates company policy or the worker's actions or omissions are so recurrent or of such a nature as to manifest a willful disregard of the employer's interest, *see Kennedy's Piggly Wiggly Stores, Inc. v. Cooper*, 14 Va. App. 701, 419 S.E. 2d 278 (1992); and when a worker is absent without prior notice, *see Henderson v. VEC*, No. 1056-99-2 (Ct. of Appeals Sept. 14, 1999). The employer bears the burden of proving misconduct. *See Kennedy's Piggly Wiggly Stores*, 14 Va. App. at 701. The willfulness element of misconduct may be shown by the surrounding circumstances to have been mitigated, or the misconduct may not be a disqualification if the employer reasonably condoned the misconduct. Ordinary acts of negligence, for example, are generally insufficient to support a finding of willful misconduct.

Voluntarily terminating employment, upon a claim of good cause, may overcome a disqualification. To succeed with a claim, the worker not only must show a good reason for quitting, but also must justify the timing of the decision. The latter element typically requires proof of having exhausted any internal grievance process to protest an intolerable work condition, or acting upon professional advice (i.e., recommendation of a doctor). The employee has the burden of proof to demonstrate good cause. Before a worker quits, they should consult an attorney for advice on whether the predicate elements for demonstrating good cause are present to support a claim.

## Claims Review & Appeal Procedure

### Initial Review of the Claim

A deputy examiner reviews the initial claim for unemployment compensation. *See* Va. Code § 60.2-619(A)(1). For claims considered valid, the deputy also initially determines when benefits will begin, the amount of the weekly benefit, and the maximum duration of the benefits period. *Id.* at § 60.2-619(A)(1)(b). The process to claim benefits typically takes from one to two months. After the monetary determination is issued, if there is any question about qualification for benefits (how and why the employment ended), the deputy will schedule a telephone conference. Both the claimant and the employer may participate. The determination of qualification or disqualification typically will be issued within one to two weeks after the conference.

During the review by the deputy, if an employer states a legally sufficient reason to disqualify someone from receiving employment benefits and indicates that evidence exists to back up the basis for termination, the deputy will generally deny the claim. An employee will be provided an opportunity to counter the employer's version of what occurred, but the deputy's job at this initial stage of the proceeding is not to try to resolve conflicting facts presented by claimant and employer.

Many claims initially denied by the deputies are later reversed by appeals examiner hearing decisions (based upon de novo review in a due process hearing, at which the employer is required to back up any contentions it made initially to defeat the claim). Legal advice prior to the hearing may be critical for a favorable outcome for the employee. Generally, the hearing is the first and last opportunity to submit evidence. An employee needs to come to the hearing prepared to present or to counter expected claims, and generally, any necessary witnesses or documents must be requested through the commission before the hearing.

The commission generally schedules appeals for claims filed by the internet or by out-of-state claimants for telephonic hearings. There are advantages and disadvantages to having telephonic hearings, and whether a telephonic hearing is better than an in-person hearing depends upon the issues in a case and whether the claimant is willing or able to travel to one of the Northern Virginia hearing offices for an in-person hearing. With telephonic hearings, the claimant will be sent copies of documents in advance of the hearing together with basic instructions for participation in the hearing (a key issue: the claimant must call in after receipt of the hearing notice and at least one day before the scheduled hearing to advise the commission of the telephone number where the claimant wishes to be called)

**Practice Tip:** Clients should contact LSNV as early in the application process as possible, preferably before the telephone fact-finding conference by the deputy. Advice about what

to expect at the conference may make a difference between a disqualification (and an additional wait for receipt of benefits) and qualification. If the claim is denied, or the commission notifies the applicant of an appeal by the employer, then that is the time to seek legal assistance, not later.

### **Appealing a Denial of Benefits**

The notice of qualification or disqualification for benefits provides **thirty (30) calendar days to file an appeal**. This can be done in person, by mail (to a local office or to the commission's Richmond office), or by fax. In any case there is a simple form to complete. If an appeal letter is sent by mail or fax, the letter must be postmarked by the filing deadline; the final date to file an appeal is set out on the bottom of the reverse side of the qualification/disqualification notice.

Further appeal of the appeals examiner's hearing decision is possible, but generally the record is closed to submission of further evidence. An appeal to the commission to overturn a hearing decision requires demonstration of legal error – i.e., a claimant or employer who failed to bring an important witness or document to the hearing cannot add to the record without showing that the additional evidence was unavailable and could not have been produced for the hearing. The commission does not allow an opportunity for either party to re-litigate the case once they have participated in a hearing and learned what they need to prepare.

There is also an opportunity to appeal a final decision of the commission to Circuit Court; but appeals to court seldom succeed because the court is required to accept as true all fact findings of the Commission that are based upon the record. Only substantial procedural errors or misapplication of state law provide a basis to overturn the commission's final decision.

### **Overpayments**

If a claimant who has received benefits is ultimately disqualified, there will be an overpayment determination. If the claimant is unable to repay the full amount in one payment, she should contact the Benefit Payment Control Unit at (804) 786-8593 to arrange a repayment installment plan, which would be one payment per month, with no interest, at whatever amount the client can afford. The Employment Commission does not waive overpayments for any reason.

If the overpayment is not repaid in full before the claimant claims future benefits, a deduction (offset) will be made from these benefits. The Employment Commission also will use other methods to collect the money owed, including collection agencies, credit bureaus, wage garnishment, attachment of bank accounts, seizing of income tax refunds, and levy and sale of personal property. The costs of collection, including administrative costs, attorney's fees, late penalty, and interest can be charged to the claimant. LSNV recommends

## Unemployment Compensation

that workers who have been overpaid benefits should begin voluntarily repaying benefits at an affordable amount each month when they return to work.

## Immigrant Worker Issues

Virginia law states that benefits shall not be paid to immigrant workers who perform services in the state unless such individuals were lawfully admitted for permanent residence at the time such services were performed, they were lawfully present for purposes of performing such services, or they were permanently and lawfully residing in the United States under color of law at the time such services were provided. *See* Va. Code § 60.2-617. Immigrant workers with documentation of work authorization or work visas generally will meet the minimum requirement for the standard to be lawfully present for the purposes of performing such services. The Virginia Employment Commission requires disclosure of a claimant's Social Security number (if one has been issued); but depending upon the worker's circumstances, a Taxpayer I.D. The number issued by the IRS may meet the agency's documentation requirement.

Individuals concerned with the possibility of complications arising with their unemployment claims due to their immigration status should contact LSNV and set up an appointment. LSNV notes that since unemployment compensation benefits are earned, qualification for and receipt of benefits is not an adverse issue (i.e., public charge) for immigration/citizenship applications.

## Referrals to Legal Services of Northern Virginia (LSNV)

A Virginia resident can get help through Legal Services of Northern Virginia (LSNV) which provides free legal assistance with employment matters (occurring in Northern Virginia) for low-income residents. Low-income D.C. residents who have claims adjudicated in Virginia may be eligible for LSNV services offered. Subject to availability of staff or volunteers, LSNV will offer representation in claims before the VA Employment Commission for residents of the District of Columbia and Maryland. There is no need to contact the local (D.C. or Maryland) federally-funded legal services program for a referral; an individual seeking advice or assistance can contact any of the LSNV branch offices directly.

LSNV's Arlington office is closest to D.C.: 3401 Columbia Pike, Suite 301 Arlington, VA 22204. Additional offices are located in Alexandria, Fairfax, Fredericksburg, Loudoun, Prince William, and Route 1. To determine eligibility and schedule an intake, workers can: 1) [apply online](#); or 2) call the intake line at (703) 778-6800 from 9:30 am – 12:00 pm, 1:30 – 3:00 pm Monday – Thursday. The earlier in the claims process that a claimant seeks help, the greater the possibility of qualifying for representation. LSNV encourages applicants for legal services not to wait until receiving notice of a hearing, as it



## Unemployment Compensation

might be too late then to obtain access to counsel.

# **FAMILY and** **MEDICAL LEAVE**

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Federal Statute	29 U.S.C. § 2601 <i>et seq.</i>
Federal Regulations	29 C.F.R. § 825.100 <i>et seq.</i>
D.C. Statute	D.C. Code § 32-501 <i>et seq.</i>
D.C. Regulations	4 DCMR §§ 1600-1699
Federal Employees	5 U.S.C. §§ 6381-6387 <i>et seq.</i> ; 5 C.F.R. §§ 630.1201 <i>et seq.</i>
D.C. Employees	D.C. Code § 32-502 <i>et seq.</i>
West Key© System	Civil Rights, Disability (78k173)

## **Table: Statutes of Limitation**

Federal FMLA: either administrative complaint with DOL Office of Wage and Hour or private suit:	2 years, or 3 years if willful violation (29 U.S.C. § 2617(c))
D.C. FMLA: administrative complaint with D.C. Office of Human Rights (OHR)	1 year (D.C. Code § 32-509(a))
D.C. FMLA: private civil suit	1 year (D.C. Code § 32-510)
D.C. Safe and Sick Leave	3 years (D.C. Code §§ 32-531.10a)
D.C. Parental Leave: administrative complaint with OHR or private suit	1 year (D.C. Code §§ 32-521.01-521.05)

## **FMLA – Federal & D.C. Laws**

### **Basic Summary of the Laws**

#### **Federal Law**

The federal FMLA requires employers with **50 or more employees** within a 75-mile radius to provide up to **12 weeks of unpaid, job-guaranteed leave every 12 months** to qualified employees in the following instances:

- (1) The birth of a child and to care for the newborn child within 12 months of the birth;
- (2) The placement of a child for adoption or foster care and to care for the adopted or foster child within 12 months of the child entering the employee's home;
- (3) To recover from the employee's own serious health condition that makes the employee unable to perform the functions of his or her job;
- (4) To care for a child, spouse, or parent suffering from a serious health condition;
- (5) A qualified exigency arising out of a spouse, child, or parent who is a military member on active duty; and/or
- (6) To care for a spouse, child, parent, or next of kin service member with a serious injury or illness.<sup>47</sup>

*See* 29 U.S.C. § 2612(a)(1)-(3).

**Job-guaranteed leave** means that the employer, in most circumstances, must return the employee to the **same or equivalent job** after leave, even if the employee has been replaced in the interim. *See* 29 U.S.C. § 2614(a). An equivalent job is one that has comparable pay, benefits, responsibilities, and hours of work. *Id.* at § 2614(a).

Taking leave does not result in the loss of any employment benefits that had accrued prior to the date on which an employee commences leave. However, an employee who returns to work after FMLA leave is not entitled to accrue any seniority or employment benefits during the period of leave, including accrued vacation time during the leave. *See* 29 U.S.C. §§ 2614(a)(2)-(3).

An employee may not take leave intermittently or on a reduced-leave schedule to care for the birth of a child or for the placement of an adopted child *unless* the employee and the employer agree otherwise. *See* 29 U.S.C. § 2612(b)(1). An employee may take leave intermittently or on a reduced-leave schedule when medically necessary, either for the employee's own serious health condition or for the serious health condition of the

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<sup>47</sup> Where the leave is to care for a spouse, parent, child, or next of kin service member with a serious injury or illness, qualified employees may take up to 26 weeks of leave.

## Family and Medical Leave

employee's spouse, son, daughter, or parent. *See id.* An employee may also take leave intermittently or on a reduced-leave schedule to take care of a service member if the employee is the spouse, son, daughter, or parent of a covered service member. *See id.*

The employer may require an employee to transfer temporarily during the period of reduced-schedule leave to an available alternative position with equivalent pay and benefits that better accommodates recurring periods of leave. *See* 29 U.S.C. § 2612(b)(2).

### **D.C. Law**

One provision within the D.C. FMLA requires employers with **20 or more employees** in the District of Columbia to provide eligible employees with **up to 16 weeks of unpaid, job-guaranteed leave every 24 months** to qualified employees for **family leave**. Events that trigger the applicability of the section include:

- (1) The birth of a child of the employee;
- (2) The placement of a child with the employee for adoption or foster care;
- (3) The placement of a child with the employee for whom the employee permanently assumes and discharges parental responsibility; and/or
- (4) The care of a family member of the employee who has a serious health condition.

*See* D.C. Code § 32-502(a) (1)-(4).

A separate provision within the D.C. FMLA requires employers with 20 or more employees in the District of Columbia to provide eligible employees with up to 16 weeks of unpaid, job-guaranteed leave every 24 months to qualified employees for **medical leave**, defined as the serious health condition of the employee if the condition prevents the employee from performing his or her job responsibilities. *See* D.C. Code § 32-503(a).

Because of the way the D.C. FMLA is written, it appears that an eligible employee can use as many as 32 weeks of leave in a given 24-month period – 16 weeks for family leave and another 16 weeks for medical leave. The D.C. Municipal Regulations provide that the entitlement to 16 weeks of family leave during a 24-month period “shall be separate from and in addition to the entitlement to 16 weeks of medical leave during any 24-month period. This means that an eligible employee may take both as many as 16 weeks of medical leave and as many as 16 weeks of family leave during the same 24-month period, notwithstanding 29 C.F.R. § 825.701(a)(1).” D.C.M.R. § 4-1607. There is no case law on this point.

## Definitions

### Covered Employers

#### *Private Sector*

The federal FMLA covers private employers with more than **50 employees** at or within 75 miles of the employee's worksite, *see* 29 U.S.C. § 2611(2)(B)(ii), where the employer employs those 50 employees for each working day during each of 20 or more calendar workweeks in either the current or preceding year. *See* 29 U.S.C. § 2611(4)(A)(i). Determination of the number of employees for purposes of FMLA leave occurs at the time the employee gives notice of leave. 29 C.F.R. § 825.110(e).

The D.C. FMLA covers private employers with more than **20 employees in the District of Columbia**. *See* D.C. Code § 32-516(2).

#### *Public Sector*<sup>48</sup>

##### *D.C. Government Employees*

District of Columbia government employees are covered by both the D.C. and federal FMLA. *See* D.C. Code § 32-501(2); 29 U.S.C. § 101(4)(A)(iii) & (B).

##### *Federal Government Employees*

Federal employees are covered by a law that, while virtually identical to the federal FMLA, has limited enforcement mechanisms. *See* 5 U.S.C. §§ 6381-6387.

##### *Other Public Agency Employees*

Generally, the employees of public agencies are subject to the federal FMLA regardless of the number of employees employed. 29 U.S.C. § 2611(4)(A)(iii).<sup>49</sup>

##### *Special Rules for School Employees*

The **federal FMLA** has more restrictive FMLA rules for the instructional employees of public and private elementary and secondary schools, and public school boards. *See* 29

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<sup>48</sup> Note that the "self-care" provisions of the FMLA do not apply to state employees (D.C. is not a state). The Supreme Court held in *Coleman v. Court of Appeals of Maryland* that the FMLA's self-care provision is "not a valid abrogation of the States' immunity from suit," reasoning that the self-care provisions do not implicate the Equal Protection Clause of the Fourteenth Amendment - unlike the family care provision, which was designed to combat states' discriminatory employment practices against women. 132 S.Ct. 1327, 1338 (2012); *see Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 730 (2003).

<sup>49</sup> A public agency is defined according to section 3(x) of the Fair Labor Standards Act, 29 U.S.C. 203(x). *See* 29 C.F.R. §825.108(a).

## Family and Medical Leave

C.F.R. § 825.600(a). If such an employee needs a reduced schedule or intermittent leave that results in the employee being out “more than 20 percent of the total number of working days over the period the leave would extend,” then the employer can require the employee to choose either to:

- (1) Take leave for a period of a particular duration. This means that the employer can require uninterrupted leave, but cannot make it last longer than the time between the first and last days of the leave request.
- (2) Transfer the employee temporarily to an alternative position, which, although comparable in pay and benefits, is better suited to periods of intermittent leave than the employee’s regular position.

*Id.* at §825.601(1)(i)-(ii).

The federal FMLA also has rules pertaining to leave taken near the end of an academic term. If an instructional employee takes leave for at least three weeks beginning **before the five final weeks of the term**, the employer can require the employee to stay out until the end of the term if: (1) the leave will last more than three weeks; and (2) the employee would have returned during the term’s final three weeks. *Id.* at § 825.602(a)(1).

In addition, if the school employee requests leave for a reason other than his or her own serious health condition **during the five-week period at the end of the term**, different rules apply. If such an employee requests more than two weeks of leave during the five final weeks of the term and the employee would return to work during the term’s final two weeks, then the employer can require the worker to continue taking leave until the end of the term. *Id.* at § 825.602(a)(2). If the employee requests leave for more than five days **during the period three weeks before the end of the term**, then the employer can require the worker to continue taking leave until the end of the term. *Id.* at § 825.602(a)(3).

Under **D.C. law**, school employees’ family and medical leave is also more restricted. See D.C. Code § 32-506. A worker who is principally employed in an instructional capacity at a public or private elementary or secondary school, and who has a planned medical issue or would be out for more than 20 percent of the total number of working days, and complies with either the family leave provisions of D.C. Code § 32-502(g)<sup>50</sup> or the medical leave provisions of D.C. Code § 32-503(c),<sup>51</sup> may be required to:

- 1) Only take family and medical leave for the specific time required for the medical treatment; or

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<sup>50</sup> The **family leave** was foreseeable based upon planned medical treatment, the worker informed the employer in advance of the need for medical treatment and made reasonable efforts to schedule the medical treatment so as not to disrupt unduly the operations of the school.

<sup>51</sup> The **medical leave** was foreseeable based upon planned medical treatment, the worker informed the employer in advance of the need to undergo medical treatment and made reasonable efforts to schedule the medical treatment so as not to disrupt unduly the operations of the school.



## Family and Medical Leave

- 2) Temporarily transfer to another position that has the same benefits and pay, and fits the worker's need for time off.

*Id.* at § 32-506(a).

In addition, if a school employee takes family and medical leave five weeks before the end of the term, the school may require the worker to continue leave until the end of the term so long as the requested leave is for a minimum of three weeks and the worker would return to work during the three-week period prior to the end of the term. *Id.* at § 32-506(c). If during the last three to five weeks before the end of the term, the employee takes leave for at least two weeks and would return during the two-week period before the end of the term, or if the school employee requests family and medical leave for more than five days during the last three weeks of the term, the employer can require the worker to continue taking leave until the end of the term. *Id.*

### **Eligible Employees**

#### ***Federal Law***

Under the federal FMLA, the worker must have been employed by the same employer from whom the leave is requested for at least **12 months** before the request for leave, *and* the employee must have worked at least 1,250 hours during the 12 months prior to the request for leave (average of 24 hours per week). *See* 29 U.S.C. § 2611(2)(A). The 12 months an employee must have been employed need not be consecutive months, but the 12 total months of previous employment must have occurred within seven years preceding the leave. *See* 29 C.F.R. §825.110(b). If, however, the leave is occasioned by military service obligations to the National Guard or Reserves, employment prior to the break in service must be counted toward the 12-month and 1,250-hour requirements even if it is more than seven years prior to leave, as must the time that the employee would have worked for the employer but for mandatory military service. 29 C.F.R. § 825.110(b)(2)(i). There is also an exception from the seven-year cap if an employer has executed a written agreement to rehire the employee after the break in service. 29 C.F.R. § 825.110(b)(2)(ii).

A “key employee” – one who is salaried and among the highest-paid 10 percent of all the employees employed by the employer within a 75-mile radius of the worksite – is not necessarily eligible to take leave with guaranteed job restoration. *See* 29 C.F.R. § 825.217. The employer may deny job restoration to such an employee if restoration would result in “substantial and grievous economic injury to the operations of the employer.” *See* 29 C.F.R. § 825.216(b).

#### ***D.C. Law***

Under D.C. law, to be eligible for family or medical leave, a worker must be employed by the employer for **one year, without a break in service**, and have worked for at least 1,000 hours (average of 19 hours per week) during the 12-month period

immediately preceding the request for the family or medical leave. *See* D.C. Code § 32-501(1).

## **Permissible Reasons for Taking FMLA/DCFMLA Leave**

### **Birth, Adoption & Foster Care**

Under D.C. and federal law, an eligible employee working for a covered employer who is a parent – mother *or* father – can take family and medical leave to bond with a newborn, newly adopted child, or newly-placed foster child. The leave must be taken within 12 months of the birth or placement of the baby or child. *See* D.C. Code §§ 32-502(a), (b); 29 U.S.C. §§ 2612(a)(1)(a), (b). Under the federal FMLA, leave for the placement of an adopted child may include time to “travel to another country to complete an adoption.” 29 C.F.R. § 825.121(a)(1). Under the D.C. law, a qualified employee working for a covered employer may also take family and medical leave for the placement of a child with the employee for whom the employee permanently assumes parental responsibility even where there is not a formal adoption or foster process. *See* D.C. Code § 32-502(a).

### **To Heal from One’s Own “Serious Health Condition”**

Under both D.C. and federal law, an eligible employee working for a covered employer can take family and medical leave to heal from his or her own serious health condition.<sup>52</sup> *See* D.C. Code § 32-503; 29 U.S.C. § 2612(a)(1)(D). D.C. law and federal law, however, differ in their definitions of what constitutes a “serious health condition.”

### **To Care for A Family Member with a “Serious Health Condition”**

#### ***Federal Law***

Under the federal FMLA, an eligible employee working for a covered employer can take family and medical leave to care for a **parent, spouse, son or daughter** who has a serious health condition. *See* 29 U.S.C. § 2612(a)(1)(C).

A parent means “a biological parent, adoptive, step or foster father or mother, or any other individual who stood in *loco parentis* to an employee when the employee was a son or daughter.” 29 C.F.R. § 825.122(b). The definition of parent specifically does not include parents-in-law. *See id.*

A spouse means “husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common-law marriage in States where it is recognized.” 29 C.F.R. § 825.122(a).

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<sup>52</sup> A state employee cannot sue the state entity that employs him for violating the FMLA’s “self-care” provision, *see supra* note 48.

A son or daughter is “a biological, adopted or foster child, a stepchild, a legal ward, or a child of a person standing in *loco parentis*, when the child is under 18 years of age, or age 18 or older and ‘incapable of self-care because of a mental or physical disability.’” 29 C.F.R. § 825.122(c).

### ***D.C. Law***

Under D.C. law, an eligible employee working for a covered employer can take family and medical leave to care for a family member who has a serious health condition. *See* D.C. Code § 32-502(a)(4).

A **family member** includes a person related by “blood, legal custody or marriage.” D.C. Code § 32-501(4)(A). A child is a “family member” for purposes of the D.C. FMLA if the worker “assumes and discharges parental responsibility” for the child and the child lives with her. *Id.* at § 32-501(4)(B). Finally, any person with whom the worker has “shared a mutual residence” within the last year, and with whom the worker “maintains a committed relationship,” is also considered a family member. *Id.* at § 32-501(4)(C). This includes same-sex and common-law spouses. *See also* D.C. Code §§ 32-701 – 32-710 (domestic partnership registration and health-care benefit expansion).

The definition of **parent** is much broader under D.C. law than under the federal FMLA. Under D.C. law, a parent is defined as:

- (1) The natural mother or father of a child;
- (2) The person who has legal custody of a child;
- (3) The person who acts as a guardian of a child regardless of whether he or she has been appointed legally as such;
- (4) An aunt, uncle, or grandparent of a child; or
- (5) A person who is married to a person listed here.

*See* D.C. Code § 32-521.01(2).

### **To Care for a Covered Service Member with a Serious Injury or Illness**

Under the federal FMLA, an eligible employee working for a covered employer can take up to 26 workweeks of leave to care for a covered service member with a serious injury or illness if the employee is the spouse, parent, son or daughter, or next of kin of the service member. *See* 29 U.S.C. § 2612(a)(3). The rules for this section are extensive. View the U.S. Department of Labor Wage and Hour Division’s Factsheet for more information: <https://www.dol.gov/whd/regs/compliance/whdfs28ma.pdf>.

## Definition of “Serious Health Condition”

### Federal Law

Under the federal FMLA, a **serious health condition** is defined as an “illness, injury, impairment or physical or mental condition that involves (A) inpatient care in a hospital, hospice, or residential medical care facility ...;” or (B) “continuing treatment by a health-care provider.” 29 C.F.R. § 825.114(a). The federal regulations clarify that a serious health condition involves, *inter alia*, a period of incapacity for more than **three consecutive calendar** days, **AND** involves continuing treatment by a health-care provider:

- **two** or more visits to a doctor (or a nurse or physician’s assistant under a doctor’s direct supervision), **OR**
- **one** visit that results in a “regimen of continuing treatment” under the supervision of a doctor. A course of prescription medication is a regimen of continuing treatment, but a course of treatment involving over-the-counter medication or home remedies such as rest or exercise are not enough in themselves to constitute a regimen of continuing treatment.

29 C.F.R. § 825.115(a)(2)(i).

Visits for terminal or chronic conditions are also covered by FMLA. *See* 29 C.F.R. § 825.115(c).

Moreover, *any* period of incapacity due to pregnancy, or for prenatal care, is a serious health condition for purposes of the FMLA, regardless of whether the woman has visited a health-care provider. *See* 29 C.F.R. §825.115(b).

### **Serious health condition under federal law**

In-patient care	<b>OR</b>	More than three full consecutive days of incapacity (i.e. inability to work, attend school, perform other regular activities) + two in-person doctor visits (the first being within the first seven days after the onset of incapacity / leave and the second being within the first 30 days, barring extenuating circumstances) <b>OR</b> one visit with regimen of continuing treatment	<b>OR</b>	Incapacity due to terminal or chronic condition (requiring “periodic treatment” at least twice a year)	<b>OR</b>	Incapacity due to pregnancy or for prenatal care
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**The following conditions are not covered under FMLA:** the common cold, minor ulcers, headaches, and routine dental or orthodontic procedures. *See* 29 C.F.R. § 825.114(b)-(d); *but see Miller v. AT&T*, 250 F.3d 820 (4th Cir. 2001) (though ordinarily flu does not meet the definition of a “serious health condition,” FMLA coverage of an episode of the flu is not precluded when the regulatory definition of a serious health condition is satisfied, e.g. with a particularly severe flu).

### **D.C. Law**

Under the D.C. FMLA, a **serious health condition** means “physical or mental illness, injury or impairment that involves (A) inpatient care in a hospital, hospice, or residential health-care facility; or (B) continuing treatment or supervision at home by a health-care provider or other competent individual.” D.C. Code § 32-501(9).

## **Calculating the Number of Weeks of Leave: 12 Months v. 24 Months**

Under both federal and D.C. leave laws, it is important to determine whether an employee has used all of his or her family and medical leave in the current 12-month or 24-month period. This can be complicated because of how the periods are calculated.

### **Federal Law**

Under the federal FMLA, the 12-month period during which a qualified employee is entitled to leave can be:

- (1) The calendar year;
- (2) Any consecutive 12-month period, such as fiscal year, a year required by State law, or a year starting on the employee’s anniversary date;
- (3) The 12-month period measured forward from the date any employee’s first FMLA leave begins; or
- (4) A rolling 12-month period measured backward from the date an employee uses any FMLA leave.

*See* 29 C.F.R. § 825.200(b).

At least one court has held that under 29 U.S.C. § 2612(a)(1), an employer must inform its employees which of the four methods it will use to calculate the 12 weeks of leave before it can use that calculation against an employee. *See Bachelder v. America West Airlines, Inc.*, 259 F.3d 1112 (9th Cir. 2001) (holding if employer does not notify employee about which formula will be used, then the method most favorable to employee applies).

The U.S. Department of Labor regulations state that employers, not employees, are

permitted to choose the method, provided that they apply it “consistently and uniformly to all employees.” 29 C.F.R. § 825.200(d)(1). The regulations go on to state that an employer who wishes to change the method used in his or her workplace must give at least **60 days’ notice** to all employees, and must implement the transition from one method to the next in such a way as to preserve for each employee their full entitlement to FMLA leave. *Id.*

Observance of a holiday during an employee’s 12 weeks of leave does not affect the 12-week entitlement, and the weeks will still count as full weeks (e.g., leave during the week of Thanksgiving would still count as a full week of leave). If the leave is intermittent or partial weeks, however, the holiday does not count against the 12 weeks of leave unless the employee was scheduled and expected to work on the holiday. 29 C.F.R. § 825.200(h)

### **D.C. Law**

The D.C. law offers little guidance on how to calculate the 24-month period. The statutory language states that an employee cannot take more than 16 weeks of leave during **any** 24-month period. *See* D.C. Code §§ 32-502(a); 32-503(a). As noted earlier, this repetition has led many advocates to argue that employees are eligible for as many as 32 weeks of leave – 16 for medical and 16 for family – every 24 months. Because the law does not provide instructions regarding how to measure the 24-month period, the worker and/or his or her advocate should use the federal method that is most favorable to the employee.

## **Calculating Intermittent and Reduced-Schedule Leave**

Employees do not have to take FMLA leave all at once. Both the D.C. and the federal FMLA laws permit certain employees to take intermittent leave and reduced-schedule leave. **Intermittent leave** is leave taken in specific blocks of time due to a single reason. **Reduced-schedule leave** is leave that reduces the number of hours that an employee works in a given work period. *See* D.C. Code §§ 32-502 (c), (d); 32-503(a); 29 CFR § 825.203(a). The amount of time taken off, either by intermittent leave or a reduced schedule, must still not exceed the total amount allowed by law.

### **Federal Law**

Under the federal FMLA, an employer can only count the amount of leave that the employee actually takes. *See* 29 C.F.R. § 825.205(a). 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 that it is one hour or less.” 29 C.F.R. § 825.203(d).

If an employee normally works a part-time schedule or a schedule that varies, the employer must calculate the leave taken by the employee on a “pro rata or proportional

basis by comparing the new schedule with the employee's normal schedule." 29 C.F.R. § 825.205(b).

### **D.C. Law**

Under the D.C. law, an employee's 16 weeks of family leave (but not medical leave) may, with the agreement of employer and employee, be taken on a reduced schedule over a period of time, provided that the time does not exceed 24 consecutive weeks. *See* D.C. Code §32-502(d).

Both medical and family leave may be taken intermittently "when medically necessary." *Id.* at §§ 32-502(c); 32-503(a).

## **Notice Requirements**

### **Employer Must Post Notice of Rights**

Both the D.C. law and the FMLA require employers to post notices that inform workers about their leave rights, and employers must post these notices in a conspicuous area of their workplace. *See* D.C. Code § 32-511; 29 C.F.R. § 825.300. In D.C., a willful failure to do this can result in a \$100 fine for each day that the notice is absent. *See* D.C. Code § 32-511(b).

Under federal law, a willful failure to post the notice can result in a civil penalty of no more than \$100 for each offense, and the offending employer cannot penalize any employee who failed to provide advance notice of the need for FMLA leave. *See* 29 C.F.R. § 825.300(b). Federal law also requires that the public notice be in the language spoken by the majority of employees. *Id.* at § 825.300(c).

### **Employers Must Provide FMLA Information to Employee**

The FMLA's regulations now set forth four types of notice about an employee's FMLA rights that an employer must provide to an employee, and how those types of notice must be provided. They are:

#### ***General notice***

Every employer covered by the FMLA must post on its premises a general notice about FMLA rights, either in a poster or electronically. In addition, employers covered by the FMLA must apprise each new employee of his or her FMLA rights in writing, in an employee handbook, flier, email, or otherwise, "upon hiring." 29 CFR § 825.300(a).

### ***Notice of Eligibility and Rights and Responsibilities***

When an employee requests (for the first time) leave that may be FMLA-qualifying, the employer must notify the employee of his or her eligibility to take FMLA leave within five business days. If the employee is not eligible for FMLA leave, the employer notice must state at least one reason why the employee is ineligible (e.g., they have not worked for the employer for at least 12 months). 29 CFR § 825.300(b).

At the same time it provides the Eligibility notice, the employer must also provide a written description of the FMLA process, the employee's obligations during that FMLA process, and the consequences of the employee's failure to meet these obligations. Such notice must include: (1) an explanation that if FMLA leave is granted it will be deducted from the employee's 12-week allowance, (2) requirements for employees to submit medical certifications and the consequences for failing to do so, (3) any employer requirements regarding the substitution of paid leave such as sick time or vacation, (4) requirements for the employee to maintain health benefits during FMLA leave, including payment of premiums, (5) key employee status, if applicable, (6) employee rights to maintain benefits and to job restoration following leave, and (7) the employee's potential liability for unpaid health insurance premiums if the employee fails to return to work following leave. 29 CFR § 825.300(c). The "eligibility notice" and the "rights and responsibilities notice" are both on the same form, available online at <http://www.dol.gov>.

### ***Designation notice***

Within five days of receiving sufficient information from the employee and his or her health-care provider, the employer must notify the employee in writing whether the requested leave is FMLA-qualifying. 29 CFR § 825.300(d). The designation notice must also include any "fitness-for-duty" certification that the employer may later request. It must also inform the employee of the amount of leave that will be deducted from the 12-week FMLA allowance for the particular period of FMLA leave; if this calculation cannot be performed at the time the leave is granted (e.g., where the amount of leave is unforeseeable or sporadic), the employer must provide such information upon an employee's request, but not more often than every 30 days. *Id.* A "designation notice" form approved by the DOL is provided online at <http://www.dol.gov/>.

An employer may retroactively designate leave as FMLA leave, but only if the retroactive designation does not cause harm or injury to the employee. 29 C.F.R. § 825.300(e).

## **Employee Requests for Leave**



## **Employee Need Not Mention FMLA**

Neither the D.C. nor the federal FMLA obligates employees to actually invoke or even mention the FMLA to qualify for taking FMLA leave. To trigger rights under the FMLA, employees must “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.” 29 C.F.R. § 825.302(c). This means that, for example, an employee is covered if she mentions only that she needs to take time off to spend time with her newborn child. For leave pursuant to a qualified exigency, notice must be given of the reason for the exigency and that a covered military member is on active duty or called to active-duty status. *Id.* For leave to care for a family member or a service member with a serious health condition, notice must be given that the family member or service member is unable to perform daily activities or is seriously injured or ill, and the anticipated duration of the absence. *Id.*

The federal DOL regulations state that it is the employer’s responsibility to inquire further if he or she needs more details to determine whether the FMLA is applicable. *See* 29 C.F.R. § 825.302(c). Numerous courts, however, have held that the employee must give the employer more information than just saying he or she is “sick.” *See, e.g., Collins v. NTN-Bower Corp.*, 272 F.3d 1006 (7th Cir. 2001) (holding that as a matter of law telling an employer that one is “sick” represents insufficient notice of a request to take FMLA leave, as the descriptor “sick” does not allow an employer to determine whether the leave would qualify as a “serious health condition”). Moreover, “[w]hen an employee seeks leave due to a FMLA-qualifying reason for which the employer has previously provided FMLA-protected leave, the employee must specifically reference the qualifying reason for leave or the need for FMLA leave.” 29 C.F.R. § 825.302(c).

## **Time for Making Request**

Under both the D.C. and the federal FMLA, employees are generally required to request FMLA leave 30 days before the leave is needed,<sup>53</sup> or as soon as practicable if the need is foreseeable but 30 days’ notice is not practicable. *See* 29 C.F.R. § 825.302(a).<sup>54</sup> An employee who could not have reasonably foreseen the need for leave in advance, however, is required to notify the employer per the employer’s “usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances.” *See* 29 C.F.R. § 825.302(a), (d); 4 DCMR § 1608.1-2. For example, if an employer typically requires employees out on ordinary sick leave to call in at the beginning of the day to report their

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<sup>53</sup> Notice of foreseeable leave pursuant to a qualified exigency must be given as soon as practicable, regardless of how far in advance the leave is foreseeable.

<sup>54</sup> “‘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. When an employee becomes aware of a need for FMLA leave less than 30 days in advance, it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day. In all cases, however, the determination of when an employee could practicably provide notice must take into account the individual facts and circumstances.” 29 C.F.R. §§ 825.302(b). When an employee gives fewer than 30 days’ notice, the employee “must respond to a request from the employer to explain why it was not practicable to give 30 days’ notice.” 29 C.F.R. § 825.302(a).

absence, an employee out on FMLA leave may be similarly required to abide by the employer's normal call-in procedures. Failure of an employee to properly notify an employer of an FMLA-related absence may cause delay or denial of FMLA protections, but an employer cannot deny FMLA leave on this ground if the employee has given at least verbal notice. 29 C.F.R. § 825.302(d).

The D.C. regulations further specify that an employee dealing with an emergency that prevents him or her from notifying the employer prior to the first day that he or she is out of work shall request leave no later than 2 business days after his or her absence begins. *See* 4 DCMR § 1608.3.

## Medical Certification

Under both the D.C. and federal FMLA, an employer may choose to require an employee to provide a written certification from a health-care provider of the serious health condition and the need for leave. *See* D.C. Code § 32-504; 29 U.S.C. § 2613. Exactly what information the employer may request is slightly different under D.C. and federal law.

### Federal Law

The medical certification requirements under the federal FMLA are identical to D.C. law, explained above, except that in the case of a family member or covered service member<sup>55</sup> needing care, the certification must state that the worker is needed to care for that person, and contain an estimate of the amount of time needed to do so. *See* 29 U.S.C. § 2613(b), 29 C.F.R. § 825.310. For leave pursuant to a qualifying exigency arising out of the active duty or call to active-duty status of a covered military member, an employer may require additional documentation to indicate the need for leave. *See* 29 C.F.R. § 825.309.

If an employer intends to request medical certification, it should do so within five business days after the employee provides notice of the need for FMLA leave. 29 C.F.R. § 825.305(b). The employee must then provide the requested certification to the employer within the timeframe requested by the employer, which must allow at least 15 calendar days after the employer's request. *Id.* If "it is not practicable under the particular circumstances" for the employee to provide the requested certification "despite the employee's diligent, good faith efforts," however, then the normal 15-day deadline for providing the certification would not apply. *Id.* This may be the case, for example, if the employee has requested the certification from his health-care provider but the health-care provider has not yet returned it to him, due to no fault of the employee, or because the

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<sup>55</sup> An employer may also request: the name of the covered service member; the relationship of the covered service member to the employee; the service member's military branch, rank, and unit assignment; the name of the military medical treatment facility, if assigned; whether the service member is on the temporary disability retired list; and a description of care to be provided to the service member and an estimated amount of leave. 29 C.F.R. § 825.310(c).

employee's medical condition has prevented him from communicating more promptly with his health-care provider.

If the employer feels that the certification provided by the employee fails to provide necessary information regarding the employee's FMLA leave request, it must notify the employee of this, in writing; the employee then has seven days to cure the deficiency. If the employee fails to provide the missing information, the employer may deny the request for leave. 29 C.F.R. § 825.305(c), (d).

Additionally, should the employer need clarification or authentication of information provided by the employee on the certification form, a representative of the employer (e.g., a human resources employee, leave administrator, or management official) may contact the employee's health-care provider directly to seek that information; the employee's direct supervisor is expressly forbidden from contacting the health-care provider. 29 CFR § 825.307(a). The employer may not ask the health-care provider for additional medical information beyond that required by the standard DOL FMLA certification form.<sup>56</sup> *Id.*

### ***Medical Recertification***

If an employee's medical condition is an ongoing one of indefinite duration, the employer can request that the employee's health-care provider recertify the condition every six months. 29 C.F.R. § 825.308(b). The employer may also request recertification during any new "leave year." 29 C.F.R. § 825.305(e). This is especially relevant in cases where the employee requires intermittent leave over an extended period to deal with chronic or ongoing qualifying conditions, e.g., asthma or diabetes.

If the leave requested for a serious health condition is limited and not ongoing, an employer may request recertification after the length of leave originally requested (e.g., after eight weeks if eight weeks was originally requested), or more quickly if the circumstances have changed significantly (e.g., if the nature or duration of the leave requested changes significantly, or if the employer receives new information that suggests that the FMLA leave may have been used improperly). 29 C.F.R. § 825.308(a), (b), and (c).

If neither of the above exceptions applies, the employer may request recertification as frequently as every 30 days, in connection with the employee's absence. *See* 29 C.F.R. § 825.308(a).

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<sup>56</sup> The FMLA does not prevent an employer from properly following the information-gathering procedures authorized by another statute, and then using the information when determining eligibility for FMLA leave. For example, if the employee's serious health condition may also constitute a disability under the ADA, and if that employee has requested an accommodation under the ADA, the employer may consider information obtained through the ADA information-gathering process. 29 CFR § 825.306(d).

### ***Fitness-for-Duty Certifications***

Before allowing an employee on FMLA leave for the employee's own serious health condition to return to work, an employer may generally require the employee to obtain a fitness-for-duty certification from his or her health-care provider. The employee's obligation to provide complete certification in the fitness-for-duty context is the same as in the initial medical certification process. 29 C.F.R. § 825.312(a). Additionally, the employer may contact the employee's health-care provider directly for purposes of authenticating or clarifying the fitness-for-duty certification, in the same manner as it would for an initial medical certification. *Id.* The employer can require that the fitness-for-duty certification address the employee's ability to perform the essential job functions of the employee's job, provided that it provides the employee with a list of those functions no later than its deadline to provide notice that the leave will be designated as FMLA leave. 29 C.F.R. § 825.312(b).

If the employee is taking FMLA leave on an intermittent or reduced-leave schedule basis, the employer may request a fitness-for-duty certification as frequently as once every 30 days, but only if reasonable safety concerns exist regarding the employee's continuing ability to perform his or her duties based on the serious health condition for which the employee took such leave. 29 C.F.R. § 825.312(f).

The federal law also contains additional certification requirements for **intermittent and reduced-schedule leave**. See 29 U.S.C. § 2613(b)(5)-(7). As under D.C. law, **second and third opinions** may be required under federal law. See 29 U.S.C. § 2613(c)-(d).

There are sample certification forms in the DOL regulations that many employers and health-care providers have used as models and that are available online:

Certification for Serious Injury or Illness of Covered Service Member (WH-385):  
<http://www.dol.gov/whd/forms/WH-385.pdf>.

Certification of Health-Care Provider for Employee's Serious Health Condition (WH-380-E):  
<https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/WH-380-E.pdf>.

Certification of Health-Care Provider for Family Member's Serious Health Condition (WH-380-F): <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/WH-380-F.pdf>.

Certification of Qualifying Exigency For Military Family Leave (WH-384):  
<http://www.dol.gov/whd/forms/WH-384.pdf>.

### **D.C. Law**

Under D.C. law, employers may require certification from a health-care provider, defined as "any person licensed under federal, state, or District law to provide health-care services." The notice should include:

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- (1) The date on which the serious health condition began;
- (2) The probable duration of the condition;
- (3) The “appropriate medical facts within the knowledge of the health-care provider” that would entitle the worker to take leave; AND
- (4) (a) If the worker is taking medical leave, a statement that the worker is unable to perform the functions of his or her position; OR  
(b) If the worker is taking family leave, an estimate of the amount of time that the employee is needed to care for the family member.

*See D.C. Code § 32-504(b).*

The employer may request **second and third opinions**, but the employer is required to pay for these additional opinions, and the third opinion is final and binding on both the employer and the employee. *See D.C. Code § 32-504(d), (e).* Recertification may be required on a “reasonable basis.” D.C. Code § 32-504(f).

An employer must keep any medical information obtained from a certification request confidential. If the employer willfully violates this confidentiality provision, he or she can be assessed a civil penalty of \$1,000 for each offense. *See D.C. Code § 32-504(g).*

## Use Paid Leave Concurrent with FMLA/DCFMLA Leave

Under the FMLA, an employer’s normal rules for requesting paid leave govern an employee’s ability to cover a period of unpaid FMLA leave with paid leave. Under the federal FMLA, the employer may require use of paid leave before beginning unpaid leave. *See 29 C.F.R. § 825.207(c).* But **under the D.C. FMLA, an employee *may* use paid leave but cannot be required to use the paid leave before beginning unpaid leave.** *See D.C. Code § 32-502(e)(2).* The 12-week period begins when FMLA leave is taken, even if a portion of it is paid sick leave. Workers’ compensation pay may similarly be counted against FMLA leave entitlement. In the case of public employees, accrued compensatory time may be substituted for FMLA leave in the same way as private employees may substitute sick leave time. 29 C.F.R. § 825.207. But federal employees cannot be required to substitute their paid leave for any part of their FMLA leave. *See 5 C.F.R. § 630.1205(d).*

## Continuation of Health Benefits

Under both the D.C. and the federal FMLA, an employer must continue to pay for an employee’s group health insurance benefits during the leave on the same terms that the employer paid for such benefits before the employee took leave. *See D.C. Code § 32-505(b)(1); 29 U.S.C. § 2614(c)(1).* The employee out on leave is still required to make any contribution to the group health plan that he or she would have made if the employee had

not taken leave. *See* D.C. Code § 32-505(b)(2); 29 C.F.R. § 825.210(a).

FMLA enables an employer to recover from the employee the cost of continuing health benefits during leave if the employee does not return from leave, unless the reason for not returning is beyond the employee's control. *See* 29 U.S.C. § 2614(c)(2).

## **Attendance Bonuses**

An employer may decline to provide a bonus award based upon "achievement of a specified goal such as hours worked, products sold, or perfect attendance" if an employee has not met the requisite threshold for the bonus due to FMLA leave. To do so, however, an employer must treat FMLA and similar non-FMLA leave the same. 29 C.F.R. § 825.215(c)(2)

## **Prohibited Employer Acts (including Retaliation)**

### **Federal Law**

FMLA prohibits interfering with, restraining, denying the exercise of, or denying attempts to exercise, any rights provided by the FMLA. 29 U.S.C. § 2615(a)(1), 29 C.F.R. § 825.220(a)(1). FMLA also prohibits from discharging or discriminating against any person for opposing or complaining about any unlawful practice under the FMLA. 29 U.S.C. § 2615(a)(2), 29 C.F.R. § 825.220(a)(2). The language of the regulations makes clear that "interfering with" includes retaliating against an employee simply for exercising the right to take FMLA leave, not only for opposing unlawful practices. *See* 29 C.F.R. 825.220(c) ("the Act's prohibition against 'interference' prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempting to exercise FMLA rights"). However, some courts in some jurisdictions have claims for "retaliation" under the FMLA extend only to retaliation for opposing or complaining about unlawful practices, not for taking leave. *See e.g., Deloatch v. Harris Teeter, Inc.*, 797 F. Supp. 2d 48, 68 (D.D.C. 2011) (granting summary judgment in employer's favor and holding that the FMLA's retaliation provision only makes it unlawful for an employer to discharge or discriminate against an individual for "opposing any practice made unlawful" under the statute, which does not include taking leave). Other D.C. district court opinions come to different conclusions. *See Hopkins v. Grant Thornton Int'l*, 851 F. Supp.2d 146, 153 (D.D.C. 2012) (holding that there existed a *prima facie* case for retaliation where the plaintiff alleged he requested FMLA leave and was terminated because of his request).

### **D.C. Law**

D.C. law prohibits an employer from discriminating against or discharging someone because he or she:

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- “opposes any practice made unlawful” by the D.C. FMLA;
- files or attempts to file a charge based on the D.C. FMLA;
- institutes, tries to institute, or helps someone else to institute a legal proceeding based on the D.C. FMLA; or
- gives any information or testimony in connection with an investigation or proceeding related to FMLA leave.

An employer is also prohibited from interfering with, restraining, or denying the exercise of or the attempted exercise of any right given by the D.C. FMLA. *See* D.C. Code § 32-507.

## Pursuing FMLA Claims

### Damages

#### *Federal Law*

The federal FMLA regulations state that an employee who files a case in federal district court may receive wages, employment benefits, and other compensation denied or lost to the employee as a result of the violation that are “justified by the facts of a particular case.” 29 C.F.R. 825.400(c).

Additionally, for violations in which the employer has not denied the employee any tangible amount or benefit, such as when an employer illegally refuses to grant FMLA leave, the employee can receive payment for any actual monetary loss that he or she suffers as a result of the violation. This can include, for example, the cost of providing care for the family member the worker would have cared for had leave not been denied, up to an amount equal to 12 weeks of wages for the employee, plus interest.

A successful litigant may also be able to receive:

- (1) liquidated damages, especially if the violation was willful;
- (2) equitable relief, including reinstatement and/or promotion; and
- (3) reasonable attorneys’ fees and “other costs of the action from the employer in addition to the judgment awarded by the court.”

29 C.F.R. § 825.400(c).

A state and WMATA employee cannot sue the state entity that employs him for violating the FMLA’s “self-care” provision, which requires employers to provide leave for recovery from the employee’s own serious health condition. *See supra* note 48.

### ***D.C. Law***

If an employee successfully proves that his or her employer violated the D.C. FMLA, the employer is liable for any wages, salary, employment benefits, and other compensation denied or lost to the employee due to the violation, plus interest. *See* D.C. Code § 32-509(b)(6)(A). The employer may also be liable for consequential damages, which can be no larger than three times the amount paid in wages, salary, employment benefits, or other compensation denied or lost to the employee. *Id.* at § 32-509(b)(6)(B). Additional liabilities include medical expenses not covered by insurance, as well as reasonable attorneys' fees and court costs. *Id.* at § 32-509(b)(6)(B)(ii). If the fact-finder determines, however, that the employer's violation was made in good faith and the employer reasonably believed that he was not violating the law, damages can be reduced. *Id.* at § 32-509(b)(6)(C).

### **Enforcement Procedures**

#### ***Federal Law***

Under the FMLA, complaints may be made to the Wage & Hour Division, U.S. Department of Labor. *See* 29 U.S.C. § 2617(c)(1)-(2). In D.C. and parts of Maryland, the Wage and Hour Division of the DOL can be reached through the Baltimore District Office at (410) 962-6211. The Baltimore District Office address is Room 207, Appraisers Stores Building, 103 South Gay St., Baltimore, MD 21202. There is also a Hyattsville Area Office, 301-436-6767, 6525 Belcrest Road, Suite 250, Hyattsville, MD 20782. In Northern Virginia, complaints may be made to the Arlington Area Office, 703-235-1182, 2300 Clarendon Blvd., Suite 503, Arlington, VA 22201. Any office can be reached by calling 1-866-4-USWAGE (1-866-487-9243).

Workers also can file claims directly in federal district court, without any exhaustion requirement. However, if the worker has made a complaint to the DOL, the worker's right to sue terminates if the DOL files suit on the employee's behalf seeking either injunctive or monetary relief. *See* 29 U.S.C. § 2617(a)

Statute of Limitations: Complaints must be filed **within two years** of the "last event constituting the alleged violation for which the action is brought," or within three years if the violation is willful. *See* 29 U.S.C. § 2617(c)(1)-(2). The statute of limitations is not tolled by filing with DOL.

### ***D.C. Law***

Under the D.C. law, complaints can be made to the D.C. Office of Human Rights, located at 441 4th St. NW, Suite 570 North (Metro: Judiciary Square) (202) 727-4559. The office is open Monday through Friday from 8:30 a.m. to 5 p.m. The Office may investigate, hold a hearing, and order the employer to pay the employee the damages described above in the Damages section. *See* D.C. Code § 32-509. The Office must complete its investigation



and hearing within 150 days after the complaint is filed. *Id.* at § 32-509(e).

Employers also may be sued directly, by either the employee or the city, in a civil action in D.C. Superior Court, and attorneys' fees are available under the law. *See* D.C. Code § 32-509(b)(7). A worker need not exhaust administrative remedies before filing in court, however if a worker files an administrative charge with the D.C. Office of Human Rights and then decides to go to court, the worker must withdraw the charge from the D.C. Office of Human Rights prior to filing. *Simmons v. District of Columbia*, 977 F. Supp. 62, 65 (D.D.C. 1997); *Id.* at § 32-509(e).

Statute of Limitations: Complaints must be filed **within one year of the violation or discovery of the violation**. *See* D.C. Code § 32-509(a); D.C. Code § 32-510. The DCFMLA regulations state that filing with the D.C. Office of Human Rights will toll the statute of limitations on a DCFMLA claim, though the statute itself is silent on this question. 4 D.C.M.R. § 1610.3. D.C. employees must also submit notice to the Office of Risk Management within six months of a DCFMLA violation. (See [\*Tort Claims against the D.C. Government\*](#) for claim guidance).

## **Other Litigation Issues**

### ***Personal Liability of Employers***

The federal FMLA defines employer to include individuals as employers. *See* 29 U.S.C. § 2611(4)(A); *see also* 29 C.F.R. § 825.104(d); *Darby v. Bratch*, 287 F.3d 673 (8<sup>th</sup> Cir. 2002) (FMLA's language clearly allows for individual liability). Besides relying on the FMLA's language, courts have also interpreted its definition of "employer" by seeking guidance from the almost identically worded definition in the Fair Labor Standards Act, which provides for individual liability. *See Wascura v. Carver*, 169 F.3d 683, 685-87 (11<sup>th</sup> Cir. 1999) (guided by FLSA decisions; noting in dicta that individual, at least in the private sector, may be an employer within meaning of FMLA); *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132 (2d Cir. 1999) (FLSA provides for personal liability; applying "economic reality" test).

A public officer sued in his individual capacity can also usually be an employer within the meaning of the FMLA. *See Darby*, 287 F.3d at 681 (holding there is no reason to distinguish employers in public sector from those in private sector."); *Lunder v. Endicott*, 253 F.3d 1020, 1022 (7<sup>th</sup> Cir. 2001); *but see Wascura*, 169 F.3d at 686-87 (holding public officers sued in their individual capacities cannot be employers within meaning of FMLA).

Individuals are also liable as employers under the D.C. FMLA. Under the D.C. FMLA, "employer" is defined to include "any individual ... who uses the services of another individual for pay in the District." D.C. Code §32-501(2).

### ***Eleventh Amendment Immunity***

## Family and Medical Leave

States, as employers, may be sued under the FMLA **only for violations of the family-care leave provisions**, not for violations of the right to leave to care for one's own serious health condition. *See Nev. Dep't of Hum. Resources v. Hibbs*, 538 U.S. 721 (2003). The reason for the distinction is the Eleventh Amendment, which protects states' sovereign immunity from private lawsuits. Congress may abrogate that sovereign immunity if it unequivocally intends to do so and acts pursuant to a valid exercise of its power under Section 5 of the Fourteenth Amendment. After a number of Circuit Courts of Appeals found all or part of the FMLA's provision for private suits unconstitutional, **the Supreme Court clarified that the protections for family care are a valid exercise of Section 5 authority because they seek to remedy an extensive history of sex discrimination in states' leave policies**. Unlike the family-care provisions, however, the self-care provisions are not sufficiently related to the goals of the Fourteenth Amendment to justify abrogation of state sovereign immunity. *Id.*

This decision is unlikely to impact the rights of D.C. government employees because D.C. is not a state. *See Alden v. Maine*, 527 U.S. 706 (1999).

### ***Undocumented Workers***

Undocumented workers can file claims under the D.C. and federal FMLA laws, but a developing line of cases may limit the **back pay** remedies available to them. In March 2002, the Supreme Court held that the National Labor Relations Board erred in awarding back pay for work not performed to an undocumented immigrant, arguing that it would force employers to violate Immigration law. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002); *but see Escobar v. Spartan Sec. Serv.*, 281 F.Supp.2d 895, 897 (S.D. Tex.2003) (holding that *Hoffman* "did not specifically foreclose all remedies for undocumented workers under either the National Labor Relations Act or other comparable federal labor statutes"); *Flores v. Albertsons, Inc.*, 2002 WL 1163623, at \*5 (C.D. Cal. Apr. 9, 2002) (finding *Hoffman* inapplicable to an FLSA action); *Flores v. Amigon*, 233 F. Supp. 2d 462, 464-65 (E.D.N.Y.2002) (holding that *Hoffman* does not bar back pay under the FLSA).

Workers, however, should not be afraid to bring these claims at the DOL. The DOL entered into a memorandum of understanding with the Immigration and Naturalization Service to encourage workers to report violations of employment laws. That agreement has been adopted by the Department of Homeland Security. *See Memorandum of Understanding between the Immigration and Naturalization Service, Department of Justice and the Employment Standards Administration, Department of Labor* (Nov. 23, 1998).

### ***Welfare to Work***

Given FMLA's fairly stringent length of service requirements, and welfare to work's emphasis on quick labor force attachment, FMLA situations are probably going to be rare in welfare-to-work scenarios. One argument to be made is that the hours and months spent getting unpaid work experience should count toward the length of service requirements if the work experience placement eventually hires the welfare recipient.

### ***Release of FMLA Claims***

The FMLA regulations state that “[e]mployees cannot waive, nor may employers induce employees to waive, their prospective rights under FMLA,” i.e., they cannot be asked to waive potential future FMLA violations that have not yet occurred. 29 C.F.R. § 825.220(d). An employee may, however, waive past FMLA claims, e.g., as part of a settlement negotiation process. *Id.*

## **FMLA – Federal Employees**

Federal employees are covered by provisions nearly identical to the federal FMLA (they also receive 12 weeks of leave in a 12-month period, for example). *See* 5 U.S.C. §§ 6381-6387; 5 C.F.R. §§ 630.1201 – 630.1211. There are, however, some minor differences. For instance:

- Federal employees may not be required to substitute their paid leave for any part of their FMLA leave. *See* 5 C.F.R. § 630.1205(d).
- The avenues of redress are more limited. Workers can file administrative grievances with their agencies or grievances under a collective-bargaining agreement. Workers may also raise an FMLA violation as a defense to a disciplinary or adverse action (e.g., separation). Employees, however, probably cannot bring lawsuits against the federal government for FMLA violations, as courts have not found that Congress ever explicitly waived the federal government’s immunity from suit with regard to the FMLA. *See Mann v. Haigh*, 120 F.3d 34, 36 (4th Cir. 1997) (noting that while Title I of the FMLA, which covers the private sector and employees of state and local governments, creates a private right of action, Title II, which governs federal employees, “omits a similar provision creating a private right of action”); *Keen v. Brown*, 958 F. Supp. 70 (D. Conn. 1998).

**Note:** Federal employees are not covered by the D.C. law.

## **Additional Leave Provisions under D.C. Law**

### **Accrued Sick and Safe Leave Act of 2008**

In D.C., employers must provide a certain amount of paid safe and sick leave to employees for illnesses and to address issues arising from stalking, domestic violence, or sexual abuse. D.C. Code § 32-531.02, *et seq.* The leave may be used for the illness or safety

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of the employee or a qualified family member. The definition of “family member” is identical to the definition under the D.C. FMLA, D.C. Code § 32-531.01(4), and an “employee”<sup>57</sup> must work the same requisite hours within a 12-month period to qualify. D.C. Code § 32-531.02(a).

The amount of leave an employee is eligible for depends on the size of the employer:

- (1) “100 or more employees: at least 1 hour of paid leave for each thirty-seven (37) hours worked, not to exceed 7 days of paid leave per calendar year.” D.C. Code § 32-531.02(a)(1);
- (2) “25–99 employees: at least 1 hour of paid leave for every 43 hours worked, not to exceed 5 days of paid leave per calendar year.” D.C. Code § 32-531.02(a)(2);
- (3) “1–24 employees: at least 1 hour paid leave for every 87 hours worked, not to exceed 3 days of paid leave per calendar year.” D.C. Code § 32-531.02(3).
- (4) **Tipped restaurant workers:** at least 1 hour of paid leave for every 43 hours worked, up to 5 days of paid leave per calendar year. D.C. Code § 32-531.02(g).

Paid leave may be used for the following reasons:

- (1) Absence resulting from physical or mental illness, injury or medical condition of the employee;
- (2) Absence resulting from obtaining professional medical diagnosis or care or preventative medical care for the employee;
- (3) Absence for the purpose of caring for a family member who has any of the conditions or needs for diagnosis or care described in (1) or (2);
- (4) Absence resulting from employee or employee’s family member being a victim of stalking, domestic violence, or sexual abuse and the absence is for the purposes of:
  - a. Seeking medical attention to treat or recover from physical or psychological injury or disability caused by the stalking, domestic violence, or sexual abuse;
  - b. Obtaining services from a victim services organization;
  - c. Obtaining psychological or other counseling services;
  - d. Temporary or permanent relocation;
  - e. Taking legal action; or
  - f. Taking other action that could reasonably be determined to enhance physical, psychological, or economic health or safety of employee, employee’s family member or the safety of those who work or associate with employee.

D.C. Code § 32-531.02(b).

Employees begin accruing sick and safe days from the first day of their employment, and can access accrued paid leave after 90 days of service. D.C. Code § 32-531.02(c)(1).

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<sup>57</sup> Independent contractors, students, and health-care workers who choose to participate in a premium pay program do not qualify as “employees” for the purposes of this Act.

## Family and Medical Leave

Paid sick leave guaranteed does carry over from year to year, but an employee is not entitled to cash out such leave at the termination of employment. 7 DCMR § 3204.

Employees must give 10 days' advance notice in writing or, if employee becomes aware of need less than 10 days before the date needed, on the date that such a need becomes known, and if the paid leave is unforeseeable, an oral request for paid leave shall be provided prior to the start of the work shift for which the paid leave is requested. D.C. Code § 32-131.03. An employer may require reasonable certification for granting paid leave for three or more consecutive days. D.C. Code § 32-531.04(a)(1).

### **Filing a Complaint for a Paid Sick/Safe Leave Violation**

Employees can file in court or with the D.C. Office of Wage-Hour (<https://does.dc.gov/page/office-wage-hour-employees>) if they believe their employer has violated these provisions. All civil or administrative complaints of violations of these provisions must be filed within 3 years of the event or final instance of a series of events. D.C. Code § 32-531.10a.

If a court or the D.C. Office of Wage-Hour finds in favor of the employee, the employee may be entitled to back pay for lost wages, reinstatement, compensatory damages, punitive damages, and reasonable attorneys' fees. D.C. Code § 32-531.12(e). Additionally, the Office of Wage-Hour may require that the employer pay \$500 in additional damages to the employee for each accrued day denied. D.C. Code § 32-531.12(f)(2).

An employer is prohibited from taking adverse action against an employee within 90 days of the employee's exercise her right under this statute or her filing of an adverse action against the employer under this statute. D.C. Code §§ 32-531.08(d).

## **D.C. Paid Family Leave Act**

As of July 1, 2020, the District of Columbia began to administer paid leave benefits to private sector employees under the D.C. Paid Family Leave Act. Private sector employees in the District, who spend more than 50% of their time working in D.C., are eligible for the following paid leave in a year:

- 2 weeks prenatal leave
- 12 weeks to bond with a new child
- 12 weeks to care for a family member with a serious health condition
- 12 weeks to care for the employee's own serious health condition

Weekly benefit amounts are based on the employee's weekly wages and capped at \$1,009 per week. Information on how to apply and required forms are available from the DOES Office of Paid Family Leave: <https://dcpaidfamilyleave.dc.gov>.

The D.C. Paid Family Leave Act prohibits employers from retaliating against employees who apply for or claim benefits under the Act, however, it does not provide for job protection. If the leave is also covered by the federal FMLA, D.C. FMLA, or the Protecting Pregnant Workers Fairness Act, then job protection would be required under those laws. Workers seeking advice on how to combine or “stack” various types of leave should be referred to First Shift Justice Project: <https://www.firstshift.org/get-legal-help>.

### Parental Leave

In D.C., employers must give up to 24 hours of unpaid parental leave within a 12-month period for “parents” to attend school-related events of their “children.” D.C. Code § 32-521.02. The event must include the child directly as a participant or subject, not merely as a spectator. *Id.* at § 32-521(3).

The word “**parent**” includes natural parent, person who has legal custody, guardian, aunt, uncle or grandparent, or the spouse of any person who qualifies for parental leave as a parent. *See* D.C. Code § 32-521(2). The word “**child**” includes anyone younger than 21, full-time college students younger than 23, and those who are disabled and dependent on the parent.

Workers must give 10 days’ advance notice, unless such notice is impossible. *See* D.C. Code § 32-521.02(d). The employer may deny the leave only if it would disrupt business and make the achievement of production or service delivery unusually difficult. *Id.* at § 32-521.02(c).

The parental leave provision can be **enforced** either by filing administrative charges with the D.C. Office of Human Rights or by filing a civil action in D.C. Superior Court. In either case, the **statute of limitations is one year**. *See* D.C. Code §§ 32-521.04, 32-521.05. Both avenues make available the same remedies, which include pay and benefits lost due to the employer’s violation, plus interest, and consequential damages not to exceed three times the amount of wages and benefits lost, medical expenses not covered while employee did not have health insurance, and attorneys’ fees. *Id.* at § 32-521.04(b)(6); *see also* D.C. Code § 32-521.05(c). Regulations are published at 44 D.C. Register 5091-5099 (Sep. 17, 1997).

### Protecting Pregnant Workers Fairness Act of 2014

Under the Protecting Pregnant Workers Fairness Act of 2014, D.C. employers are required to provide reasonable workplace accommodations for workers whose ability to perform the functions of a job are affected by pregnancy, childbirth, a related medical condition, or breastfeeding. This differs from the requirements of federal law in that pregnant workers can only receive a reasonable accommodation under the ADA when they

## Family and Medical Leave

have a disability stemming from a pregnancy, e.g. pregnancy-related diabetes. In certain, fact-specific circumstances an employer may grant a pregnant worker additional leave, beyond that allotted under the federal FMLA or D.C. FMLA, as a reasonable accommodation under the ADA.

For more information on this law, see the D.C. law section of the [Discrimination chapter](https://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/OHR%20Enforcement%20guidance%20-%20PPWFA_92517.pdf) of this Manual. Additional information regarding these protections can be found at: [https://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/OHR%20Enforcement%20guidance%20-%20PPWFA\\_92517.pdf](https://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/OHR%20Enforcement%20guidance%20-%20PPWFA_92517.pdf)

## Emancipation Day

All workers in D.C. are entitled to a day off on District of Columbia's Emancipation Day, April 16, provided that they give their employers 10 days' notice. This leave is unpaid unless the employee opts to use his or her paid vacation time. *See* D.C. Code § 32-521.02.

## Funeral Leave for D.C. Government Employees

A District government employee is entitled to funeral leave or annual leave "to make arrangements for or attend a funeral or memorial service for a family member." D.C. Code § 32-705(c).

## Leave Bank for D.C. Government Employees

A district government employee is entitled to donate and withdraw annual leave time from the D.C. government's annual leave bank. *See* D.C. Code § 1-612.05.

To withdraw leave, a government employee, or another employee acting on his or her behalf, if the employee wanting leave is incapable of requesting it, must submit a **written, notarized application to the employee's personnel authority**. *See* D.C. Code § 1-612.07. An employee wishing to donate leave must also submit a written request, and may, if he or she chooses, designate the employee who is to receive the leave. *Id.* at § 1-612.06. There are specific rules that govern how much leave each employee may donate. *Id.*

To be accepted, the application requesting leave should indicate that:

- (1) A medical emergency has necessitated the leave request;
- (2) The medical emergency will result in an absence of at least 10 workdays;
- (3) The employee requesting leave has previously donated a minimum of four hours of annual leave to the annual leave bank that year; and

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- (4) The employee requesting leave does not have accrued paid leave sufficient to cover the expected period of absence from work.

See D.C. Code § 1-612.08.

### **FMLA – A Checklist For Federal And D.C. Law**

The checklist below is a shorthand method for helping you to initially evaluate the most common eligibility issues under the D.C. and federal FMLA. Using this checklist should not substitute for a more thorough analysis under the statute and regulations before filing suit. See 29 U.S.C. § 2601 *et seq.*, 29 C.F.R. § 825.100 *et seq.*; 5 U.S.C. § 6381, 29 C.F.R. § 630.100 (federal employees); D.C. Code § 32-501 *et seq.*, 4 DCMR § 1600 (D.C. law).

#### **1. Is the Employer Covered? (Any One)**

##### Federal Law

- ☐ Public employer
- ☐ 50 or more employees per workday for 20 calendar weeks in current or preceding year at employee's worksite or within 75 mile radius of employee's worksite
- ☐ Secondary employer jointly employing FMLA-covered employees

##### D.C. Law

- ☐ D.C. government
- ☐ 20 or more employees within the District of Columbia

#### **2. Is the Employee Eligible? (All Three Required)**

##### Federal Law

- ☐ Employer employs 50 or more workers within 75 miles of worker's worksite
- ☐ Employee worked at least 12 months for the employer in question
- ☐ Employee worked at least 1,250 hours for the employer in the previous 12 months

##### D.C. Law

- ☐ Employer employs 20 or more people in the District of Columbia
- ☐ Employee worked at least 12 months for the employer
- ☐ Employee worked at least 1,000 hours for the employer in the previous 12 months

#### **3. Is it FMLA-protected Leave? (Any One)**

##### Federal Law

- ☐ New child (birth or adoption)
- ☐ Caring for the serious health condition of son, daughter, spouse or parent
- ☐ Healing from employee's own serious health condition renders him or her unable to perform functions of position
- ☐ Caring for serious injury or illness of service member who is a son, daughter,



## Family and Medical Leave

- \_\_\_\_\_ spouse, parent, or next of kin
- \_\_\_\_\_ Exigency related to call to active duty or active-duty status of covered military member who is a son, daughter, spouse or parent

### D.C. Law

- \_\_\_\_\_ New child (birth, adoption or foster care placement)
- \_\_\_\_\_ Caring for the serious health condition of a person related by blood, legal custody or marriage, or person with whom the employee has shared a mutual residence in the last year and with whom the employee maintains a committed relationship
- \_\_\_\_\_ Employee's own serious health condition renders him or her unable to perform functions of position

#### **4. Is it a Serious Health Condition (Federal & D.C. Law)? (Any One)**

##### Federal Law

- \_\_\_\_\_ Inpatient care in hospital, hospice or residential medical facility
- \_\_\_\_\_ More than three consecutive calendar days of incapacity and either treatment on at least two occasions by health-care provider or one occasion of treatment by health-care provider with continuing treatment under his or her supervision
- \_\_\_\_\_ Incapacity for pregnancy or prenatal care
- \_\_\_\_\_ Incapacity for serious chronic health condition (e.g. asthma, diabetes, epilepsy)
- \_\_\_\_\_ Incapacity for long-term untreatable illness (e.g. Alzheimer's, severe stroke, terminal illness)
- \_\_\_\_\_ Incapacity due to multiple treatments for condition that would require more than three days absence if left untreated (e.g. cancer treatments, restorative surgery after accident, dialysis)
- \_\_\_\_\_ Substance abuse treatment

##### D.C. Law

*Use above checklist, plus the following:*

- \_\_\_\_\_ Continuing treatment by health-care provider or other competent individual

#### **5. Has the Employer Violated FMLA (Federal & D.C. Law)? (Possible Violations)**

- \_\_\_\_\_ Has employer wrongfully counted FMLA-qualified absences under progressive absenteeism policy?
- \_\_\_\_\_ Has employer miscalculated eligibility for FMLA leave by:
  - \_\_\_\_\_ Failing to designate a 12-month leave period?
  - \_\_\_\_\_ Failing to give notice of applicability of Act within two business days?
- \_\_\_\_\_ Has employer failed to post required FMLA notices?
- \_\_\_\_\_ Has employer failed to maintain health benefits during leave?
- \_\_\_\_\_ Has employer harassed an employee for requesting FMLA leave or taking FMLA leave?
- \_\_\_\_\_ Has employer denied employee's request for FMLA-qualifying leave?
- \_\_\_\_\_ Has employer fired employee while on FMLA leave or upon return from FMLA leave?
- \_\_\_\_\_ Has employer fired or discriminated against employee for asserting her rights under FMLA, including for having opposed violations of the FMLA or participated in an

## Family and Medical Leave

investigation of FMLA violations?  
\_\_\_\_\_ Has employer fired, harassed, or discriminated against an employee for  
taking  
or attempting to take FMLA leave?

The above checklist is adapted from a checklist prepared by Sharon Dietrich of Community Legal Services in Philadelphia, Pa. Do not use this checklist as a substitute for a more thorough analysis under the statute, regulations, and current case law.

### **Additional Leave Provisions under Maryland State and Local Law**

#### **Maryland Healthy Working Families Act (Sick and Safe Leave)**

Enacted on February 11, 2018, the Maryland Healthy Working Families Act (MHWFA) provides that all Maryland private employers that employ 15 or more employees must provide paid sick and safe leave, whereas employers with 14 or fewer employees must provide unpaid leave. Md. Code Ann., Lab. & Empl. § 3-1304. While all employees are counted, including full-time, part-time, temporary, and seasonal employees, the MHWFA does not apply to, *inter alia*, independent contractors, construction workers, agricultural workers, and minors. *Id.* at §§ 3-1301, 3-1303.

Earned sick and safe leave can be used for:

- Care for the physical or mental health of the employee or a family member;
- Preventative medical care for the employee or a family member;
- Maternity or paternity leave; or
- To obtain relief in response to domestic or sexual assault of the employee or a family member

*Id.* at § 3-1305.

Covered employees accrue one leave hour for every 30 hours worked. Employees may accrue up to 40 leave hours each year and employers may limit total accrual to no more than 64 hours at any time. Employees may carry over up to 40 unused leave hours each year, subject to the 64 hour cap. Carryover is not required, however, if the employer awards the employee the full amount of required leave at the beginning of each year. *Id.* at §3-1304.

If an employer's existing paid time off (PTO) policy—including vacation, sick days, short-term disability, floating holidays, parental leave, or other PTO—permits employees to access and accrue leave at the same or greater rate as under the Act, and leave can be used for the same reasons, employers need not provide additional sick and safe time.

Although paid leave must be granted to eligible employees, employers have the latitude to set restrictions on its use, e.g. probation periods; accrual caps; set notice requirements, etc. Employers are permitted to obtain verification that the leave was used for an appropriate purpose in certain circumstances. Employers are not required to pay out unused, accrued sick and safe leave upon termination or resignation. *Id.* §§3-1304-1305.

Employees may file complaints with the Commissioner of Labor and Industry for alleged violations of the Act, including retaliation. The Commissioner has the authority to issue an order instructing the employer to comply with the Act. If the employer does not comply, the Commissioner may either bring an action to enforce the order for the civil penalty or request that the Attorney General bring an action on behalf of the employee. Additionally, within three years of the order, the aggrieved employee can bring a civil action to enforce that order. Successful employees may receive an award of treble damages, punitive damages, attorneys' fees, and injunctive relief. For complaint forms and additional information, see [www.dlir.state.md.us/paidleave](http://www.dlir.state.md.us/paidleave).

### **Maryland Time to Care Act, 2022 (MTCA)**

The MTCA expands the paid leave rights of Maryland employees while affording them temporary paid leave benefits even when not otherwise eligible for job-protected leave under the federal Family Medical Leave Act (FMLA). The MTCA will apply to all employers with a single employee in the state. Only employers with 15 or more employees are required to contribute, as are employees. Self-employed persons may opt in. Generally, eligible employees may receive up to 12 weeks of paid family and medical leave in a 12-month period. This leave entitlement is expanded to 24 weeks for a parent if leave is needed to bond with a new child and for the employee's own serious health condition during the same benefit year. The maximum weekly pay benefit is \$1,000. Funded with employer and employee payroll tax contributions set to begin Oct. 1, 2023, **paid leave benefits will start Jan. 1, 2025.**

### **Maryland Flexible Leave Act**

Effective Oct. 1, 2008, the Flexible Leave Act authorizes employees of employers with 15 or more individuals to use "leave with pay" for an illness in the employee's immediate family which includes a child, spouse or parent. Md. Code Ann., Lab. & Empl. § 3-802 (2008). The law was expanded in 2021 to allow employees to use their earned leave with pay for bereavement following the death of a child, spouse or parent. There is no limit on the amount of accrued leave with pay an employee can use for bereavement purposes. *Id.* Leave with pay is considered time away from work for which an employee is paid and includes sick leave, vacation time, and compensatory time. An employee may only use leave

with pay that has been earned. Employees who earn more than one type of leave with pay may elect the type and amount of leave with pay to be used. An employee who uses leave with pay under this law is required to comply with the terms of any collective bargaining agreement or employment policy.

The Flexible Leave Act prohibits an employer from discharging, demoting, suspending, disciplining, or otherwise discriminating against an employee or threatening to take any of these actions against an employee who exercises rights under this law. *Id.* This law does not affect leave granted under the Federal Family and Medical Leave Act of 1993 (FMLA).

### **Private Employers – Birth or Adoption**

Employers who provide leave with pay to a worker following the birth of a worker's child must provide the same leave with pay to a worker when a child is placed with the worker for adoption. *See* MD. CODE ANN. LAB. & EMPL. §§ 3-802(a)(3), (d). For purposes of this section, an "employer" is a person engaged in a business, industry, profession, trade or other enterprise in Maryland, and includes those, such as employment agencies, who act directly or indirectly in the interest of another employer with an employee. *Id.* at § 3-802(a)(4).

### **State Employees**

In 1993, Maryland began providing limited unpaid family and medical leave for state employees. *See* MD. CODE ANN. STATE PERS. & PENS. § 9-1001 (calling for regulations to implement the federal FMLA for state employees). These regulations are scattered throughout the Code of Maryland Regulations in the sections covering various state agencies. *See, e.g.,* Md. Code Regs. 11.02.13 (FMLA regulations for Maryland Department of Transportation employees); Md. Code Regs. 17.04.11.24(I) ("[For employees of the Department of Budget and Management] Family and Medical leave may be used in accordance with the provisions of the Family and Medical Leave Act of 1993, the implementing federal regulations, and the regulations, policies, and guidelines promulgated by the Secretary.").

As of 1996, a Maryland public employee who is primarily responsible for the care and nurturing of a child may use, without certification of illness or disability, as many as 30 days of accrued sick leave to care for a child during the period immediately following the birth of the child or the placement of the child with the worker for adoption. *See* Md. Code Ann. STATE PERS. & PENS. § 9-505 (a) (1) & (2).

If the parents of the child are both Maryland public employees and both are responsible for the care and nurturing of their child, they may use together, without certification of illness or disability, as many as 40 days, not to exceed 30 days for one

## Family and Medical Leave

employee, of accrued sick leave to care for the child during the period immediately following the birth of the child or the placement of the child with the worker(s) for adoption. *Id.* at § 9-505 (b) (1) & (2) (2002).

State employees using accrued sick leave for the birth or adoption of a child under these provisions can receive payment for that leave only if they provide the information to their supervisors that is required by the federal FMLA guidelines. *Id.* at § 9-505(c).

## **Montgomery County Paid Sick and Safe Leave Ordinance**

Beginning October 1, 2016, employers in Montgomery County must provide paid sick leave to employees. 27 Mont. Co. Code 7-8. The Montgomery County ordinance substantially mirrors D.C.'s paid sick leave law (see above), except for the schedule of accruing hours. As with the D.C. law, the leave may be taken to recover from illness; obtain preventative care; or recover from a sexual assault, stalking, or domestic violence incident; or to assist a family member in doing all of the above.

While all employers must provide one hour of leave for every 30 hours worked, up to 56 hours each year, the cap on *paid* leave changes depending on employer size. Employers with five or more workers must provide at least 56 hours (7 work days) of paid leave each calendar year, while employers with fewer than five employees need only provide at least 32 paid hours each calendar year – though the additional 24 hours of unpaid sick leave must be provided if accrued.

Employers must carry over accrued but unused hours to the next calendar year, with a cap of 56 carryover hours. Under this ordinance, employers can limit employees to use of no more than 80 sick leave hours in a calendar year. Earned paid sick leave need not be paid upon termination. Employees begin accruing leave from their first day of work in the county, and can use accrued leave after 90 days of work.

Employees denied accrued paid sick leave, or those retaliated against for using or seeking to use paid sick leave, may file a complaint with the County Office of Human Rights. The Human Rights chapter's one year statute of limitations would likely apply on such claims. In the County Human Rights office, once a claim is filed, a mediation is generally held, followed by an investigation if the mediation is unsuccessful. Investigations, which can take up to one year in some cases, will conclude that reasonable grounds do or do not exist to believe that a violation of the ordinance occurred.

## **Additional Leave Provisions Under Virginia Law**

The Virginia Human Rights Act contains expanded protections relating to pregnancy, childbirth and related medical conditions, and lactation. Employers with 5 or

## Family and Medical Leave

more employees must provide related reasonable accommodations, without reference to whether they impose an undue hardship on the employer. VA. Code Ann. § 2.2-3909.

**Public employees** in Virginia (except those who opt out of participation in the Sickness and Disability Program) are entitled to paid family and personal leave for “absences due to a short-term incident, illness or death of a family member, or other personal need.” VA. CODE ANN. §§ 51.1-1107 through -1108. The leave can be taken at the sole discretion of the employee, so long as he gives his supervisor reasonable notice and no “emergency or exigent circumstances” exist such that the absence would “materially impede” the agency’s ability to perform a critical function. *Id.* at § 51.1-1108. The number of hours per year an employee may use depends on how long he or she has been employed. *Id.* at § 51.1-1107.

**Home health care workers** who provide services to patients enrolled in Medicaid and work on average at least 20 hours per week or 90 hours per month are entitled to paid sick leave. Employers must provide covered employees one hour of paid sick leave for every 30 hours worked, capped at 40 hours in a year. Accrued sick leave may be used to care for a family member’s or employee’s (i) mental or physical illness, injury, or health condition; (ii) need for medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition; or (iii) need for preventive medical care. The law also prohibits employers from retaliating against an employee related to taking such leave. Va. Code Ann. § 40.1-33.3 – 40.1-33.6.

# **DISCRIMINATION**

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Federal Regulations	29 C.F.R. § 1600.101 <i>et seq.</i>
D.C. Statute	D.C. Code §§ 2-1401.01-1411.06
D.C. Regulations	4 DCMR §§ 500-599; 700-799
Federal Employees	29 C.F.R. § 1614.101 <i>et seq.</i>
D.C. Employees	4 DCMR §§ 100-199
Virginia Statute	VA. Code Ann. § 2.2-214; § 2.2-2639; §§ 2.2-3900 <i>et seq.</i> ; § 40.1-28.6; §§ 51.5 <i>et seq.</i>
Maryland Statute	Md. Ann. Code Art. 49B § 16
Howard County (MD)	Howard County Code §§ 12.200-12.218
Montgomery County (MD)	Montgomery County Code Chapter 27
Prince George's County (MD)	Prince George's County Code § 2.185
Alexandria (VA)	City of Alexandria Code § 12-4
Arlington County (VA)	Arlington County Code § 6-22(d)
Fairfax County (VA)	Fairfax County Code, Chapter 11-1-5
Prince William County (VA)	Prince William County Code § 10.1

## **Table: Categories of People Protected from Discrimination**

The following table lists “protected categories” under Federal law, the District of Columbia, Maryland, Virginia, and counties in the D.C. metro area. (See below for header key.)

	Fed	Title VII	1981	D.C.	Md.	Va.	HC	MC	PGC	ALX	ARC	FC	PWC
Race		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Color		✓		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Nat'l origin	✓	✓	*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Ancestry					✓			✓		✓			
Sex		✓		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Pregnancy		✓		✓	✓	✓							
Religion		✓		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Creed					✓		✓	✓	✓				
Age (40+)	✓			✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Age (18+)				✓									
Disability	✓			✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Personal Appearance				✓			✓		✓				
Marital Status				✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Familial Status							✓		✓				✓
Family Responsibility				✓				✓					
Parenthood/Kids								✓			✓		
Childbirth or related medical conditions					✓	✓	✓						
Sexual Orientation		✓		✓	✓	✓	✓	✓	✓	✓	✓		
HIV/AIDS & Public Employees						✓							
Genetic Status	✓			✓	✓			✓					
Occupation							✓		✓				
Source of Income				✓			✓	✓					
Matriculation				✓									
Political Affiliation				✓			✓		✓		✓		
Gender Identity/Expression		✓		✓	✓	✓		✓					
Domestic Violence, Sexual Offenses, Stalking				✓									
Homeless Status				✓									
Credit Information				✓									
Veteran Status	✓					✓							

## Discrimination

Federal (general)	⇒	Fed.
Federal—Title VII of the Civil Rights Act	⇒	Title VII
Federal—Section 1981	⇒	1981
(Although it does not technically cover “national origin,” Congress clearly intended to cover various ancestries as “races” when it passed the Civil Rights Act of 1866. <i>Saint Francis College v. Al-Khazraji</i> , 481 U.S. 604 (1987))		
D.C.—D.C. Human Rights Act	⇒	D.C.
Maryland—Fair Employment Practices Act	⇒	Md.
Virginia—Virginia Human Rights Act	⇒	Va.
Howard County	⇒	HC
Montgomery County	⇒	MC
Prince George’s County	⇒	PGC
Alexandria City	⇒	ALX
Arlington County	⇒	ARC
Fairfax County	⇒	FC
Prince William County	⇒	PWC

## **Federal Discrimination Laws**

### **Title VII – Civil Rights Act of 1964**

*Title VII* protects individuals from discrimination on the basis of **race, color, religion, sex, or national origin**. See 42 U.S.C. § 2000e-2.<sup>58</sup> Title VII was amended in 1978, in the Pregnancy Discrimination Act, to clarify that sex discrimination included discrimination on the basis of **pregnancy, childbirth**, and related medical conditions. *Id.* at § 2000e(k). In 2020, the Supreme Court of the United States issued its landmark decision in the case *Bostock v. Clayton County*, 590 U.S. (2020), which held that the prohibition against sex discrimination in Title VII of the Civil Rights Act of 1964 (Title VII) includes employment discrimination against an individual on the basis of **sexual orientation or gender identity**. Title VII allows for both disparate impact and disparate treatment theories of liability.

*Title VII* covers employers with **15 or more employees** (for each working day in each of 20 calendar weeks in the current or preceding calendar year). See 42 U.S.C. § 2000e(b).<sup>59</sup> It also covers **employment agencies** that discriminate in many areas of the referral process, including job advertisements, employment counseling, and job referrals. **Labor unions** operating or maintaining a hiring hall or having 15 or more members, and are recognized under the *National Labor Relations Act* or are recognized as the complaining worker’s representative, also are covered. See 42 U.S.C. § 2000e(c),(e). Unlike some other

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<sup>58</sup> While many employees of religious institutions are covered by Title VII and other anti-discrimination statutes, some employees are not covered due to a “ministerial exception” grounded in the First Amendment to the Constitution. *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 132 S.Ct. 694, 703 (2012) (“[T]he Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.”) *Our Lady of Guadalupe Sch. V. Morrissey-Berru*, 140 S. Ct. 2049 (2020).

<sup>59</sup> An agent may also be a covered employer, if the principal is large enough. See e.g. *Owens v. Rush*, 636 F.2d 283 (10th Cir. 1980) (holding that Sheriff was an agent of the county, and therefore covered under Title VII). Conversely, a principal may be liable for the discriminatory acts of its agent.

anti-discrimination statutes, *Title VII* caps damages depending on the employer's size. While there are no limits on recovery of monetary losses (such as lost pay, benefits, expenses and interest), recoveries for compensatory damages for emotional injuries and punitive damages are each capped at \$50,000 to \$300,000, depending on the employer's number of workers.

## **The Civil Rights Act of 1866, 42 U.S.C. §1981 & the Civil Rights Act of 1870, 42 U.S.C. § 1983**

Race discrimination claims may also be brought under the Civil Rights Acts of 1866 and 1870. 42 U.S.C. §§ 1981, 1983. Both of these sections were created specifically to protect against racial discrimination; however, the courts have made clear that the concept of "race" as it was understood in 1866 at the passage of the statute covers what we may think of today as "national origin" discrimination. "Based on the history of Section 1981, we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics." *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (recognizing that in the 19<sup>th</sup> century, society considered as "races" such ethnicities as Irish, Swedes, Finns, Italians, Hebrews, Arabs, etc., thus rendering discrimination against such "races" illegal under § 1981).

Section 1981 protects the rights of all persons to enter into and enforce contracts. An at-will employment relationship is contractual in nature, thereby implicating § 1981 protection. *See McLean v. Patten Communities*, 332 F.3d 714 (4th Cir. 2003). Unlike Title VII, § 1981 protects against discrimination by employers of all sizes. Moreover, there is no requirement under § 1981 to first exhaust administrative remedies by going to the Equal Employment Opportunity Commission or a state or local agency. Rather, a victim of discrimination may file directly in court for a § 1981 violation. It should be noted that Section 1981 only allows for a disparate treatment theory of liability.

Section 1983 allows people to sue state and local government officials for violations of their clearly established Constitutional Rights, such as discrimination on the basis and race and gender. Under this Section 1983, government officials may be sued and may be held personally liable for the harm caused. Municipal governments including the District of Columbia, but not state governments or state agencies, may also be liable under Section 1983 if an employee can show that the violation of law was pursuant to an official policy or a pattern and custom of unlawfulness. *Monell v. Department of Soc. Servs. Of the City of New York*, 436 U.S. 658 (1978).

In addition to discrimination, § 1981 authorizes claims for retaliation. *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 445 (2008). Additionally, and unlike several federal laws such as Title VII, §§ 1981 and 1983 allow lawsuits against individual employees or supervisors who discriminate or retaliate. *Smith v. Bray*, 681 F.3d 888 (7th Cir. 2012); *Patterson v. County of Oneida*, 375 F.3d 206 (2d Cir. 2004)

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The statute of limitations for claims under §§ 1981 and 1983 vary depending on the exact claim being brought. For hiring claims under Section 1981 and all claims under Section 1983, the statute of limitations is the state's general statute of limitations (three years in Maryland and the District of Columbia and two years in Virginia). Other claims under Section 1981, such as harassment, retaliation, or discriminatory termination, have the federal four-year statute of limitations. *See Jones v. R. R. Donnelley & Sons Co.*, 541 U.S. 369, 382 (2004).

Sections 1981 and 1983 do not have caps on damages that may be recovered. Section 1983 is not applicable to federal employees and Section 1981 is not applicable to local, state, or federal employees.

## Pregnancy Discrimination Act

Under the 1978 *Pregnancy Discrimination Act (PDA)*, discrimination based on pregnancy constitutes sex discrimination under Title VII. *See* 42 U.S.C. § 2000e(k). An employer is required to treat pregnancy the same way that the employer treats other temporary disabilities, such as a broken leg. For example, an employer cannot force a pregnant employee on leave to use vacation benefits before receiving sick leave pay or disability payments unless the employer imposes a similar requirement on all employees with temporary disabilities. In *Young v. United Parcel Service*, 135 S.Ct. 1338 (2015), the Supreme Court found that the Pregnancy Discrimination Act requires courts to consider the extent to which an employer's policy treats pregnancy workers less favorably than it treats nonpregnant workers similar in their ability or inability to work.

However, a recent decision from the Seventh Circuit has put pregnancy discrimination case law in flux. In *EEOC v. Walmart Stores E., L.P.*, No. 21-1690 (7th Cir. Aug. 16, 2022), the Seventh Circuit upheld a summary judgment order in favor of Walmart. At issue was Walmart's policy of providing temporary alternative duty (TAD) to workers injured on the job, but denying TAD to pregnant workers. In applying *Young*, the court accepted Walmart's position that its TAD policy was meant to implement a local workers' compensation program, limit the company's legal exposure, and avoid the costs of hiring replacements. Walmart had a legitimate, non-discriminatory business reason for denying TAD to employees not injured on the job, including pregnant women, and was not in violation of the Pregnancy Discrimination Act.

Biologically, pregnancy ends with the birth of the child. This is also the point where protection under the *PDA* ceases. Under federal law, the status of being a mother or parent is not a protected class.<sup>60</sup>

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<sup>60</sup> Under D.C. law, however, it is illegal for an employer to discriminate against a worker because of his or her familial responsibilities. *See* D.C. Code §2-1402.11(a) (2003). In other words, a worker cannot be discriminated against on the grounds that he or she is a parent. However, being a parent does not entitle a worker to accommodations or other special treatment.

*Relationship to the American with Disabilities Act & Family Medical Leave Act*

A majority of courts hold that a normal pregnancy is not a disability under the *Americans with Disabilities Act (ADA)*. See, e.g., *Gudenkauf v. Stauffer Communications*, 922 F. Supp. 465, 473 (D. Kan. 1996). Complications resulting from pregnancy or a physical impairment aggravated by a pregnancy, however, may be a disability under the *ADA*. See, e.g., *Patterson v. Xerox Corp.*, 901 F. Supp. 274 (N.D. Ill. 1995).<sup>61</sup> In addition, the termination of employment because of pregnancy may also create a claim under the *Family and Medical Leave Act (FMLA)*. See 29 U.S.C. § 2612(a)(1)(A).

## **Age Discrimination in Employment Act**

The 1967 *Age Discrimination in Employment Act (ADEA)* prohibits discrimination against people who are age 40 and older. See 29 U.S.C. §§ 621-634. The benefited employee, who received the job, promotion, raise, etc., instead of the aggrieved employee, does not need to be younger than age 40 (the cut-off age for the protected class under federal law). The benefited employee only need be “significantly younger.” Therefore, a 60-year-old can win a case in which she was replaced by a 50-year-old.<sup>62</sup> The ADEA protects individuals from being discriminated against in favor of younger employees. Workers over the age of 40 cannot sue an employer on the basis that the employer treated older employees more favorably. In other words, the ADEA protects the older worker but not the younger worker. See *General Dynamics Land System, Inc. v. Cline*, 540 U.S. 581 (2004).

A successful ADEA plaintiff may obtain the following as damages: (1) injunction to prevent or repair discriminatory employment practices, (2) reinstatement or reinstatement, (3) an award of back pay and front pay, and (4) liquidated damages in an amount that potentially doubles the lost wages when a court finds a willful violation. Because damages under the ADEA are largely economic, plaintiffs in age discrimination cases often are advised to bring claims under both the ADEA as well as under state or local law such as the 1977 District of Columbia Human Rights Act, which allows for non-economic damages such as emotional damages and punitive damages. As with other employment statutes, the ADEA allows for the recovery of attorneys’ fees and costs.

## **Americans with Disabilities Act (ADA) and ADA Amendment Act (ADA-AA)**

The *Americans with Disabilities Act (“ADA”)* protects individuals with disabilities in a

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<sup>61</sup> D.C. law is similar to the federal law. See D.C. Code § 2-1401.05; 4 D.C.MR § 516.4.

<sup>62</sup> Unlike the ADEA, the D.C. Human Rights Act protects all persons 18 and older from discrimination based on age. See D.C. Code §§ 2-1401.01-1411.06.

variety of ways. The three most common employment claims under the ADA are disparate treatment, disparate impact, and failure to accommodate. For these types of claims, applicants or employees have to prove that they have a **disability** and that they were **qualified** for the job. (Both of these terms are discussed below.) There are other kinds of claims under the ADA that may not require proof that the employee has a disability or is qualified, including retaliations claims, association claims, and claims regarding medical exams or inquiries.

The *ADA Amendment Act (ADA-AA)* greatly broadened the definition of disability under the ADA and became effective on January 1, 2009.

### **Definition of Disability**

Disability is defined under the *ADA* as including three separate prongs—“actual” disability, “record of” disability, and “regarded as” disability. However, for complained-of actions occurring on or after January 1, 2009, the meaning of this terminology has changed substantially as a result of the *ADA-AA*. Because most cases are now governed by the *ADA-AA*, this section addresses the new definition. Also, pre-*ADA-AA* authority on the definition of disability is now questionable.

#### **Actual disability**

“Actual” disability means a **“physical or mental impairment that substantially limits one or more major life activities”** of an individual. 42 U.S.C. § 12102(1)(A).

The *ADA-AA* does not affirmatively define the term “substantially limits,” but does state that it means something less than a significant or severe limitation. Pub. L. 110–325, §§ 2(a)(8) and 2(b)(4), 42 U.S.C. § 12101 (Note). The new law also expressly requires the definition of disability be construed broadly<sup>63</sup>, 42 U.S.C. § 12102(4)(A); 29 C.F.R. § 1630.1(c)(4), and should not demand extensive analysis. Pub. L. 110–325, § 2(b)(5), 42 U.S.C. § 12101 (Note); 29 C.F.R. § 1630.1(c)(4). Moreover, the *ADA-AA* states that the focus of an *ADA* claim should not be whether the individual has a disability but rather whether the covered entity has met its legal obligations toward the individual. Pub. L. 110–325, § 2(b)(5), 42 U.S.C. § 12101 (Note); 29 C.F.R. § 1630.1(c)(4). This means that the *ADA* will cover many more people.

In assessing whether an impairment is substantially limiting, the *ADA-AA* requires the determination be made “without regard to the ameliorative effects of mitigating measures.”<sup>64</sup> 42 U.S.C. § 12102(4)(E)(i); 29 C.F.R. § 1630.2(j)(1)(vi). Mitigating measures

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<sup>63</sup> In doing so, the *ADA-AA* effectively overruled *Toyota Motor Mfg. Ky. v. Williams*, 534 U.S. 184 (2002), which had held that the definition of disability was a “demanding standard.” See P.L. 110-325, § 2(b)(4), 42 U.S.C. § 12101 (Note).

<sup>64</sup> This provision effectively overruled *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999), *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999), and *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), which had

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include, but are not limited to, things that an individual may use to reduce, or even eliminate, the effects of an impairment, such as medication, medical supplies, equipment, and appliances; prosthetics; implantable hearing devices; mobility devices and equipment and oxygen therapy equipment; assistive technology; learned behavioral or adaptive neurological functions; psychotherapy; behavioral therapy; and physical therapy. 42 U.S.C. § 12102(4)(E)(i); 29 C.F.R. § 1630.2(j)(5)(v). For example, a person with epilepsy whose seizures are controlled by medication now is assessed as if he or she were not taking anti-seizure medication. Also, courts still should consider the *negative* effects (or side-effects) of mitigating measures. *See* 29 C.F.R. 1630.2(j)(4)(ii). Note, however, that mitigating measures do not include “ordinary” eyeglasses or contact lenses.<sup>65</sup> 42 U.S.C. § 12102(4)(E)(ii) and (iii); 29 C.F.R. § 1630.2(j)(5)(i).

The ADA-AA also defines conditions that are episodic or in remission as disabilities if they would substantially limit a major life activity when active. 42 U.S.C. § 12102(4)(D); 29 C.F.R. § 1630.2(j)(1)(vii).

The ADA-AA defines major life activities by two non-exhaustive lists that include both everyday activities and common bodily functions:

- (A) Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
- (B) Major bodily functions include but are not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

42 U.S.C. § 12102(2). *See also* 29 C.F.R. § 1630.2(i)(1)(i) and (ii).

### Record of disability

Even if applicants or employees do not have an “actual” disability, they may be covered under another prong of the ADA’s disability definition. The second prong is a “record of” disability. 42 U.S.C. § 12102(1)(B). A person with a “record of” disability is an individual “who has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.” 29 C.F.R. § 1630.2(k)(1). All of the ADA-AA’s rules of construction described above—broad construction, not considering mitigating measures, assessment in the active state, and expanded view of major life activities—also apply in a “record of” claim.

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held that mitigating measures must be considered when determining whether someone has a disability. *See* P.L.110-325 §§ 2 (a)(4) and 2(b)(2), 42 U.S.C. § 12101 (Note).

<sup>65</sup> In other words, a person’s vision is assessed with regular eyeglasses on, 29 C.F.R. § 1630.2(j)(1)(vi), and if fully corrected, it may not constitute an “actual” disability. But such person may still have a “regarded as” disability, 29 C.F.R. Part 1630 App., § 1630.10(b), and may also be able to challenge an employer’s uncorrected visual-acuity standards. 42 U.S.C. § 12113(c); 29 C.F.R. § 1630.10(b).



### Regarded as disability

The third prong is “regarded as” disability, which has been completely redefined by the *ADA-AA*. It now covers any individual who has been subjected to an action prohibited by the *ADA* “because of an actual or perceived physical or mental impairment whether or not the impairment limits, or is perceived to limit, a major life activity.” 42 U.S.C. § 12102(1)(C).

Note that, as stated above, the individual no longer has to show that a covered entity perceived her to be substantially limited in a major life activity. Thus, the terms “substantial limitation” and “major life activity” are now irrelevant to “regarded as” claims. 29 C.F.R. § 1630.2(j)(2).

On the other hand, it is a defense to an allegation of “regarded as” coverage that the actual or perceived impairment is both transitory (having an expected or actual duration of six months or less) *and* minor. “Regarded as” disability has by far the broadest coverage, and because of its expansiveness, it often should be the first prong to consider in establishing disability. *See* 29 C.F.R. § 1630.2(g)(3). It has one significant limitation, however: It will not support a failure-to-accommodate claim. 42 U.S.C. § 12201(h); 29 C.F.R. §§ 1630.2(o)(4) and 1630.9(d). Thus, the individual alleging that the employer failed to provide a reasonable accommodation must be able to establish an “actual” or “record of” disability for that claim.

### **Qualified to Perform Essential Functions of the Job**

As noted above, most (though not all) *ADA* claims require the applicant or employee prove *both* a disability (under one of the above prongs) *and* that they are **qualified**.

Under the *ADA*, a person with a disability is qualified if he or she “satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position.” 29 C.F.R. § 1630.2(m). There is usually no dispute as to education, experience, and licenses. The more typical areas of inquiry are identifying the essential job functions, and if they cannot be performed without an accommodation, identifying a reasonable accommodation that would allow the individual to perform the essential job functions.

### **Reasonable Accommodations**

Discrimination includes failing to make reasonable accommodations to the known physical or mental limitations of an individual with a disability, or denying employment opportunities to such a person based on the need to make reasonable accommodations. 42 U.S.C. § 12112(b)(5)(A) & (B). A reasonable accommodation may include: job restructuring, a part-time or modified work schedule, use of leave, a leave of absence, making facilities or

an application process more accessible, making employer-provided transportation accessible, and/or reassignment to a vacant position.<sup>66</sup> The employer need not make an accommodation if doing so would pose an undue burden.<sup>67</sup> 42 U.S.C. § 12112(b)(5)(A). In order to identify a reasonable accommodation, the employer and employee must typically engage in a good-faith, “interactive process.” 29 C.F.R. § 1630.2(o)(iii).

### **Special Topic: COVID-19 and Reasonable Accommodations**

The COVID-19 pandemic has had considerable impact in the workplace, not least of all with respect to reasonable accommodations. Courts have found reasonable accommodations warranted where a worker’s disability put them at greater risk from COVID-19. *Harry B Silver v. City of Alexandria*, No. 1:20-CV-00698, 2020 U.S. Dist. LEXIS 119359, at \*2–9 (W.D. La. July 6, 2020) (finding that a city council member’s request to participate in city council meetings through virtual appearance was a reasonable accommodation that the city council member was entitled to in consideration of the COVID-19 pandemic because his disability made him more susceptible to contracting and “succumbing to the virus”); *Peeples v. Clinical Support Options, Inc.*, No. 3:20-cv-30144-KAR, 2020 U.S. Dist. LEXIS 169167, at \*18 (D. Mass. Sept. 16, 2020) (granting PI to preclude termination of employee with asthma who had requested to continue to telework).

Workers experiencing “long COVID” may also qualify for reasonable accommodations. For evolving guidance on these and other COVID-related workplace protections, see EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (last updated July 12, 2022).

Under the ADA-AA, the courts have determined the following to be reasonable accommodations in specific cases: medical leave;<sup>68</sup> flexible work schedules;<sup>69</sup> teleworking;<sup>70</sup> assigning certain duties to a team member with a disability and excusing the

<sup>66</sup> Reassignment is generally defined as requiring the employer place the individual into the vacant position, rather than forcing the person to compete for the open job. See, e.g., *Aka v. Washington Hosp. Center*, 156 F.3d 1284, 1304–1305 (D.C. Cir. 1998). Although there is contrary precedent in the Eighth Circuit, it is based on case law that has since been abrogated. See *EEOC v. United Airlines, Inc.*, 693 F.3d 760 (7th Cir. 2012). On the other hand, many courts state that an employer does not have to create a new position as an accommodation. See, e.g., *Aka*, 156 F.3d at 1305; *Sydnor v. Fairfax County, Va.*, 2011 WL 836948, at \*8 (E.D. Va. Mar. 3, 2011).

<sup>67</sup> Under D.C. law, an employer is not required to make a reasonable accommodation that is contrary to business necessity. See 4 DCMR § 514.

<sup>68</sup> *Barnett v. Uniformed Services University of the Health Sciences*, 2011 WL 3511049, at \*11 (D. Md. Aug. 9, 2011).

<sup>69</sup> *Valle-Arce v. Puerto Rico Ports Authority*, 651 F.3d 190 (1st Cir. 2011).

<sup>70</sup> *Dahlman v. Tenenbaum*, 2011 WL 3511062 (D. Md. Aug. 9, 2011).

performance of certain other assignments;<sup>71</sup> rest-and-recover breaks between assignments;<sup>72</sup> working from a seated position;<sup>73</sup> use of a lifting device;<sup>74</sup> sign-language interpreter for meetings and trainings.<sup>75</sup> The Supreme Court has held that an employer's duty to reasonably accommodate can be superseded by a bona fide seniority system.<sup>76</sup>

### **Direct Threat Defense**

An employer is not required to employ a person who constitutes a direct threat to the safety of others in the workplace. *See* 42 U.S.C. § 12113(b). An employer similarly is protected if a person would pose a direct threat to that individual's own safety. 29 C.F.R. § 1630.15(b)(2); *see also Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002).

Direct threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The analysis requires an individualized assessment of the individual's present ability to safely perform the essential job functions. This analysis also must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. 29 C.F.R. § 1630.2(r).

In determining whether an individual would pose a direct threat, the factors under consideration include: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. 29 C.F.R. § 1630.2(r).

### **Alcoholism and Drug Addiction**

It is likely that alcoholism is a disability under the *ADA-AA* (although casual drinking or occasional over-drinking may not be). Moreover, the *ADA-AA* typically would apply to persons who are no longer using alcohol or drugs, but who have a history of addiction.

On the other hand, the *ADA* does not stop an employer from taking action against one who is *currently engaging* in the illegal use of drugs, 42 U.S.C. § 12114(a), or who has done so recently.<sup>77</sup> Also, an employer may hold a current or former substance abuser to the same employment standards to which it holds other workers. *See* 42 U.S.C. § 12114(c)(4); 29 C.F.R. § 1630.16(b). This is true even if the unsatisfactory performance

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<sup>71</sup> *Miller v. Ill. Dep't of Transp.*, 643 F.3d 190, 198 (7th Cir. 2011).

<sup>72</sup> *Carter v. Pathfinder Energy Services, Inc.*, 662 F.3d 1134 (10th Cir. 2011).

<sup>73</sup> *Sydnor v. Fairfax County, Va.*, 2011 WL 836948 (E.D. Va. Mar. 3, 2011).

<sup>74</sup> *Zombeck v. Friendship Ridge*, 2011 WL 666200 (W.D. Pa. Feb. 14, 2011).

<sup>75</sup> *EEOC v. UPS Supply Chain Solutions*, 620 F.3d 1103 (9th Cir. 2010).

<sup>76</sup> *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).

<sup>77</sup> Many courts have interpreted the "currently engaging" language as including drug use that is sufficiently recent to justify the employer's reasonable belief that the drug abuse remained an ongoing problem. *See, e.g., Mauerhan v. Wagner Corp.*, 649 F.3d 1180, 1186–1187 (10th Cir. 2011) (collecting authorities).

under those standards is related to the substance abuse. 29 C.F.R. § 1630.16(b) (4).

## **The Rehabilitation Act - Disability Discrimination Claims for Federal Employees and Employees of Federal Government Contractors**

There are three sections of the 1973 Rehabilitation Act relevant here—Section 501, which protects federal-sector employees; Section 503, which protects employees of certain federal government contractors; and Section 504, which protects employees of entities receiving federal financial assistance.

### Section 501

The ADA does not apply to federal employees so, as noted above, most federal employees of the Executive Branch must file their claims under § 501 of the Rehabilitation Act of 1973.<sup>78</sup> 29 U.S.C. § 791. The substantive liability standards of § 501 are the same as those of the ADA described above, 29 U.S.C. § 791(g); 29 C.F.R. § 1614.203(b), and the ADA-AA's changes in how "disability" is to be interpreted also apply equally to § 501 claims, Pub. L. 110-325, § 7; 29 U.S.C. §§ 705(9)(B) and 705(20)(B), as amended. The charge-filing and exhaustion procedures are substantially different, however.<sup>79</sup> This section does not apply to uniformed members of the military, 29 C.F.R. § 1614.103(d)(1), and may not apply to airport security screeners. *See Joren v. Napolitano*, 633 F.3d 1144 (7th Cir. 2011); *Field v. Napolitano*, 663 F.3d 505, 512 (1st Cir. 2011).

### Section 503

Section 503 applies to employees of contractors holding federal contracts worth more than \$10,000. 29 U.S.C. § 793. (Note that many of those contractors also will be covered by the ADA.) Again, the substantive liability standards of § 503 are the same as those of the ADA described above, 29 U.S.C. § 793(d), and the ADA-AA's changes in how "disability" is to be interpreted also apply equally to § 503 claims. Pub. L. 110-325, § 7; 29 U.S.C. §§ 705(9)(B) and 705(20)(B), as amended. However, there is no private right of action under § 503; the only remedy is via an administrative complaint with the Department of Labor. *Martin Marietta Corp. v. Maryland Comm'n on Human Relations*, 38 F.3d 1392, 1403 (4th Cir. 1994).

### Section 504

Section 504 applies to recipients of federal financial assistance. 29 U.S.C. § 794. This does not include federal procurement contractors who receive federal money to purchase a

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<sup>78</sup> Although some courts also allow such claims to proceed under § 504, doing so does not seem to have any advantages, and it may invite confusion over the proper causation standard.

<sup>79</sup> See [http://www.eeoc.gov/federal/fed\\_employees/complaint\\_overview.cfm](http://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm).

good or service (and who instead may be covered under the ADA or § 503). Instead, federal financial assistance is typically money used for the public good. Thus, most recipients of federal financial assistance are state and local governmental entities, or private non-profit organizations.

Like the sections above, the ADA-AA applies to § 504 claims, P.L. 110-325, § 7; 29 U.S.C. §§ 705(9)(B) and 705(20)(B), as amended, and its substantive liability standards are the same as those of the ADA, 29 U.S.C. § 794(d), with two important exception—most courts hold that § 504 requires proof of sole cause,<sup>80</sup> and compensatory damages are not available without proof of intentional discrimination (usually defined as “deliberate indifference”).<sup>81</sup>

There may be good reason to proceed under § 504, especially given that while states retain the power to assert immunity from ADA employment-discrimination claims, they have waived immunity from claims under § 504. *Constantine v. Rectors and Visitors of George Mason University*, 411 F.3d 474, 491–496 (4th Cir. 2005); *Barbour v. Washington Metropolitan Area Transit Authority*, 374 F.3d 1161 (D.C. Cir. 2004).

One advantage, is that there is no exhaustion requirement against non-federal employers in § 504 claims, *Lucas v. Henrico County School Bd.*, 822 F. Supp. 2d 589, 602–604 (E.D. Va. 2011) (collecting cases).

In addition, the statute of limitations in a § 504 claim may be longer. Rather than requiring that a charge be filed within 180 (or 300) days, § 504 “borrows” the relevant state-law limitations period. Courts in Maryland typically apply that state’s three-year statute of limitations. *See, e.g., Jeandron v. Board of Regents of University System of Maryland*, 510 Fed. Appx. 223, 226 (4th Cir. 2013), citing cases. Courts in Virginia follow that state’s one-year statute of limitations. *Wolsky v. Med. Coll. of Hampton Roads*, 1 F.3d 222, 225 (4th Cir. 1993). D.C. courts are mixed, and the result depends on the court. Federal courts in the District have generally held that the District’s three-year limitations period for personal injury applies, but the District of Columbia Court of Appeals has applied a one-year statute. *Featherston v. District of Columbia*, 908 F. Supp. 2d 153, 154–155 (D.D.C. 2012).

§ 504 claims also do not have damages caps, *see Roberts v. Progressive Independence, Inc.*, 183 F.3d 1215, 1223–1224 (10th Cir. 1999), interpreting 42 U.S.C. § 1981a, (although punitive damages are not available, *Barnes v. Gorman*, 536 U.S. 181 (2002));

## The Congressional and Presidential Accountability Acts

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<sup>80</sup> *See, e.g., Constantine v. Rectors and Visitors of George Mason University*, 411 F.3d 474, 498 n.17 (4th Cir. 2005).

<sup>81</sup> *See, e.g., S.H. ex rel. Durrell v. Lower Merion School Dist.*, 729 F.3d 248 (3d Cir. 2013) (non-employment case collecting authorities).

## Discrimination

The Congressional Accountability Act of 1995 (CAA) extends the employment protections of the ADA and § 501 to employees of the House, Senate, Office of Congressional Accessibility Services, the Capitol Police, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Compliance, and the Office of Technology Assessment. *See* 2 U.S.C. §§ 1301(a)(3), 1302(a)(3), 1302(a)(10), and 1311(a)(3). 2018 amendments to the CAA expanded workplace protections to unpaid employees, including interns and fellows. *See* Congressional Accountability Act of 1995 Reform Act, Pub. L. 115-397. For more information on workplace rights for legislative branch staff, *see* the Manual's [\*Federal Government Workers\*](#) chapter.

Likewise, the Presidential and Executive Office Accountability Act extends those employment protections to certain employees of the Executive Office of the President, the White House, and the Vice President's residence. *See* 3 U.S.C. § 411.

## Equal Pay Act

The 1963 *Equal Pay Act (EPA)*, a section of the Fair Labor Standards Act, 29 U.S.C. § 206(d), prohibits discrimination in compensation based on sex. It is incorporated into Title VII by the Bennett Amendment, 42 U.S.C. § 2000e-2(h).

To make a case for compensation discrimination, a plaintiff must show unequal compensation for substantially equal work—entailing equal skill, effort, and responsibility—that was performed under similar working conditions. *See* 29 U.S.C. § 206(d)(1).

An employer can defend against wage discrimination cases by showing that the difference in compensation can be explained by a merit system, a seniority system, a system measuring quality or quantity of production, or some other *bona fide* factor other than sex. *See Corning Glass Works v. Brennan*, 417 U.S. 188 (1974).

## Lilly Ledbetter Fair Pay Act

The 2009 Lilly Ledbetter Fair Pay Act addresses the timeliness of compensation in discrimination claims. It superseded the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, which held that when an employer makes a discriminatory decision with regard to compensation, such as denying a raise, discrimination occurs at the time of the initial decision to deny the raise, rather than subsequently with each paycheck based on the discriminatory decision.

## Discrimination

Under the *Ledbetter Act*, a discrimination claim arises each time an individual receives a discriminatory paycheck. As long as the individual receives one discriminatory paycheck within the filing period, her complaint will be timely.

**Note:** The maximum backpay period is limited to two years prior to the filing of the complaint. *See* P.L. 111-2.

## Genetic Information Non-Discrimination Act

The 2008 Genetic Information Nondiscrimination Act (GINA), which prohibits genetic information discrimination in employment, took effect on November 21, 2009. Under Title II of GINA, it is illegal to discriminate against employees or applicants because of genetic information. GINA prohibits the use of genetic information in making employment decisions, restricts acquisition of genetic information by employers and other entities covered by Title II, and strictly limits the disclosure of genetic information. *See* 42 U.S.C.A. § 2000ff-1.

The EEOC enforces Title II of GINA (dealing with genetic discrimination in employment). The departments of Labor, Health and Human Services and the Treasury are responsible for issuing regulations for Title I of GINA, which addresses the use of genetic information in health insurance.

### **Definition of “Genetic Information”**

Genetic information includes information about an individual’s genetic tests and the genetic tests of his or her family members, as well as information about any disease, disorder, or condition (i.e., his or her family medical history). Family medical history is included in the definition of genetic information because it often is used to determine whether someone has an increased risk of getting a disease, disorder, or condition in the future. *See* 42 U.S.C.A. § 2000ff.

### *Discrimination and Harassment Because of Genetic Information*

The law forbids discrimination on the basis of genetic information when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits, or any other term or condition of employment. *An employer may never use genetic information to make an employment decision because genetic information doesn’t tell the employer anything about someone’s current ability to work.* Under GINA, it is also illegal to harass a person because of his or her genetic information. Harassment can include, for example, making offensive or derogatory remarks about an applicant or employee’s genetic information, or about the genetic information of a relative of the applicant or employee. Harassment is illegal when it is so severe or pervasive that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted). The harasser

can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee, such as a client or customer.

### **Retaliation**

Under GINA, it is illegal to fire, demote, harass, or otherwise “retaliate” against an applicant or employee for filing a charge of discrimination, participating in a discrimination proceeding (such as a discrimination investigation or lawsuit), or otherwise opposing discrimination. *See* 42 U.S.C.A. § 2000ff-6(f).

### **Rules Against Acquiring Genetic Information**

It usually will be unlawful for an employer to acquire an employee's genetic information. There are six narrow exceptions to this prohibition:

- Inadvertent acquisitions of genetic information do not violate GINA, such as situations where a manager or supervisor overhears someone talking about a family member's illness.
- Genetic information (such as family medical history) may be obtained as part of health or genetic services, including wellness programs, offered by the employer on a voluntary basis, if certain specific requirements are met.
- Genetic information may be acquired as part of the certification process for FMLA leave (or leave under similar state or local laws), where an employee is asking for leave to care for a family member with a serious health condition.
- Acquisition through commercially and publicly available documents like newspapers is permitted, as long as the employer is not searching those sources with the intent of finding genetic information.
- Acquisition through a genetic monitoring program that monitors the biological effects of toxic substances in the workplace is permitted when the monitoring is required by law or, under carefully defined conditions, when the program is voluntary.
- Acquisition of genetic information of employees by employers who engage in DNA testing for law enforcement purposes as a forensic lab, or for purposes of human remains identification, is permitted; however the genetic information only may be used for analysis of DNA markers for quality control to detect sample contamination. *See* 42 U.S.C.A. § 2000ff-1(b).

### **Confidentiality of Genetic Information**

It also is unlawful for an employer to disclose genetic information about applicants or employees. Employers must keep genetic information confidential and in a separate medical file. (Genetic information may be kept in the same file as other medical information in compliance with the Americans with Disabilities Act.) There are limited exceptions to this non-disclosure rule.



## **Immigration Reform and Control Act – National Origin**

The 1986 *Immigration Reform and Control Act (IRCA)*, which applies to employers with three or more employees, prohibits employers from discriminating against workers or prospective workers based upon national origin or citizenship status. *See* 8 U.S.C. § 1324b(a). Employers who are shown valid forms of employment verification must accept them and cannot require extra documentation of non-citizens or people who they perceive are non-citizens. *Id.* at § 1324b(a)(6). It also requires, however, that all employers be able to prove that workers hired after November 6, 1986 are documented and legally allowed to work in the United States. *Id.*

A worker cannot bring *Title VII* and *IRCA* claims under the same set of facts, so the *IRCA* is only useful when Title VII does not apply—such as when an employer has three to 15 employees, or when the discrimination is based on citizenship status. *IRCA* reports go to Department of Justice, Special Counsel for Immigration-Related Unfair Employment Practices. (800) 255-7688. P.O. Box 27728, Washington, D.C. 20038-7728. <http://www.usdoj.gov/crt/osc>. A worker generally has 180 days to file a complaint. <https://www.justice.gov/crt/filing-charge>.

## **Welfare to Work**

The federal discrimination statutes apply to welfare recipients participating in welfare-to-work programs. EEOC guidance indicates that “welfare recipients participating in work-related activities are protected by federal anti-discrimination statutes if they are ‘employees’ within the meaning of the federal employment discrimination laws.” *Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms*, EEOC Enforcement Guidance (December 3, 1997), <http://www.eeoc.gov/>. The Second Circuit ruled that TANF recipients who are working in New York City's workfare program are “employees” covered by Title VII. *See United States v. City of New York*, No. 02-6102, 2004 U.S. App. Lexis 2439 (2d. Cir. Feb. 13, 2004).

Because TANF is a federally-funded program, Title VI of the Civil Rights Act, which prohibits discrimination in federally-funded programs, also applies. Title VI complaints are made to the Office of Civil Rights, U.S. Department of Health and Human Services.<sup>82</sup>

## **Federal Contracts**

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<sup>82</sup> D.C.'s welfare reform law also states that D.C. discrimination laws apply to welfare-to-work recipients. D.C. Code § 3-205.19i (Supp. 1999).

## Discrimination

Discrimination because of age, disability, race, color, religion, sex, sexual orientation, gender identity, and national origin are prohibited by Executive Order, and these requirements apply to contracts and subcontracts of the federal government which are worth at least \$10,000. See Executive Order 11246. 41 CFR 60-1.5. The Office of Federal Contract Compliance (OFCCP) at the Department of Labor is responsible for investigation and enforcement of these complaints. The deadline to file a complaint is 180 days from the date of the alleged discrimination. More information on workplace rights under EO 11246 is available at:

[https://www.dol.gov/sites/dolgov/files/ofccp/regs/compliance/factsheets/FACT\\_Workplace\\_Aug2016\\_ENGESQA508c.pdf](https://www.dol.gov/sites/dolgov/files/ofccp/regs/compliance/factsheets/FACT_Workplace_Aug2016_ENGESQA508c.pdf).

## Retaliation Protections

Almost all of the federal discrimination statutes contain anti-retaliation provisions. These provisions generally prohibit employers from retaliating against an employee for participating in or pursuing a complaint of unlawful discrimination in a formal discriminatory forum, e.g., the EEOC, or for opposing unlawful discrimination.

Participation in the making of a complaint or testifying at a discrimination hearing is almost always protected, unless it is done with malice. Employees who raise concerns about discrimination using internal employer mechanisms also are protected. *Crawford v. Metropolitan Gov't of Nashville and Davidson Cty.*, 129 S. Ct. 846 (2009). The employee must have a reasonable good faith belief that the underlying activity that he or she is opposing is unlawful discrimination to be considered to have engaged in protected activity by opposing discrimination.

The Supreme Court has found that retaliation need not amount to a tangible employment action or adverse employment action. Instead, it need only be action that would have “dissuaded a reasonable worker from making or supporting a charge of discrimination.” *Burlington Northern & Santa Fe Railroad v. White*, 548 U.S. 53 (2006).

In addition, there is disagreement within the Circuits as to what remedies are available for retaliation claims under the ADA. For example, the Seventh Circuit limited the remedies in an ADA retaliation case to the equitable remedies set forth in 42 U.S.C. § 2000e-5(g)(1). See *Kramer v. Banc of America Securities, LLC*, 355 F.3d 961 (7<sup>th</sup> Cir. 2004). The Third Circuit, on the other hand, held that retaliation claims under the ADA were to be analyzed “under the same framework we employ for retaliation claims arising under Title VII.” *Shellenberger v. Summit Bancorp.*, 318 F.3d 183 (3d Cir. 2003) (quoting *Krouse v. American Sterilizer Co.*, 126 F.3d 494, 500 (3d Cir. 1997)). While the Supreme Court has not yet directly dealt with this issue, it is likely, based on its expansive holdings in *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) and *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), to agree with the Third Circuit and conclude that the Title VII analysis applies. Similarly, the Supreme Court has found an implied right of action for retaliation under Section 1981. *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008). Notably, the

Supreme Court has held that the ADEA protects federal employees who complain of age discrimination. *Gomez-Perez v. Potter*, 553 U.S. 474 (2008).

## **Criminal Records**

The EEOC has issued guidance on the consideration of criminal records in its compliance manual. Essentially, the EEOC suggested that excluding persons from employment on the basis of a criminal record, without a business necessity for the policy, likely would have an adverse impact on African-Americans and Hispanics and, as such, violates Title VII of the Civil Rights Act of 1964. For more extensive treatment of this issue, see *Chapter 12: Criminal Records as a Barrier to Employment*.

## **D.C. Discrimination Laws**

In many respects, the laws in D.C. are the same as the federal laws regulating employment discrimination. However, D.C.'s anti-discrimination protections are more expansive. Throughout the above section, some differences have been noted in the footnotes. Additional key differences are discussed more fully below. For information on how to file a discrimination complaint under D.C. laws, see this chapter's section on [Procedure for Filing Complaints of Discrimination](#).

## **Differences between D.C. and Federal Law**

### **Qualifying Employers**

The *D.C. Human Rights Act* (DCHRA), D.C. Code §§ 2-1401.01-1411.06, differs from Title VII in that it applies to all employers, regardless of size. The only limitation is that the religious accommodation requirement, i.e., a day off for Sabbath worship or holy day observations, applies only to employers with five or more employees. *Id.* at § 2-1402.11(c). Religion-based discrimination still is prohibited for all employers.

The 2022 Human Rights Enhancement Act took effect on October 1, 2022 and expanded the DCHRA's coverage to include homelessness as a protected characteristic. The amendments also clarified that the DCHRA's anti-discrimination protections include independent contractors.

### **Protected Categories**

As previously mentioned, the D.C. statute provides expanded coverage to different types of discrimination. Areas covered under D.C. law, but not federal law, include:

- Marital and familial status (including family responsibilities)

## Discrimination

- Personal appearance (outward appearance, but subject to business requirements or standards)
- Family responsibilities (supporting a person in a dependent relationship)
- Political affiliation
- Matriculation (being enrolled in college or vocational school)
- Place of residence or business
- Source of income
- Age discrimination protection is available to anyone over 18 years old (unlike federal law, which requires the claimant to be at least 40 years old). D.C. Code 2-1401.02(2)
- Credit Information (any written, verbal, or other communication of information) bearing on an employee's creditworthiness, standing, capacity, or history)
- Status as a Victim or Family Member of a Victim of Domestic Violence, a Sexual Offense, or Stalking
- Homeless Status

### **English-Only Rules**

Rules that require workers to speak English-only are illegal under D.C. law. *See* 5 DCMR § 506.3. They also may constitute discrimination on the basis of race or national origin in violation of the 1977 D.C. Human Rights Act.

## **Protecting Pregnant Workers Fairness Act of 2014**

D.C. law is also broader than federal law in that pregnant workers in D.C. can receive a reasonable accommodation without needing to show that they have a disability stemming from an abnormal pregnancy. Under the Protecting Pregnant Workers Fairness Act of 2014, D.C. employers are required to provide reasonable workplace accommodations for workers whose ability to perform the functions of a job are affected by pregnancy, childbirth, a related medical condition, or breastfeeding. D.C. Code § 32-1231.01.

The law specifically outlines examples of reasonable accommodations:

- More frequent or longer breaks
- Time off to recover from childbirth
- Purchasing or modification of equipment or seating
- Temporary transfer to a less strenuous or hazardous position, or light duty, or a modified work schedule
- Having the employee refrain from heavy lifting
- Relocating the employee's work area
- Providing private (non-bathroom) space for expressing breast milk

## **Filing a Complaint under the Protecting Pregnant Workers Fairness Act of 2014**

If an employer has wrongfully denied a pregnant worker a reasonable accommodation or has discriminated against a worker because of pregnancy, childbirth, the need to breastfeed or a related medical condition, the worker can file a claim with the D.C. Office of Human Rights, or in court within three years of the violation. D.C. Code § 32-1231.09. To file a complaint:

- **Online** at <https://ohr.dc.gov/service/file-discrimination-complaint>; or
- **In-Person** at 441 4th Street NW, Suite 570N, Washington, D.C. 20001

Cases can also be initiated through the Department of Employment Services (DOES), and DOES and OHR are currently sharing responsibilities for these cases (as of fall 2016). OHR will hand a mediation/investigation, but if the case is not resolved, DOES will conduct an administrative hearing.

## **Sexual Orientation and Transgender Discrimination**

It is illegal to discriminate against an employee on the basis of sexual orientation or gender identity. *Bostock v. Clayton County*, 590 U.S. (2020). Sexual orientation is also covered under the D.C. Human Rights Act; thus, it is illegal to discharge, suspend, or refuse to hire or promote an individual because of her sexual orientation or suspected orientation. Sexual orientation is defined as “male or female homosexuality, heterosexuality and bisexuality, by preference or practice.” *Underwood v. Archer Management Services, Inc.*, 857 F. Supp. 96, 98 (D.D.C. 1994).<sup>83</sup>

The D.C. Human Rights Act also was amended by the Human Rights Clarification Amendment Act of 2005 to protect against discrimination based on “sexual orientation, gender identity or expression.” D.C. Code § 2-1402.11. These terms are defined as including the “gender-related identity, appearance, expression, or behavior of an individual, regardless of the individual’s assigned sex at birth.” D.C. Code § 2-1402.12A. Consequently, transgender persons now also are entitled to protection under the D.C. Human Rights Act. D.C. Code § 2-1402.11.

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<sup>83</sup> In Maryland, the Anti-Discrimination Act of 2001 protects workers from workplace discrimination based upon sexual orientation. *See* 2001 MD S.B. 205 (May 15, 2001) (effective October 1, 2001). Sexual orientation, however, was limited to female or male homosexuality, heterosexuality or bisexuality; thus, transgender persons and transsexuals are not covered by this law. Under the law, employers may not discriminate against people based upon sexual orientation in terms of hiring or firing. *See* Md. Ann. Code, State Govt. Art. § 20-601 *et seq.* Only employers with more than 15 workers are covered by this law. Additionally, religious organizations are exempt from this act.

## Damages & Filing Deadlines

The D.C. statute does not have a damages cap, while *Title VII* caps damages depending on the employer's size. In addition, federal claims are subject to a 300-day statute of limitations. The D.C. one-year statute of limitations is slightly more generous.

While federal government employees cannot bring claims under the D.C. Human Rights Act (DCHRA), employees of the D.C. government can bring claims under the *DCHRA* and *Title VII*, as well as the *ADA*, and the *ADEA*.

Private employees are not required to exhaust administrative remedies before bringing an action in court under the *DCHRA*. However, D.C. government workers who file discrimination claims under the *DCHRA* must exhaust administrative remedies on their statutory claims through the D.C. Office of Human Rights before going to court. *Newman v. D.C.* 518 A.2d 698 (D.C. 1986).

## **Maryland Discrimination Laws**

Careful consideration should be given to the significant differences between federal statutes and how they have been interpreted, and the Maryland statute and several county ordinances and how they have been interpreted. Issues of coverage and scope, administrative and judicial limitation periods, damages and venue should be evaluated before initiating a claim. This is a brief summary of the Maryland statute and the ordinances in Baltimore County, as well as Howard, Montgomery and Prince George's counties. For information on how to file a discrimination complaint under MD laws, see this chapter's section on [Procedure for Filing Complaints of Discrimination](#).

*Maryland's Fair Employment Practices Act* (FEPA) prohibits discrimination on the basis of race, color, religion, national origin, sex, age, marital status, sexual orientation, genetic information, gender identity, or disability, unrelated in nature and extent to an individual's ability to perform a particular job, or because of the individual's refusal to submit to a genetic test or make available the results of a genetic test. *See* Md. Ann. Code, State Govt. § 20-606(a). FEPA also covers disabilities due to pregnancy or childbirth. *Id.* at § 20-609. The CROWN Act expands the definition of race to include "certain traits associated with race, including hair texture and certain hairstyles." "Braids, twists, and locks" along with "hair texture, afro hairstyles, and protective hairstyles" are specifically named and included in this protection. *Id.* at § 20-101.<sup>84</sup>

FEPA applies to private employers, public employers, labor organizations, and joint labor-management training committees. *Id.* at § 20-601. Employers must have more than 15 employees each day for more than twenty weeks to be held accountable under FEPA. *Id.* at § 20-601.

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<sup>84</sup> Effective October 1, 2020.

## Discrimination

As of October 2019, Maryland's anti-discrimination protections extend to independent contractors as well. *Id.* at § 20-601. Maryland courts have yet to address and interpret new protections for independent contractors.

FEPA now defines workplace harassment as unwelcome or offensive conduct based on "race, color, religion, ancestry or national origin, sex, age, marital status, sexual orientation, gender identity, or disability." Conduct need not be severe or pervasive. Employees can file a complaint for unlawful employment harassment against employers with 1 or more employee. *Id.* at § 20-601(d).

There are significant textual differences between the Maryland statute and federal statutes. For example, "disability" and "employer" are defined more broadly in Maryland, accommodations that may be required during an employee's pregnancy have been expanded and the protected age class is not defined as 40 or older. There are other textual differences.

Additionally, the Maryland Court of Appeals has indicated a willingness to depart from federal jurisprudence. In *Haas v. Lockheed Martin Corp.* 396 Md. 469, 914 A.2d 735 (2007) it declared:

"Maryland appellate courts have interpreted state statutes, rules, and constitutional provisions differently than analogous federal provisions on numerous occasions, even where the state provision is modeled after its federal counterpart."

"Maryland courts sometimes prefer interpretations of state statutes varying from similar federal statutes . . ." *Id.* at 742 n. 10.

The *Haas* Court went on to determine that an act of discriminatory discharge occurs on the last date of employment, contrary to the Supreme Court's holding that it occurs on the date the employee is notified that discharge will occur at a future date.

"We hold that, for the purpose of claims filed pursuant to § 42 of the Maryland Code, Article 49B, [now codified at State Government Article §20-601, *et seq.*] a "discharge" occurs upon the actual termination of an employee, rather than upon notification that such a termination is to take effect at some future date. In doing so, we find more persuasive the reasoning employed by those states that have rejected the [U.S. Supreme Court's] *Ricks/Chardon* rule in favor of the one we adopt today." *Id.* at 750.

A plaintiff's burden of proof is also different under Maryland law. The Court of Appeals in *Ruffin Hotel Corp. of Maryland v. Gasper*, 418 Md. 594, 17 A.3d 676 (2011), which was brought under the Montgomery County antidiscrimination ordinance stated:

"We believe Maryland law to be settled that a plaintiff's burden is to prove that the exercise of his or her protected activity was a 'motivating' factor in the discharge,

## Discrimination

thereby creating burden-shifting to the defendant. An instruction that imposes upon a plaintiff the burden of proving that the exercise of his or her protected activity was the ‘determining’ factor in the discharge from employment is a misstatement of the law, and erroneous.”

Counties may enact separate ordinances when authorized by the General Assembly. At least four local counties have been so authorized. *See* Montgomery County Code § 27-1, *et seq.*; Prince George’s County Code §2-185, *et seq.*; Howard County Code § 12.200, *et seq.*; and Baltimore County Code §29-1-101, *et seq.* While there is no such authorization set forth in Title 20, Baltimore City has enacted an ordinance as well. Its validity is subject to question.

There are significant differences between Title 20 and the several county ordinances, including, but not limited to the following:

While Title 20 imposes the same caps on damages as *Title VII* of the Civil Rights Act, county ordinances do not.

While Title 20 applies only to employers with 15 or more employees, the Howard County ordinance applies to those with five or more workers, while the Montgomery and Prince George’s ordinances apply to those with just one employee. The Baltimore County ordinance only applies to employers with less than 15 employees – which deprives such employees of a common law right of action as articulated in *Brandon v. Molesworth*, 104 Md. App. 167, 655 A.2d 1292 (1995). In that case, the Court held that an employee exempted from statutory protections had a common law claim for gender discrimination. This suggests that any employee excluded from Title 20 and county ordinances may have a common law claim for other forms of discrimination.

Some county ordinances have added protected categories. For example, Prince George’s County prohibits discrimination based on “familial status” and “political opinion,” neither of which is specified in Title 20. Montgomery County prohibits discrimination based on “family responsibilities;” Howard County has added “occupation” and “gender identity or expression” and Baltimore County also prohibits “gender identity or expression” discrimination. A comprehensive list of additional protected categories is found under each county’s code.

In *Pope-Payton V. Realty Management Services, Inc.*, 815 A.2d 919, 149 Md. App. 393 (2003) the Court of Special Appeals rejected the contention that venue lies where an employment decision was made and held that venue is proper in the county where the decision is implemented, *i.e.*, where the employee works or worked.

The Maryland Equal Pay for Equal Work Act prohibits employers from paying male or female employees different wages for work involving equal or substantially similar skill, effort and responsibility, unless the disparity exists based on a merit system, a seniority system, an incentive system, or some other lawful factor other than sex. The law applies to



any employer with two or more employees with more than \$250,000 in annual gross sales. See Md. Ann. Code Lab. & Empl. Art. § 3-301 *et seq.*

## **Virginia Discrimination Laws**

### **Virginia Human Rights Act**

The *Virginia Human Rights Act* generally prohibits unlawful discrimination employment practices on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions including lactation, age, marital status, sexual orientation, gender identity, disability, or military status for employers with more than 15 employees. See Va. Code Ann. §§ 2.2-3900 *et seq.* Included in the definition of race discrimination is discrimination on the basis of natural hairstyles, e.g. employees who choose to wear their hair in an afro, braids, locks, or twists. Virginia adopts a “motivating factor” standard of causation in employment discrimination claims. Va. Code Ann. § 2.2-3905(B)(6).

For information on how to file a discrimination complaint under VA laws, see this chapter’s section on [Procedure for Filing Complaints of Discrimination](#).

Specific employer eligibility requirements exist for various protected categories and claims:

- For employers with between 5 and 15 employees OR one or more domestic workers, these prohibitions only apply to unlawful discharge on the basis of race, color, religion, national origin, military status, sex, sexual orientation, gender identity, marital status, disability, pregnancy, or childbirth or related medical conditions including lactation. Va. Code Ann. § 2.2-3905
- Prohibitions on unlawful discharge on the basis of age discrimination only apply to employers with between 5 and 20 employees. *Id.*
- Employers with 5 or more employees are required to provide reasonable accommodations to employees with disabilities. Va. Code Ann. § 2.2-3905.1 Additionally, discrimination against qualified individuals who have physical or mental impairments is covered under the *Virginians with Disabilities Act*. *Id.* at §§ 51.5 *et seq.*

Under the *Virginia Human Rights Act*, certain agencies must review their regulations and services to ensure there is no discrimination against individuals with HIV or AIDS. *Id.* at § 2.2-214. Public workers and those working for government contractors also are protected from discrimination on bases similar to those covered in the *Virginia Human Rights Act*. *Id.* at §§ 2.2-4200-4201. In addition, Virginia requires equal pay regardless of gender. *Id.* at § 40.1-28.6.

Unlike in Maryland, a worker cannot rely on any public policy contained in the *Virginia Human Rights Act* (VHRA) to support a wrongful termination claim in Virginia. *See Doss v. Jamco*, 254 Va. 362, 492 S.E.2d 441 (Va. 1997). If the policy is reflected elsewhere in the Virginia Code (such as in a criminal statute), however, the fact that it is also in the VHRA will not, by itself, defeat the claim. *See Mitchem v. Counts*, 259 Va. 179, 523 S.E.2d 246 (2000).

The *Virginia Human Rights Act* prohibits retaliation for opposing unlawful discriminatory practices, filing a complaint, or participating in an investigation. *See* Va. Code Ann. §2.2-3905(B).

### **Pregnant Workers Fairness Act (PWFA)**

Beginning July 1, 2020, workers who are pregnant, recovering from childbirth, nursing, or have a related medical condition, who work at Virginia employers with 5 or more employees have a right to reasonable accommodations, unless the employer can demonstrate that the accommodation would constitute an undue hardship. The law specifically outlines examples of reasonable accommodations:

- Frequent or longer bathroom breaks
- Breaks to express breast milk
- Access to a private location other than a bathroom for the expression of breast milk
- Acquisition or modification of equipment or access to or modification of employee seating
- Temporary transfer to a less strenuous or hazardous position
- Assistance with manual labor
- Job restructuring
- Modified work schedule
- Light duty assignments
- Leave to recover from childbirth

Va. Code Ann. § 2.2-3909.

If an employer has wrongfully denied a reasonable accommodation related to pregnancy, childbirth, the need to breastfeed or a related medical condition, or taken an adverse action against a worker for such the request or use of a reasonable accommodation, the worker can file a lawsuit in court within two years of the violation. *Id.* Employees are not required to file a complaint with the Division of Human Rights (DHR) before suing for a violation of the PWFA. If they do choose to file a complaint with DHR, they have 90 days after DHR makes a final decision on the complaint to file a lawsuit. An employee who wins a pregnancy accommodation lawsuit can recover damages; equitable

relief, such as an order requiring that accommodations be provided; and attorney fees. *Id.*

It should be noted that protections against termination and discrimination on the basis of pregnancy, unrelated to requests for reasonable accommodations, only apply to employers with 15 or more employees under the Virginia Human Rights Act. Va. Code Ann. § 2.2-3905.

## **Theories of Liability – Proving Discrimination**

There are two main types of discrimination cases: disparate impact cases and disparate treatment cases. In disparate impact cases, the plaintiff claims the employer had a practice or policy that applies to all employees or applicants that had a disparate impact on a protected group. In disparate treatment cases, the plaintiff claims that she was treated differently because of his or her membership in a protected group. Harassment/hostile work environment cases are a subset of the disparate treatment type case. In these cases, the plaintiff claims that she has been subjected to harassment on the basis of his or her membership in a protected category that is severe and pervasive enough to create a hostile work environment. Each of these legal theories is discussed below.

### **Disparate Treatment**

Disparate treatment claims can be proven by direct evidence (e.g., an admission), or indirect/circumstantial evidence. Very few plaintiffs have direct evidence that unlawful discrimination has occurred, so most cases are brought relying on indirect or circumstantial evidence. Plaintiffs who lack direct evidence of discrimination need to have facts that roughly fit into the framework used by federal courts. The basic framework, described below, applies to all types of discrimination (race, sex, etc.), and is generally applicable in state court actions as well, even for non-federal claims.

#### **McDonnell-Douglas Analysis**

In a disparate treatment case, the plaintiff must first establish his or her *prima facie* case, which consists of four elements: (1) The plaintiff was a member of a protected category; (2) the plaintiff was qualified for his or her position or the promotion sought; (3) an adverse employment action was taken against the worker or applicant (e.g., fired, not hired, constructive discharge); and (4) the position was given to a less qualified person or kept open. See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Jefferies v. Harris County Community Action Association*, 615 F.2d 1025, 1030 (5<sup>th</sup> Cir. 1980).

Generally, the position must have been given to someone not in the plaintiff's protected class, but there are exceptions, such as in age discrimination cases where a 60-year-old plaintiff could bring a claim for being denied a position in favor of a 50-year-old person (both are in the protected class of persons over 40 years old).

## Discrimination

Once the plaintiff establishes a *prima facie* case, the employer has the burden to produce evidence showing that there was a legitimate, non-discriminatory reason for the adverse employment decision. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). This is merely a burden of production, not a burden of proof. *Burdine*, 450 U.S. at 255.

Sometimes an employer will defend itself by arguing that the decision for the adverse employment action was made by someone in the same protected group as the plaintiff. Note, however, that the mere presence of one minority in the decision-making process cannot shield the company from all charges under civil rights statutes. *See In re Lewis*, 845 F.2d 624, 635 (6<sup>th</sup> Cir. 1988); *Billingsley v. Jefferson County*, 953 F.2d 1351, 1353 (11<sup>th</sup> Cir. 1992).

If the defendant meets its burden of production, the burden shifts back to the plaintiff to show by a preponderance of the evidence that the reason offered by the defendant is merely a pretext for discrimination. *See McDonnell*, 411 U.S. at 804-05. This requires a showing that (1) the reason was false and (2) discrimination is likely the actual reason. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507-08 (1993) (quoting *Burdine*, 450 U.S. at 256); *see also Aka v. Washington Hospital Ctr.*, 156 F.3d 1284, 1289 (D.C. Cir. 1998). Some D.C. cases laying out this framework include *Arthur Young & Co. v. Sutherland*, 631 A.2d 354 (D.C. 1993); *RAP, Inc. v. District of Columbia Commission on Human Rights*, 485 A.2d 173 (D.C. 1984).

Critically, however, once an employer puts forth its purported non-discriminatory reason for an adverse action, the plaintiff has no burden to prove a *prima facie* case. *Brady v. Office of Sergeant at Arms*, 520 F.3d 490 (2008). Rather, the plaintiff must show that the employer's proffered non-discriminatory reason was pretextual.

In a *Title VII* disparate-treatment suit where an employee has suffered an adverse employment action and an employer has asserted a legitimate, non-discriminatory reason for the decision, the district court need not — and should not — decide whether the plaintiff actually made out a *prima facie* case under *McDonnell Douglas*. Rather, in considering an employer's motion for summary judgment or judgment as a matter of law in those circumstances, the district court must resolve one central question: Has the employee produced sufficient evidence for a reasonable jury to find that the employer's asserted non-discriminatory reason was not the actual reason and that the employer intentionally discriminated against the employee on the basis of race, color, religion, sex, or national origin? *See Hicks*, 509 U.S. at 507-08, 511, 113 S.Ct. 2742; *Aikens*, 460 U.S. at 714-16, 103 S.Ct. 1478.2

## **Adverse Employment Action**

An **adverse employment action** is one that produces a significant change in the employee's status—affecting the terms, conditions, or privileges of employment. Examples include a decision to terminate or failure to promote, a decision not to hire, a reassignment with greatly different responsibilities, or a change in benefits. *See Brown v. Brody*, 199 F.3d 446, 456 (D.C. Cir. 1999) (citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)). In *Stewart v. Ashcroft*, the D.C. Circuit found that the denial of an opportunity to move up within the “hierarchy” of a division within the Department of Justice constituted an adverse employment decision. 2003 U.S. App. LEXIS 26165 (D.C. Cir. 2003). The court stated that “failing to select an employee for a position with substantially greater supervisory authority is an adverse employment action.” *Id.* at 13. In *Daka, Inc. v. McCrae*, the D.C. Court of Appeals found that a transfer to a position with no responsibility, no potential for overtime, and “a diminution of job title that adversely affected his employability” could constitute an adverse employment action. 2003 D.C. App. LEXIS 752 (D.C. 2003). Importantly, however, this “adverse action” formula only applies in discrimination cases. In retaliation cases, by contrast, an “adverse” action includes any action that well might have dissuaded a reasonable worker from making or supporting a charge of discrimination. *Burlington Northern & Sante Fe Railway. Co. v. White*, 548 U.S. 53 (2006).

## **Direct Evidence Cases**

When there is evidence of animus, the burden-shifting framework does not apply, and the case is analyzed as a direct evidence claim. *See Kearney v. Town of Wareham*, 316 F.3d 18, 22 (1st Cir. 2002). The classic example of direct evidence or animus is when a supervisor tells the worker that she is being fired because there are “too many women in the department.” This rarely happens, and, when it does, the plaintiff rarely has credible evidence to corroborate her version of the events. If the plaintiff does have such evidence, then liability is generally established.

## **Mixed Motive Cases**

The Supreme Court clarified in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), that the Civil Rights Act of 1991 amended *Title VII* to allow for limited remedies in mixed motive disparate treatment cases involving direct evidence cases or in indirect evidence cases analyzed under *McDonnell Douglas*. Mixed motive cases are when part of the employer's reason for taking an adverse action against the plaintiff involved unlawful discrimination. The plaintiff, however, must still prove that the unlawful reason was a **motivating factor** in the employer's decision. If the employer can prove that the same adverse action would have been taken even without the unlawful discriminatory motive, the plaintiff may still recover injunctive and declaratory relief, as well as attorney's fees. *See generally* LARSON K. LEX, LEXSTAT 1-1 EMPLOYMENT DISCRIMINATION § 1.07 (2006); *Landgraf v. Usi Film Prods.*, 511 U.S. 244 (1994). The mixed motive analysis is not available for cases brought pursuant to the ADEA (age discrimination). *Gross v. FBL Financial Services*, 129 S. Ct. 2343 (2009).

### **Pattern and Practice - Statistical Proof of Disparate Treatment**

If an employer has a pattern of intentional discrimination against a particular group, it may be used as evidence that the employer discriminated against a particular person. The leading case on this point is *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), which lays out the elements of proof and the role of statistics. The *Teamsters* case discusses the particular allocation of proof in a class action, but pattern and practice evidence is helpful in developing individual cases as well. A plaintiff may introduce any of the following evidence: statistics, testimony of employees, statements by decision makers (e.g. Texaco executives being taped), evidence of highly-subjective decision-making practices, evidence of specific exclusionary practices, or evidence of a pattern of discrimination charges. Again, the employer may articulate some legitimate non-discriminatory reason, and the worker must then show that the employer's reason is pretextual.

### **Disparate Impact - When a Rule has a Discriminatory Effect**

In a disparate impact case, a worker claims that a particular employment practice, such as a personnel rule or a test, violates *Title VII* because it has a **disparate impact** on members of a protected class and is not supported by a legitimate business justification. It is not necessary to prove that the employer intended to discriminate.

The plaintiff's *prima facie* case consists of showing that the employment practice has a disproportionate adverse impact on a protected class. The employer may defend by showing that the practice is required by business necessity.

One of the leading cases discussing the disparate impact theory is *Griggs v. Duke Power Company*, 401 U.S. 424 (1971). In *Griggs*, the Supreme Court held that the employer's requirement that hired applicants possess a high school diploma had an unlawful disparate impact on African Americans, where a high school diploma was not significantly related to positive job performance. *See also Dothard v. Rawlinson*, 433 U.S. 321 (1977) (holding prison could set height and weight requirements for guard positions, but could not create male- and female-only positions); *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979) (holding that barring former heroin addict on methadone from driving subway was justified by business necessity).

A disparate impact challenge is stronger if it challenges a specific, clearly delineated employment practice applied at a defined point in the job selection process. *See Wards Cove Packing Company, Inc. v. Antonio*, 490 U.S. 642 (1989) (finding mere existence of racial imbalance insufficient to establish disparate impact without demonstration that a particular employment practice created disparate impact); *American Federation of State, County and*

*Municipal Workers v. State of Washington*, 770 F.2d 1401, 1406 (9th Cir. 1985).<sup>85</sup> However, “if the complaining party can demonstrate to the court that the elements of [the employer's] decision-making process are not capable of separation for analysis, the decision-making process may be analyzed as one employment practice.” *McClain v. Lufkin Industries*, 519 F.3d 264 (5th Cir. 2008) (citing 42 U.S.C. § 2000e-2(k)(1)(B)(I)).

## Harassment

Harassment can come in two forms. The first is **quid pro quo** harassment, which is generally only implicated in the sexual harassment context. It involves the promise of a benefit or a threat based on the employee’s willingness or unwillingness to submit to sexual advances and/or offers. This type of harassment is addressed in the Manual’s chapter on [Sexual Harassment](#). The second is harassment resulting from the creation of a **hostile work environment**.

A hostile work environment exists when there is unwelcome behavior on the basis of a protected category that is “sufficiently severe and pervasive to alter the conditions of [the victim’s] employment and create an abusive working environment.” *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986). A hostile work environment is a “workplace . . . permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.” *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986)). In addition, the plaintiff must perceive the environment as abusive in order for a hostile environment to exist. See *Harris v. Forklift Systems*, 510 U.S. 17, 21-22 (1993).

The behavior does not need to be directed specifically at the victim in order to be considered harassment. See *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415-16 (10<sup>th</sup> Cir. 1987); cf. *Garvey v. Dickinson College*, 763 F. Supp. 799, 801-02 (M.D. Pa. 1991) (finding incidents against others cannot be too attenuated). For example, an atmosphere where sexual or racial jokes are pervasive may create a hostile work environment.

Unlike quid pro quo, hostile environment applies to harassment on the basis of membership in any protected class or category. The behavior need not be sexual in nature, as long as it creates a hostile environment related to some protected class or category. See e.g., *Firefighters Institute for Racial Equality v. St. Louis*, 549 F.2d 506, 514-15 (8th Cir. 1977), cert. denied sub nom. *Banta v. United States*, 434 U.S. 819 (1977); and *Gray v. Greyhound Lines, East*, 545 F.2d 169, 176 (D.C. Cir. 1976) (finding hostile environments based on the protected class of race); *Compston v. Borden, Inc.*, 424 F. Supp. 157 (S.D. Ohio 1976) (religion); and *Cariddi v. Kansas City Chiefs Football Club*, 568 F.2d 87, 88 (8th Cir. 1977) (national origin).

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<sup>85</sup> The disparate impact theory is not available under 42 U.S.C. § 1981.

## **Employer's Affirmative Defense**

It is important for potential plaintiffs to remember that before filing a complaint of hostile environment or harassment, they should work to comply with any existing employer policy regarding discrimination. *See Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998). If the employer proves that it had an effective anti-harassment policy and that the employee failed to take advantage of it, and if there is no tangible adverse employment action, then the employer can raise an affirmative defense to the harassment. *Id.* If the harasser was a supervisor, then the employer may raise an affirmative defense that (1) the employer exercised reasonable care to prevent and correct the harassment, and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. *Id.*; *see also Farragher v. City of Boca Raton*, 524 U.S. 775 (1998).

## **Denial of Promotion**

To establish a *prima facie* case of a **denial of promotion based on discrimination**, a plaintiff must show that: (1) she is a member of a protected class; (2) her employer had an open position for which she applied; (3) she was qualified for the position; and (4) she was rejected for the position under circumstances giving rise to an inference of unlawful discrimination. *See Taylor v. Virginia Union University*, 193 F.3d 219, 229 (4th Cir. 1999). Well-established case law makes clear that an employee need not prove that she applied for and was rejected for a promotion in order to make out a *prima facie* case. *See Int'l Brotherhood of Teamsters v. U.S.*, 431 U.S. 324 (1977). In *Teamsters*, the court stated, "[t]he denial of Title VII relief on the ground that the claimant had not formally applied for the job could exclude from the Act's coverage the victims of the most entrenched forms of discrimination. Victims . . . could be denied relief precisely because the unlawful practices had been so successful as totally to deter job applications from members of minority groups." *Id.* at 367; *see also Dews v. A. B. Dick Co.*, 231 F.3d 1016, 1020, 1021 (6th Cir. 1999) (holding that in non-promotion case, plaintiff need not prove that he applied for and was rejected for promotion when employer did not notify employees about available promotion); *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126 (11th Cir. 1984) (holding failure to apply for a promotion not required where employee did not know of job and no formal mechanism to express interest is in place).

## **Retaliation**

Title VII, § 1981, and the D.C. Human Rights Act provide a cause of action for individuals whose employers have retaliated against them for **participating** in a charge of unlawful discrimination or for **opposing** a practice made unlawful by the discrimination statutes. *See* 42 U.S.C. § 2000e-3(a); 42 U.S.C. § 1981; D.C. Code § 2-1402.61.

Participation in the making of a complaint or testifying at a discrimination hearing is almost always protected, unless it is done with malice. The protection of opposition activity



is more limited. The employee must have an objectively reasonable and good faith belief that the underlying activity that he or she is opposing is unlawful discrimination.

A *prima facie* case for retaliation is made if the plaintiff can show that (1) she engaged in a statutorily-protected activity, (2) the employer made an adverse personnel decision resulting in a tangible harm, and (3) there is a causal connection between the two. *McKenna v. Weinberger*, 729 F.2d 783, 790 (D.C. Cir. 1984). The standard for showing a causal connection differs between Title VII and the DCHRA. Under the DCHRA, a plaintiff need not show that the plaintiff's protected activity was a but for cause of the retaliation. Under Title VII, however, following the Supreme Court's decision in *University of Texas Southwestern Medical Center v. Nassar*, 134 S. Ct. 881, 885 (2014), a plaintiff must show that the retaliation would not have occurred but for<sup>86</sup> the plaintiff's protected activity.

The definition of what constitutes an **adverse personnel decision** in the retaliation context was expanded by the Supreme Court in *Burlington Northern & Sante Fe Railway. Co. v. White*, 548 U.S. 53 (2006). In *Burlington*, the Court held that under Title VII's anti-retaliation provision an adverse personnel decision includes any action that well might have dissuaded a reasonable worker from making or supporting a charge of discrimination. *Id.*

As with discrimination cases, once the plaintiff has presented evidence of a *prima facie* case of retaliation, the burden then shifts to the employer to produce evidence of a legitimate non-discriminatory reason for the adverse action. If the employer is successful, then the plaintiff must show by a preponderance of the evidence that the employer's purported reason was a mere pretext for retaliation.

Knowledge of protected activity by a retaliating official can be assumed when an adverse action follows closely on the heels of protected activity. *Jones v. Bernanke*, 557 F.3d 670 (D.C. Cir. 2009). Assessment of temporal proximity is not keyed to a worker's first protected act. Where a worker engages in additional protected activity and an adverse action closely follows, an inference of retaliation may be made even if the *initial* protected activity of the employee had occurred years earlier. *Id.* (finding evidence of temporal proximity between plaintiff's request for a hearing before an administrative law judge and a negative performance evaluation one month later, despite the request occurring eleven months after his initial information complaint).

Notably, a plaintiff need not prevail on his or her underlying complaint to successfully establish a retaliation claim. In participation cases, the mere filing of a complaint is statutorily protected activity. *See Berger v. Iron Workers Reinforced Rodman Local 201*, 843 F.2d 1395, 1425 (D.C. Cir. 1988). In opposition cases, the plaintiff must have a reasonable belief that he was complaining of unlawful discriminatory conduct. *See Clark Co. School Dist.*, 532 U.S. 268 (2001).

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<sup>86</sup> This standard mirrors the but-for standard for retaliation under the ADEA that the Court outlined in *Gross v. FBL Fin. Servs.*, 557 U.S. 167 (2009).

## Constructive Discharge

Another adverse action against an employee involves an employer that **constructively discharges** the employee. This occurs “when the employer deliberately makes working conditions intolerable and drives the employee into an involuntary quit.” *Atlantic Richfield Co. v. D.C. Comm’n on Human Rights*, 515 A.2d 1095, 1101 (D.C. 1986).

In *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004), the Supreme Court resolved a split amongst the circuit courts on this issue and held that *Title VII* encompasses employer liability for constructive discharge in the harassment context, but that the affirmative defenses of *Burlington/Faragher* apply. Accordingly, to prove this claim, a plaintiff must show that his or her working conditions were so intolerable that a reasonable person would have felt compelled to resign. Where a supervisor is the perpetrator and the harassment results in a constructive discharge that also involves a tangible employment action (e.g., transferring the employee to a position in which he or she would face unbearable work conditions), the employer is strictly liable for the harassment/constructive discharge. Where no tangible employment action has occurred, however, the employer still may use the *Burlington/Faragher* affirmative defenses discussed earlier in this section.

## **Procedure for Filing Complaints of Discrimination**

### Deadlines for Filing Claims

The following are general statute of limitations for filing specific claims under federal and state law:

- *Title VII, ADA or ADEA* - 300 days (but federal employees must file their EEO claims with an EEO counselor within 45 days)
- *DC HRA* – One year for private employees (180 days for D.C. government employees)
- *VA HRA & Virginians Disabilities Act* – 180 days
- *MD HRA* – Six months
- 42 U.S.C §§ 1981 & 1983 – Three years, Four years for retaliation claims.
- *Rehabilitation Act* – 45 days
- *EPA* – Two years / Three years for willful violations
- *IRCA* – 180 days

Under *Title VII*, the charge-filing and suit-filing periods are subject to equitable estoppel, equitable tolling, and waiver. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (superseded by the Civil Rights Act of 1991 (Nov. 21, 1991) [P.L. 102-166](#), § 2, 105 Stat. 1071); *cf. Air Line Stewards & Stewardesses Ass’n, Local 550 v. American Airlines*, 763 F.2d 875, 1985 U.S. (7th Cir. Ill. 1985) (denying flight attendant plaintiffs retirement benefits that were not part of the settlement agreement). The Supreme Court has held that

the filing of an “intake questionnaire” and affidavit with the EEOC may be sufficient to satisfy the requirement that a charge be filed. *Federal Express Corp. v. Holowecki*, 552 U.S. 389 (2008).

The statute of limitations begins to run from the discriminatory act, not from when the consequences of that act became apparent. See *Delaware State College v. Ricks*, 449 U.S. 250 (1980). However, where discriminatory conduct constitutes a continuing violation, as in a hostile work environment, a series of separate acts will collectively constitute one unlawful employment practice. *AMTRAK v. Morgan*, 536 U.S. 101, 117 (2002). As long as a claimant files a charge within 300 days of any act that is part of the continuing violation, the charge will be timely. *Id.*

Similarly, in pay discrimination claims, the Title VII statute of limitations renews whenever an employee receives a discriminatory paycheck, as well as when a discriminatory pay decision is made, when a person becomes subject to the practice, or when a person is otherwise affected by the decision.

## **Filing Complaints against Private Employers at the Equal Employment Opportunity Commission (EEOC)**

A worker cannot file a lawsuit under *Title VII*, the *ADA*, the *ADEA*, or *Genetic Non-Discrimination Act (GINA)* without first filing an administrative complaint or charge with the **EEOC** or a **state fair employment practices agency**. The EEOC is the federal agency charged with enforcement of *Title VII* and other employment discrimination statutes. See <http://www.eeoc.gov> for additional *Title VII* guidance.

**NOTE!** Discrimination claims under state laws may have shorter or longer statutes of limitations than the EEOC’s 300 day filing deadline. See state-specific sections below for relevant filing deadlines.

D.C., Virginia, and Maryland are “deferral jurisdictions,” which means they have state Fair Employment Practice Agencies or FEPA agencies which may accept charges of discrimination. In D.C., this agency is the Office of Human Rights (OHR). In Maryland, this agency is the Maryland Commission on Human Relations, and in Virginia, this agency is the Virginia Office of Civil Rights. Because of “work sharing agreement[s],” between the EEOC and these

agencies, any charge filed with these agencies is automatically “cross-filed” with the EEOC. See *Wilson v. Communications Workers of America*, 767 F. Supp. 304, 306 n.2 (D.D.C. 1991). A claimant has **300 days** from the discriminatory act to file his or her complaint for federal anti-discrimination violations with the EEOC in D.C., MD, or VA because these are “FEPA” states. Workers filing claims under Title VI of the Civil Rights Act, e.g. WMATA workers, which prohibits discrimination in federally-funded programs, must file within **180 days**.

The worker must include all claims, charges, or complaints in his or her original filing.

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Otherwise, she might be barred from raising the charges later in court. “Only those discrimination claims stated in the initial charge, those reasonably related to the original complaint, and those developed by reasonable investigation of the original complaint may be maintained in a subsequent Title VII lawsuit.” *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 962-63 (4<sup>th</sup> Cir. 1996).

Claimants can call the relevant field office for more information on how to file a claim, schedule a telephone interview, and more:

**D.C.:** For discrimination occurring in Washington, D.C., claims may be filed with the EEOC at the **Washington Field Office**; 131 M Street NE; 4<sup>th</sup> Floor, Suite 4NW02F; Washington D.C. 20507-0100. To submit an inquiry and schedule an appointment for an interview, please use the online system at <https://publicportal.eeoc.gov/portal/> or call 1-800-669-4000; TTY: 1-800-669-6820.

**MD:** For discrimination occurring in Maryland, EEOC complaints must be filed with the **EEOC's Baltimore District Office**, GH Fallon Federal Building, 31 Hopkins Plaza, Suite 1432, Baltimore, MD 21201 (1-800-669-4000; TTY: 1-800-669-6820). To submit an inquiry and schedule an appointment for an interview, please use the online system at <https://publicportal.eeoc.gov/portal/> or call 1-800-669-4000; TTY: 1-800-669-6820.

**Note:** The MCHR and the EEOC will cross-file claims if the applicant checks the appropriate boxes on the charge form.

**VA:** The **Washington Field Office of the EEOC** covers federal claims arising in Northern Virginia, including Arlington County, Fairfax County, Warren County, Clarke County, Frederick County, Loudoun County, and the western half of Fauquier County. The EEOC's Washington Field Office is located at 131 M. Street, NE, Fourth Floor, Washington D.C. 20507. To submit an inquiry and schedule an appointment for an interview, please use the online system at <https://publicportal.eeoc.gov/portal/> or call 1-800-669-4000; TTY: 1-800-669-6820.

## Filing Complaints against Private Employers – D.C.

### Filing at the D.C. Office of Human Rights

The D.C. FEP Agency is the D.C. Office of Human Rights (part of the Department of Human Rights and Local Business Development). It is located at 441 4th St. NW, Suite 570 North (Metro: Judiciary Square) (202-727-4559).

A claimant, generally, must file his or her claim in the D.C. Office of Human Rights within **one year**. D.C. law provides for mandatory mediation, which is available, but not

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required, under federal law. Currently, the time between filing a complaint and getting to mediation is 60 days, but it can take significantly longer than the EEOC-suggested 270 days to get a decision after the close of the investigation. Notably, a complainant need not first file with the Office of Human Rights to maintain an action in court for discrimination under the *D.C. Human Rights Act*.

In order to file a claim, a complainant can simply walk in and watch a video on OHR filing procedures and fill out a questionnaire. However, persons must have an appointment to see an intake specialist. Call Monday through Friday, 8:30 a.m. to 5:00 p.m. to schedule an intake appointment. Appointments are scheduled two to three months in advance. Intake interviews are conducted Monday through Thursday, 9 a.m. to 3 p.m. and usually take one to two hours. Complainants can also submit the intake questionnaire through OHR's online portal: <https://ohr.dc.gov/page/employment-intake-questionnaire-form>.

The complaint form, available on-line at <https://ohr.dc.gov/service/file-discrimination-complaint> in English, Amharic, Chinese, French, Korean, Spanish, and Vietnamese, can be completed ahead of time. Workers should not delay in contacting the office for an appointment because the filing deadlines will be strictly enforced.

Because cases are “cross-filed” in D.C., it is not necessary to file with the EEOC as well—this should happen automatically. However, the claimant should review the Charge of Discrimination to ensure that the claim is cross-filed.

If a worker only wants to pursue his or her claim under the *D.C. Human Rights Act*, he or she may proceed by filing a lawsuit directly in D.C. Superior Court and bypassing the administrative office. D.C. Code § 2-1403.16(a). This differs from claims under federal law, which first must be filed with the EEOC. Workers who are represented by an attorney may consider going directly to court.

**Practice Tip:** Many employment discrimination attorneys file cases directly in D.C. Superior Court and avoid the D.C. Office of Human Rights and the EEOC altogether. Litigating in the Civil Division is very confusing and pro se litigants should take this on only as a last resort. Workers should contact employment discrimination attorneys to try to find one who will take their case for a contingency fee or reduced cost. Also, if the D.C. Office of Human Rights makes a finding, whether or not there is discrimination, an employee loses her right to litigate her case in court and must work through the D.C. Office of Human Rights administrative process.

## **Filing Complaints against Private Employers - Maryland**

### **Filing at the Maryland Commission on Civil Rights**

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A worker must submit a claim for a violation of federal and Maryland state laws with the Maryland Commission on Civil Rights (MCCR) within **300 days** of the alleged discrimination. See Md. Ann. Code, Art. §20-1004(c). As stated above, FEPA's anti-discrimination protections only apply to employers with 15 or more employees. A complaint alleging an unlawful employment practice that is filed within 300 days with the federal or local human rights commission is deemed acceptable.

Note that the filing requirements for workplace harassment are different. Complaints alleging workplace harassment against an employer with 1 or more employees can now be filed within **2 years** after the date on which the alleged harassment occurred. *Id.* at §20-1004(c)(3). However, the filing period for harassment claims filed with the EEOC remains 300 days.

The commission is located at 6 St. Paul St., 9<sup>th</sup> Floor, Suite 900, Baltimore, Md. 21202 (410-767-8600 or 800-637-MCHR (Md. only)). Office hours are Monday through Friday from 9:00 a.m. to 5:00 p.m. Intakes are done online at <https://mccr.maryland.gov/Pages/Intake.aspx>. The web site can be translated into a number of different languages.

### **Local Agencies**

In addition to Maryland state law, various counties of their own anti-discrimination protections. Employees who are discriminated against in violation of a county's codes may bring civil actions in circuit court within two years of the discriminatory act. However, as with Title 20 and federal statutes such as *Title VII*, one must first exhaust administrative remedies. County-specific filing deadlines are:

- Baltimore County: six months
- Howard County: six months
- Montgomery County: one (1) year of the complained act or omission
- Prince George's County: 180 days

Note that not all months are 30 days long which means there can be a difference between "six months" and "180 days." For example, January 1 to June 30 is six months, but it is also 181 days. In Prince George's County, an administrative complaint alleging the occurrence of a discriminatory act on January 1 and filed on June 30 would be untimely.

The local agencies are as follows:

**Baltimore City:** Baltimore City Community Relations Commission, Baltimore City Office of Civil Rights, City Hall-Room 250, 100 N. Holliday Street, Baltimore, MD 21202, (410) 396-3100. Source of law: Baltimore City Code, Article 4.

**Baltimore County:** Baltimore County Human Relations Commission, Drumcastle Government Center, 6401 York Road, Suite 1013, Baltimore, MD 21212, (410) 887-5917,



TDD (410) 339-7520. Source of law: Baltimore County Code, Article 3, Title 3.

**Howard County.** Office of Human Rights and Equity, 9820 Patuxent Woods Drive, Suite 237, Columbia, MD 21046 (410-313-6430; TDD 410-313-6401). Source of law: Howard County Code §§ 12.200-12.218.

**Montgomery County.** Office of Human Rights, 21 Maryland Avenue, Suite 330, 2<sup>nd</sup> Floor, Rockville, Md. 20850 (240-777-8450; TDD 240-777-8480). Source of law: Montgomery County Code, Chapter 27. The code is similar to *Title VII*, and suits under it are authorized by Md. Code Ann. , State Govt. Art. §20-601 *et seq.*

**Prince George's County.** Human Relations Commission, 14741 Governor Oden Bowie Drive, Suite L105, Upper Marlboro, Maryland 20772 (301-883-6170; TDD 301-925-5167). Office Hours: Monday-Friday, 8:30 a.m. to 5 p.m. Source of law: Prince George's County Code § 2.185.

Complaints against small employers who are exempted from Title VII, the Maryland Human Rights Act, and local discrimination laws, can be filed directly in court. *See Kerrigan v. Magnum Entertainment, Inc.*, 804 F. Supp. 733 (D. Md. 1992).

## **Filing Complaints against Private Employers - Virginia**

### **Virginia Office of Civil Rights**

To file a claim and to make sure all claims are preserved, clients and advocates should file a complaint with the Office of Civil Rights, 202 North Ninth Street, Richmond, Va. 23219 (804-225-2292). Employees filing a claim for an alleged discriminatory practice in violation of the VHRA must file with the Office of Civil Rights within **180 days**. Where the claim alleges violations of federal anti-discrimination statutes that also falls under the VHRA have 300 days to file a complaint. *See* 1 Va. Admin. Code § 45-20-30. Complaint forms are available on the Council's website: <http://www.oag.state.va.us/programs-initiatives/civil-rights>. Local agencies also should be contacted in the place in which the discrimination occurred. *See* Va. Code Ann. § 2.2-3900 *et seq.*

After a complaint is submitted, the Division will serve a charge on the employer and the parties will have the option to mediate. *Id.* at § 2.2-3907(B)-(C). Following an investigation, the Division will determine if there is reasonable cause. If no reasonable cause is found, the Division will dismiss the charge and issue a right-to-sue letter. The claimant will have 90-days to file a lawsuit in court. *Id.* at § 2.2-3907(E). Claimants may also request a right-to-sue letter if 180 days have passed since the filing of the complaint. *Id.* at 2.2-3907(H).

## Discrimination

Potential remedies include: compensatory and punitive<sup>87</sup> damages, temporary or permanent injunctive relief, reasonable attorney's fees, and costs. *Id.* at §2.2-3908(B).

### **Filing a Lawsuit**

Before filing a lawsuit, claims under the *Virginia Human Rights Act* must first exhaust administrative remedies by filing a complaint with the Office of Civil Rights in the Office of the Attorney General of Virginia and may proceed to state court once they have exhausted this remedy. VA. Code Ann. § 2.2-3907-3908. Employees filing a claim for an alleged discriminatory practice in violation of the VHRA must first file with the Office of Civil Rights within 180 days. Where the claim alleges violations of federal anti-discrimination statutes that also falls under the VHRA have 300 days to file a complaint. *See* 1 Va. Admin. Code § 45-20-30.

### **Local Agencies in Virginia**

The local agencies are as follows:

**City of Alexandria.** Alexandria Office on Human Rights, 123 N. Pitt Street, Suite 230, Alexandria, VA 22314 (703-746-3140). Office Hours: Monday-Friday, 8 a.m. to 5 p.m. The office accepts walk-in clients, or clients can call to receive a questionnaire form by mail. Additionally, the questionnaire form can be obtained online at: <http://alexandriava.gov/humanrights/info/default.aspx?id=550>. Source of law: City of Alexandria Code § 12-4 (Human Rights Ordinance).

**Arlington County.** Complaints regarding employment discrimination require an Employment Discrimination Intake Form. These forms are available online at: <https://www.arlingtonva.us/Government/Topics/Human-Rights>. They can be submitted online, or printed and completed and returned by mail or in person to The Office of Human Rights, 2100 Clarendon Boulevard, Suite 318, Arlington, Va. 22201 (703-228-3929; TTY: 703-228-4611). Office Hours: Monday-Friday, 8 a.m. to 5p.m. Source of Law: Arlington County Code § 6-22(d).

**Fairfax County.** Fairfax County Human Rights Commission, 12000 Government Center Parkway, Suite 318, Fairfax, Va. 22035-0093 (703-324-2953; TDD 703-324-2900). Office Hours: Monday-Friday, 8:30 a.m. to 5 p.m. Clients can call and speak immediately with an intake officer or walk in to fill out a questionnaire form. The last walk-in is taken at 4 p.m. Complaints can also be filed online at <http://www.fairfaxcounty.gov/humanrights/employment-discrimination/file-complaint>. Advocates can call Deputy Director Annie Carroll at 703-324-2721. Source of Law: Fairfax County Code, Chapter 11-1-5.

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<sup>87</sup> Punitive damages are capped at \$350,000. *See* Va. Code Ann. § 8.01-38.1.



## Discrimination

The Fairfax County Human Rights Commission does not take complaints for employers located in Fairfax City, Alexandria, or Falls Church. Alexandria complaints are handled by the Alexandria Human Rights Office (see above). For Fairfax City or Falls Church claims, clients or advocates should contact the Virginia Council on Human Rights or the EEOC.

**Prince William County.** Prince William County, Human Rights Commission, 15941 Donald Curtis Drive, Suite 125, Woodbridge, VA 22191-4291 (703-792-4680). In order to file a complaint, persons must complete an Intake Questionnaire. This form is available online at <http://www.pwcgov.org/government/dept/hrc/Pages/howtofile.aspx>. The form can be filled out and submitted online, or filled out online and then printed out, or printed out first and then completed. If forms are printed rather than submitted online, completed forms should be mailed to the above address. Claimants also can call the office and request that a form be mailed to them. The Washington Lawyers' Committee has some copies of the form as well. Office Hours: Monday to Friday, 8 a.m. to 5 p.m. (Spanish-speaking clients should call from 9 a.m. to 3 p.m.) Source of law: Prince William County Code § 10.1.

### **Claim Procedure: D.C. Government Employees**

D.C. government workers who file discrimination claims under the *D.C. Human Rights Act* must exhaust administrative remedies on their statutory claims through the D.C. Office of Human Rights *Human Rights Act* (OHR) before going to court. *Newman v. D.C.*, 518 A.2d 698 (D.C. 1986).

To proceed administratively, the employee must contact the EEO counselor in the agency within **180 days** of the alleged discriminatory event (except for complaints about sexual harassment, for which the client has one year to consult the EEO counselor). See 4 D.C.M.R. § 105.1. The EEO counselor then has 21 days to investigate the complaint, during which s/he meets with the complainant, interviews the parties involved, and tries to resolve the matter. The EEO counselor has 30 days to resolve the complaint once the complainant makes contact. If the complaint is not resolved within 30 days, the EEO counselor will issue the complainant an exit letter. If an EEO counselor is not responsive within one to two business days after initial contact, the complainant should document her attempts and contact another EEO Counselor or contact OHR directly.

The complainant has 15 days after the receipt of the exit letter to contact OHR and file a formal complaint. For a D.C. government employee who receives an exit letter or an adverse decision from her agency EEO counselor, the "formal" complaint process through the OHR is the same process as for any other employee initiating a complaint at the OHR.

When filing a civil action in court, the worker is in the same position as a worker filing a civil action against a private employer. The worker has **one year** to file his or her complaint. See D.C. Code § 2-1403.16.

D.C. employees also may have causes of action under *Title VII*, the *ADA*, or the *ADEA*, which may be brought using the administrative procedures of the EEOC, followed by a lawsuit in federal court. For federal claims, the employee must file with the EEOC within **300 days** of the discriminatory adverse action. The internal procedures described above do not apply to federal causes of action.

## **Claim Procedure: Federal Government Employees**

The process for filing discrimination complaints against the federal government is governed by the Equal Employment Opportunity Commission's (EEOC) regulations found at 29 C.F.R. § 1614. Discrimination based upon race, color, sex, sexual orientation, gender identity, national origin, religion, handicap, or age is prohibited in employment with the federal government. The process for an employee of, or applicant for employment with, the federal government to file a complaint of discrimination against his/her agency is substantially different than an employee or applicant alleging discrimination against a private-sector employer.

### **EEO Counseling – Stage 1**

The first step of the federal-sector complaint process is EEO counseling. An employee of, or applicant for, employment with the federal government who believes he/she has been discriminated against must contact an EEO counselor in the agency's EEO office within **45** calendar days of the date of the alleged discriminatory event. 29 C.F.R. § 1614.105(a)(1). This time frame can be extended in limited circumstances. *Id.* at § 1614.105(a)(2). Examples of situations where the time frame can be extended are: (1) if a continuing violation occurs, (2) if the worker has severe health problems which make her completely incapacitated and unable to file a complaint, or (3) if the worker is misled by the agency official of the filing deadline. Union grievance proceedings do **not** toll the statute of limitations.

The EEO counselor must advise the complainant that he/she has the choice between traditional EEO counseling or participation in alternative dispute resolution (ADR). *Id.* at § 1614.105(b)(2). Traditional EEO counseling involves the EEO counselor meeting with the complainant and the agency officials involved to gather basic facts regarding the claim and to determine if the case can be settled. EEO counseling is only supposed to last 30 calendar days from the date of the complainant's first contact with the agency's EEO office. *Id.* at § 1614.105(d). If the complainant chooses ADR, then the pre-complaint processing will terminate after 90 calendar days. *Id.* at § 1614.105(f).

**Note:** The complaint must include *all* the relief the worker is seeking and must include *all* of the claims. If these are not included, the worker may be barred from including them in court or at a later stage of the administrative process.

## **Filing the formal complaint – Stage 2**

After the EEO counseling stage is completed, the EEO counselor will send a letter to the complainant notifying the complainant of the right to file a formal discrimination complaint. *Id.* at § 1614.105(d). This letter typically is referred to as the “notice of final interview.” Significantly, the complainant has only **15 calendar days** from the date she receives the notice of final interview to file the formal complaint. *Id.* at § 1614.106(b). If the formal complaint is not filed within those 15 calendar days, then the complainant will be barred from raising that complaint in the future. The formal complaint must contain the following information: identity of the complainant and the agency; description generally of the action(s) that form the basis of the complaint; address and telephone number of the complainant or the complainant’s representative; and signature of the complainant or the complainant’s attorney. *Id.* at § 1614.106(c). The complaint also should include a request for compensatory damages and all other relief being sought by the complainant.

The complaint can be amended to include issues or claims “like or related to” those raised in the original complaint at any time prior to the conclusion of the investigation of the original complaint. *Id.* at § 1614.106(d). In general, a complaint may be amended to include additional bases of discrimination at any time before an EEOC hearing.

## **The investigation – Stage 3**

In what seems an odd conflict-of-interest, the agency that is accused of discrimination is responsible for investigating the complaint. A formal discrimination complaint must be investigated within 180 calendar days of the date the complaint was filed. *Id.* at § 1614.108(e). If the original complaint was amended, the investigation must be completed within either 180 calendar days after the date of the last amendment or 360 calendar days from the date of the filing of the original complaint, whichever is earlier. *Id.* at § 1614.108(f). The agency EEO office can request a 90-day extension to continue and complete its investigation but the complainant is under no obligation to agree to any extensions.

## **Agency decision/EEOC hearing/Filing suit in court – Stage 4**

At the completion of the investigation, the agency must notify the complainant of her rights for continued processing of the complaint. *Id.* at § 1614.108(f). In short, after the investigation is complete, the complainant may: (1) request that the agency issue a decision regarding the merits of the complaint; (2) request a hearing by an EEOC administrative judge; or (3) file suit in U.S. District Court. *Id.* at § 1614.108(f). Importantly, at any time after 180 calendar days has expired from filing a formal discrimination complaint, the complainant may file suit in an appropriate U.S. District Court or request that an administrative judge of the EEOC conduct a hearing. *Id.* at § 1614.108(g). Once that initial 180 calendar days has expired, the complainant does not have to wait for the agency to complete its investigation to request an EEOC hearing or file suit in court, nor does the complainant need a “right to sue” letter. If the investigation has been completed prior to the

180 calendar days, the agency will provide the complainant with notice of her rights. A complainant must file a request for a hearing within 30 days of receiving notice from the agency of hearing rights. If the complainant wishes to request an EEOC hearing, the complainant must send the hearing request to the appropriate office of the EEOC and a copy of the hearing request must be sent to the agency's (i.e., employing/discriminating agency) EEO office.

The maximum amount of compensatory damages allowed, other than back pay and possibly front pay, is \$300,000. *See Fogg v. Ashcroft*, 254 F.3d 103 (D.C. Cir. 2001) (holding Civil Rights Act limits on damage awards applies to each lawsuit, not each claim within each suit).

## **Compulsory Arbitration Agreements**

There is extensive case law on the issue of compulsory arbitration agreements, whether contained in pre-employment contracts, collective bargaining agreements, or elsewhere. This section provides a non-exhaustive summary of current law on this constantly evolving topic. Notable Supreme Court holdings in this area include:

- The outcome of a collectively-bargained arbitration award may not be used to bar a discrimination lawsuit. *See Alexander v. Gardner-Denver*, 415 U.S. 36 (1974) (on remand, the plaintiff was denied award because he was fired for non-discriminatory reasons). **However**, an individually-signed agreement to arbitrate may bar a *Title VII* claim. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).
- The Federal Arbitration Act (FAA) is applicable to all workers *except* transport workers. *See Circuit City Stores, Inc. v. Adams*, 121 S.Ct. 1302 (2001). *See also Sw. Airlines Co. v. Saxon*, 142 S. Ct. 1783 (2022) (airplane cargo loaders and ramp supervisors constitute exempt transport workers). Hence, in general, workers who sign arbitration agreements with their employers are subject to those agreements.
- Arbitration agreements that prohibit class and collective arbitration are enforceable. *Epic Systems Corp. v. Lewis*, 580 U.S. 1107 (2018).
- Whether an employee's agreement to arbitrate discrimination claims is unconscionable is an issue for the arbitrator, not federal courts, to decide. *Rent-a-*

### **Practice Pointer**

It is important to ask clients and prospective clients if they have mandatory arbitration agreements. Many workers might not even be fully aware that they have signed such agreements, so it is crucial to ask them to produce to you **all** documents from the employer that they have signed.

*Center, West, Inc. v. Jackson*, 130 S.Ct. 2772 (2010).

- A company can lose its right to arbitrate by waiting too long to compel arbitration. *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (2022).

## **Special Issue: Undocumented Workers & Discrimination Claims**

The Immigration Reform and Control Act of 1986 (IRCA) imposed civil and criminal penalties on employers who knowingly hire and employ undocumented workers—that is, individuals who do not have authorization to work in the United States. The penalties are “employer sanctions.” See 8 U.S.C. §§ 1324a(a)(1)(A), (a)(2), (e)(4), (f). The IRCA requires employers to verify an employee’s identity and authorization to work by referring to certain documents and must complete the I-9 form for each new hire.

Under *Title VII*, an aggrieved worker may be entitled to reinstatement, instatement, back pay, front pay, compensatory damages, punitive damages, injunctive relief, as well as attorney’s fees and costs. Before the Supreme Court’s decision in *Hoffman Plastics Compounds v. National Labor Relations Board*, 535 U.S. 137, 148-52 (2002), it was settled law that documented and undocumented immigrants were protected by federal anti-discrimination laws and entitled to their remedies, including Title VII, the ADEA, the ADA, and the Equal Pay Act. See, e.g. *EEOC v. Tortilleria “La Mejor,”* 758 F.Supp. 585 (E.D. Cal. 1991). But in *Hoffman*, the Supreme Court threw this otherwise straightforward eligibility for relief into disarray for undocumented workers, ruling that an undocumented worker who gained employment through the use of false documents could not get “back pay” for the time that he was illegally fired for union activities. While *Hoffman* was limited to the “back pay” remedy under the NLRA,<sup>88</sup> and courts have broadly held that the ruling is not applicable in the wage-and-hour context (as explained in the [Wage and Hour](#) chapter), it has strongly influenced the litigation of immigrants’ protections under labor and employment laws.

In *U.S. EEOC v. Mar. Autowash, Inc.*, the Fourth Circuit noted that “[n]othing [in Title VII] explicitly bars undocumented workers from filing complaints,” 820 F.3d 662, 666 (4th Cir. 2016), but declined to address the extent to which Title VII covers undocumented workers—noting that it is “a novel and complex problem. *Id.* at 667. Undocumented workers are unable to pursue hiring discrimination claims, on the basis that they “cannot present a prima facie case under McDonnell Douglas because IRCA makes that person legally unqualified for the position.” *United States EEOC v. Phase 2 Invs. Inc.*, 310 F.

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<sup>88</sup> The term “back pay” may refer to the wages the employee would have earned but for the employer’s illegal activity under the NLRA or discrimination statutes (as it does here), or, it may refer to wages owed under the FLSA or state wage laws for work already performed.

## Discrimination

Supp. 3d 550, 578 (D. Md. 2018); *see also Chaudhry v. Mobil Oil Corp.*, 186 F.3d 502 (4th Cir. 1999) and *Egbuna v. Time-Life Libraries*, 153 F.3d 184 (4th Cir. 1998). But where the worker's qualifications for a position is not an essential element, such as a hostile work environment claim, "discrimination...is an unlawful employment practice under Title VII even if that employee is an undocumented alien." *United States EEOC v. Phase 2 Invs. Inc.*, 310 F. Supp. 3d 550, 580 (D. Md. 2018).

Determination of what remedies are available to undocumented workers under Title VII is an evolving issue. While the Fourth Circuit has ruled that undocumented workers are ineligible for reinstatement or back pay in discrimination claims, the door remains open for courts to impose some kind of monetary penalty. *United States EEOC v. Phase 2 Invs. Inc.*, 310 F. Supp. 3d 550, 580 (D. Md. 2018). "Otherwise, employers would have an incentive to hire undocumented immigrants: they could pay such employees less than their colleagues with the knowledge that they will be able to pocket the difference, even if they may be required to implement some injunctive relief." *Id.*

# **SEXUAL** **HARASSMENT**

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**Table: Sources of Law – Harassment**

Federal Statute	42 U.S.C. § 2000e (2003) 42 U.S.C. § 1981 (2003)
Federal Regulations	29 C.F.R. § 1600 (2003)
D.C. Statute	D.C. CODE ANN. §§ 2-1401.01 – 2-1403.17 (2003)
D.C. Regulations	D.C. MUN. REGS. tit. 4, §§ 700-799 (2001)
Federal Employees	29 C.F.R. § 1614 (2003)
D.C. Employees	D.C. MUN. REGS. tit. 4, §§ 100-199 (2001)



## Sexual Harassment

As a legal matter, workplace sexual harassment is a form of sex discrimination and is prohibited by Title VII and the D.C. Human Rights Act, among other local anti-discrimination laws. Because sexual harassment is a prevalent problem and has distinct legal principles, it is covered here in a separate chapter both for convenience and because some claims (e.g., *quid pro quo* harassment) apply only to sexual harassment. **The procedures for filing a sexual harassment complaint with local agencies are the same as discussed in the [Discrimination](#) Chapter.**

**Title VII**, the federal law prohibiting sexual harassment, applies only to companies, labor organizations, employment agencies or governments with **15 workers** or more. *See* 42 U.S.C. 2000(e)(b). However, Title VII does not apply to bona fide “private members clubs” that are exempt from taxation, 42 U.S.C. § 2000(e)(b)(2). The **D.C. Human Rights Act, however**, applies to all employers, regardless of size.

### **Federal Law**

There are two types of sexual harassment claims that alter the terms of employment either expressly or constructively: (1) **quid pro quo**, and (2) **hostile work environment**. *See Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).<sup>89</sup> *Quid pro quo* harassment occurs when an employer conditions an employee’s status on complying with the employer’s sexual demands, and a hostile work environment occurs when sexually harassing conduct is sufficiently severe or pervasive as to alter the employee’s terms and conditions of employment. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752 (1998).

## **Two Types of Harassment**

### **Quid Pro Quo Harassment (tangible employment action claim)**

*Quid pro quo*<sup>90</sup> sexual harassment describes a situation where a supervisor takes a tangible employment action against an employee because of a refusal to submit to sexual demands. Generally, *quid pro quo* harassment is considered “sexual blackmail.” *See Gary v. Long*, 59 F.3d 1391, 1395 (D.C. Cir. 1995).<sup>91</sup>

*Quid pro quo* sexual harassment refers to a situation where a supervisor explicitly makes submission to his or her unwelcome sexual advances a condition of employment, and also encompasses situations where submission to unwelcome sexual advances is not explicitly made a condition of employment, but the rejection of such advances is nevertheless the motivation underlying an employer’s decision to take an adverse

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<sup>89</sup> A definition of sexual harassment can be found in 29 CFR § 1604.11(a).

<sup>90</sup> *Quid pro quo* sexual harassment occurs when submission to or rejection of unwelcome sexual conduct by an individual is used as the basis for employment decisions affecting such individual. 29 C.F.R. 1604.11(a)(2)(1993).

<sup>91</sup> All genders can be victims of and sue for sexual harassment.

employment action against an employee. *See Ellis v. Director, CIA*, No. 98-2481, 1999 U.S. App. LEXIS 21638, 1999 WL 704692, at \*3 (4th Cir. Sept. 10, 1999) (discussing *quid pro quo* sexual harassment and explaining that “[w]hen a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor’s sexual demands,” he or she establishes a violation of Title VII (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753-54 (1998)); *Briggs v. Waters*, 484 F. Supp. 2d 466, (E.D. Va. 2007).

### **Hostile Work Environment (non-tangible employment action claim)**

A plaintiff alleging sexual harassment based on a hostile work environment must prove that: (1) the conduct to which he or she was subjected was unwelcome; (2) the harassment was based on sex;<sup>92</sup> (3) the harassment was sufficiently severe or pervasive to create an abusive working environment; and (4) there is some basis for imposing liability on the employer. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993).

In order to meet the third element, an employee must demonstrate that the conduct (1) was severe or pervasive enough to create an objectively hostile or abusive environment; and (2) the worker subjectively perceived the environment to be abusive. *Id.*<sup>93</sup> In order to determine whether this element is met, courts look to the frequency of the conduct, its severity, whether the acts were physically threatening or humiliating, or a mere offensive utterance, and whether that unreasonably interfered with work. *Id.*

Examples of conduct that can create a hostile environment include comments of a sexual nature, unwelcome physical contact and/or offensive sexual materials as a regular part of the work environment. Supervisors, managers, co-workers and even customers can be responsible for creating a hostile environment. *See, e.g., Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287 (8th Cir. 1997).

There is no “magic number” of incidents that gives rise to an actionable hostile work environment claim. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993) (“[W]e can say that whether an environment is ‘hostile’ or ‘abusive’ can be determined only by looking at all the circumstances.”); *see also, EEOC v. WC&M Enters., Inc.*, 496 F.3d 393, 400 (5th Cir. 2007) (“Under the totality of the circumstances test, a single incident of harassment, if sufficiently severe, could give rise to a viable Title VII claim as well as a continuous pattern of much less severe incidents of harassment.”); *Terry v. Ashcroft*, 336 F.3d 128, 148 (2d Cir. 2003) (noting that the relevant test for harassment is “quality or quantity”).

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<sup>92</sup> This same standard applies to other protected categories such as race. If the harassment was “because of” the employee’s conduct it could be unlawful if it meets the other elements.

<sup>93</sup> The same legal principles and analysis apply in cases of hostile work environment harassment based on other protected categories, e.g., race, religion, etc.

## Employer Liability

An employer will be liable for harassment by a co-worker or a supervisor if it knew or should have known of the harassment and failed to take prompt remedial action to stop further harassment. *See Paroline v. Unisys Corp.*, 879 F.2d 100 (4th Cir. 1989). Additionally, in the case of harassment by supervisors, an employee may more easily prove harassment under a “respondeat superior” theory. Specifically, an employer will be strictly liable for sexual harassment if a supervisor’s harassment culminates in a tangible employment action. *See Ellerth v. Burlington Industries*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998). “Tangible employment actions” include any “significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” *See Ellerth*, 524 U.S. at 761. An employer will also be liable for sexual harassment when “a supervisor’s official act precipitates the constructive discharge.”<sup>94</sup> *See Pennsylvania State Police v. Suders*, 542 U.S. 129, 141-42 (2004).

If no tangible employment action was taken, an employer may raise an affirmative defense to a claim of vicarious liability for a supervisor’s harassment by proving that (1) the employer exercised reasonable care to prevent and promptly correct the harassment; **and** (2) the worker unreasonably failed to take advantage of the employer’s sexual harassment corrective procedures, or to avoid harm. *See Faragher*, 524 U.S. at 808.

Unless the harassment is “open and notorious,” an employee must usually place the employer on notice of the sexually harassing behavior in order to hold the employer legally liable. *See Parkins v. Civil Constructors of Illinois, Inc.*, 163 F.3d 1027, 1038 (7th Cir. 1998). The worker may place the employer on notice by informing supervisory personnel or human resources of the harassment. Employees should consult the employer’s sexual harassment policy for guidance, where available.

The mere existence of a sexual harassment policy does not necessarily mean that an employer has satisfied the first part of the *Ellerth/Faragher* test. *See Watkins v. Professional Security Bureau*, 1999 WL 1032614 at \*4 (4th Cir. 1999). The employer has to engage in a good-faith effort to prevent sexual harassment by providing and advancing a clear and effective policy. *See Ocheltree v. Scollon Productions, Inc.*, 335 F.3d 325 (4th Cir. 2003) (en banc) *Anderson v. G.D.C. Inc.*, 281 F.3d 452 (4th Cir. 2002) (placing an EEOC poster about discrimination on the wall of a dispatch trailer did not constitute a good-faith effort to comply with Title VII).

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<sup>94</sup> If the employee shows that the working environment is so abusive that it became so intolerable that resignation was a reasonable response, the employee may be able to establish that she was constructively discharged from her job. *See Pennsylvania State Police v. Suders*, 542 U.S. 129, 139 (2004) (finding that the reasonableness of the response is determined by an objective standard, based on whether conditions were severe enough that a person in the employee’s position would have no choice but to quit). *Id.* For example, if the employee was subject to a significant pay reduction, or was transferred to a position where she would face unbearable working conditions, she may have a claim for constructive discharge. *Id.*

## Same-Sex Harassment

Under federal law, a worker can bring a claim for sexual harassment committed by a member of the same sex. *See Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998). To prevail on a claim of same-sex sexual harassment, the worker must prove that “the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted ‘discrimination [] because of [] sex.’” *Id.* at 79-80.

## Domestic Workers

Many domestic workers, especially live-in domestic workers, are subject to sexual harassment, rape and other abuses, but may not be protected under Title VII because their employers do not usually employ 15 or more employees. *See Hidden in the Home: Abuse of Domestic Workers with Special Visas in the United States*, HUMAN RIGHTS WATCH, June 2001, [http://hrw.org/reports/2001/usadom/usadom0501-01.htm#P89\\_2728](http://hrw.org/reports/2001/usadom/usadom0501-01.htm#P89_2728). As of the date of publication, domestic workers continue to be excluded from anti-discrimination protections under the D.C. Human Rights Act. D.C. Code § 2-1401.02(10). Virginia amended its Human Rights Act in 2020 to extend workplace protections to domestic workers. Va. Code Ann. § 2.2-3905. Although Maryland’s general workplace protections only apply to employers with 15 or more employees, in 2022 anti-harassment protections were expanded to include employers with 1 or more employees. Md. Ann. Code, State Govt. § 20-601(d). Maryland domestic workers are now able to bring sexual and workplace harassment claims against their employers.

Other civil and criminal laws may also apply. For domestic workers subject to human trafficking, local service providers include Ayuda and the National Domestic Workers’ Alliance – DMV chapter. For domestic workers at the homes of diplomats, contact the Human Trafficking Legal Center at [info@htlegalcenter.org](mailto:info@htlegalcenter.org). The State Department’s Bureau of Protocol may also be able to assist – see the [International Employees](#) chapter for more information.

## Sexual Harassment by a Public Employer

As with their private-sector counterparts, public employees are protected from sexual harassment by Title VII of the Civil Rights Act.

## Retaliation

## Sexual Harassment

If the worker is subjected to adverse action after raising a complaint of sexual harassment, the worker can also bring a claim of illegal retaliation in violation of section 704(a) of Title VII. To make out a ***prima facie* case of retaliation**, the worker must show that: (1) the worker engaged in statutorily protected activity; (2) the employer took an adverse employment action; and (3) there is a causal connection between the protected activity and the adverse employment action. *See Gregg v. Hay-Adams Hotel*, 942 F. Supp. 1, 8 (D.D.C. 1996). To demonstrate the causal connection, the worker must show that the adverse action would not have occurred “but for” the filing of a lawsuit. *Id.*

To have engaged in **statutorily protected activity**, the worker must have complained of harassment or participated in an EEOC (or equivalent) proceeding. Protected activity includes making internal complaints about discrimination. *See Armstrong v. Index Journal Co.*, 647 F.2d 441, 448 (4th Cir. 1981).

It is not uncommon for a harasser or employer to fire or otherwise subject an employee to an **adverse action** if she reports sexual harassment. Adverse actions can include termination, demotion, suspension, denial of promotion, poor evaluation, unfavorable job re-assignment or any other action or treatment that would be likely to dissuade a “reasonable worker” from making or supporting a charge of discrimination. *See Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (2006).

Generally, the third element – **causation** – can be shown by proving a link between the protected activity and any adverse action, such as a demotion or termination. That link often can be shown by demonstrating that the adverse action came soon after the complaint of harassment, but a short time frame is not required:

[A]n adverse action following closely on the heels of protected activity may in appropriate cases support an inference of retaliation even when occurring years after the initial filing of charges. *See Holcomb v. Powell*, 433 F.3d, 889, 903 (D.C. Cir. 2006) (considering protected activity occurring two years after the filing of the complaint); *Singletary v. District of Columbia*, 351 F.3d 519, 524–25 (D.C. Cir. 2003) (concluding that the district court erred in evaluating temporal proximity only on the basis of the “original protected activity” rather than protected activity years later (internal quotation marks omitted)).

*See Jones v. Bernanke*, 557 F.3d 670, 680 (2009). If bringing a claim solely under Title VII, the but-for causation standard may apply. *See University of Texas Southwest Medical Center v. Nassar*, 134 S. Ct. 881, 885 (2014).

If the employer puts forth a legitimate non-discriminatory reason for an adverse action, whether the employee has made out a *prima facie* case for retaliation is irrelevant; rather, the question is whether the worker has provided enough evidence to prove to a jury that retaliation has taken place. *See Jones v. Bernanke*, 557 F.3d 670, 681 (2009).

## **Filing a Complaint**

In order to preserve a claim for sexual harassment or retaliation under Title VII, a person must file a charge with the EEOC within 300 days in D.C., Maryland and Virginia (180 days for WMATA employees). *See* 42 U.S.C. § 2000e-5. The complainant should provide a complete and detailed explanation of the incidents of sexual harassment as part of his or her EEOC charge.

## **D.C. Human Rights Act**

A D.C. worker also can sue for sexual harassment under the District of Columbia Human Rights Act (“DCHRA”). The DCHRA protects against sexual harassment in the workplace, as well as other types of discrimination. *See* D.C. Code § 2-1401.01, *et seq.* A worker who has been sexually harassed can file a complaint with the District of Columbia Office of Human Rights (DCOHR), but unlike Title VII, the worker also can file a lawsuit for sexual harassment in D.C. court without needing to first file with the Office of Human Rights. Please see this manual’s chapter on [Discrimination](#) for a detailed discussion of the process for filing a complaint under the D.C. Human Rights Act.

**Note:** If a complaint is pending with the DCOHR, a worker may not simultaneously file a private action and vice versa; instead, the worker should first request that the Office of Human Rights dismiss his or her claim for administrative reasons, prior to filing in court. *See* D.C. Code § 2-1403.16(a).

## **Level of Proof**

The 2022 Human Rights Enhancement Act greatly expanded the definition of sexual harassment under the DCHRA. Sexual harassment is defined as “any conduct of a sexual nature” that unreasonably alters an individual’s terms, conditions, or privileges of employment or has the purpose or effect of creating an intimidating, hostile or offensive work environment. Conduct can be direct or indirect, verbal or nonverbal, and includes sexual advances, requests for sexual favors, conduct of a sexual nature that is made a term or condition of employment, or where submission or rejection of the conduct is used as a basis for an employment decision affecting employment. D.C. Code § 2-1402.11(c-2).

Importantly, the HREA codified standards for determining when sexual harassment has occurred. A finder of fact shall consider the totality of the circumstances and need not determine that the conduct was severe or pervasive for it to constitute sexual harassment. The DCHRA expressly notes that there is no specific requirement for number of incidents or level of egregiousness. Finders of fact shall consider, *inter alia*, the frequency, duration, and location of conduct; whether the conduct involved threats, slurs, epithets, stereotypes,

or humiliating or degrading conduct; or whether a party to the conduct held a position of formal or informal authority relative to another party. *Id.*

## **Filing a Complaint**

Any person (even if not an aggrieved party) can file a complaint with the District of Columbia Office of Human Rights alleging a violation of the DCHRA. *See* D.C. Code § 2-1403.04(a).

## **Statute of Limitations**

Under the DCHRA, a worker **must file a claim alleging sexual harassment within one year**. *Id.*

If the harassment is made up of a series of hostile acts, then a complaint with the Office of Human Rights or in court is timely as long as the last act fell within the one-year limitations period: “a hostile work environment claim concerns a single unlawful practice which is treated as an indivisible whole for purposes of the limitation period, even if the initial portion of that claim accrued outside the limitations period.” *See Lively v. Flexible Packaging Assn.*, 830 A.2d 874 (D.C. 2003) (en banc). The Court used an “entire mosaic” analysis that looked at (1) frequency of the conduct; (2) severity; (3) whether the conduct is physically threatening or humiliating; and (4) whether there is interference with the employee’s performance at work.

## **Retaliation Prohibited**

The D.C. Code contains broad anti-retaliation provisions. *See* D.C. Code § 2-1402.61; *see also, Psychiatric Inst. Of Washington*, 871 A.2d 1146 (D.C. 2005), (where the court stated that “all adverse conduct is relevant so long as it would not have taken place but for the gender of the victim”).

## **Intentional Infliction of Emotional Distress**

A worker suffering from workplace sexual harassment can also bring a claim for intentional infliction of emotional distress if there is sufficient evidence of creation of a hostile work environment or evidence of “extreme and outrageous conduct.” *See, e.g., King v. Kidd*, 640 A.2d 656, 679 (D.C. 1993) (holding that the creation of a hostile work environment constituted a *prima facie* case of intentional infliction of emotional distress). To establish a *prima facie* case of intentional infliction of emotional distress in D.C., a worker must show “(1) ‘extreme and outrageous’ conduct on the part of the defendant

## Sexual Harassment

which (2) intentionally or recklessly (3) causes ‘severe emotional distress.’” *See Best*, 484 A.2d at 985 (citing *Sere v. Group Hospitalization, Inc.*, 443 A.2d 33, 37 (D.C.), cert. denied, 459 U.S. 912 (1982)).

A plaintiff can prevail on the intentional infliction of emotional distress claim even if the plaintiff fails to prove the sexual harassment claim. *See Estate of Underwood v. National Credit Union Administration*, 665 A.2d 621, 640 (1995) (finding that an intentional infliction of emotional distress claim stemming from alleged sexual harassment was not barred by the Workers’ Compensation Act, and that plaintiff did not have to prove sexual harassment claim to prevail on intentional infliction of emotional distress claim); *see also Psychiatric Inst. Of Washington v. District of Columbia Comm’n on Human Rights*, 871 A.2d 1146 (D.C. 2005).

See this manual’s chapter on [Employment Torts](#) for more information regarding this cause of action.

## **Undocumented Workers**

See this manual’s section on [Undocumented Workers & Discrimination Claims](#).

## **Welfare to Work**

See this manual’s section on [Welfare to Work](#) in the [Discrimination](#) chapter.

## **D.C. Government Employees**

See this manual’s Discrimination chapter for [Claim Procedure: D.C. Government Employees](#).

## **Federal Employees**

See this manual’s Discrimination chapter for [Claim Procedure: Federal Government Employees](#).

## **Maryland**



## Sexual Harassment

Maryland law prohibits sexual harassment. While Maryland courts look to Title VII for guidance, they are not bound by federal law in their interpretation of the broader protections afforded by state law. *See Haas v. Lockheed Martin*, 396 Md. 469, 914 A.2d 735, 750-51 (2007). Please see this manual's chapter on [Discrimination](#) for a detailed discussion of Maryland's prohibition on [discrimination](#) and [filing requirements](#).

Workplace sexual harassment need not be "severe or pervasive." It includes unwelcome sexual advances, requests for sexual favors, or other conduct of a sexual nature where submission to the conduct is explicitly or implicitly made a term or condition of employment; submission to or rejection of the conduct is used as a basis for employment decisions; or the conduct, taken in its totality, creates a working environment a reasonable person would perceive as abusive or hostile. Md. Ann. Code, State Govt. § 20-601(k).

Employers are liable for harassment where the offending party undertakes or recommends employment actions, such as hiring, firing, promoting, demoting, and reassignments, or directs, supervises, or evaluates the work activities of the employee. Employers are also liable if their negligence leads to harassments or continuation of harassment. *Id.* at § 20-611.

A worker aggrieved by alleged sexual harassment under § 20-606 of the Maryland State Government Code may file a complaint with the Human Relations Commission ("Commission"), or with the Equal Employment Opportunity Commission, according to the procedures prescribed in Md. Code Ann., State Gov't § 20-1004 (2010). Claims of harassment can be brought against employers with 1 or more employees. *Id.* at § 20-601(d).

The worker must file the complaint with the Maryland Commission of Civil Rights (MCCR) within **2 years** of the alleged offense. *Id.* at § 20-1004(c)(3). If an employer is based in Montgomery, Prince George's, Howard, or Baltimore County, a worker may file their complaint with the local anti-discrimination agency of that county instead of the MCCR—subject to the same 2 year statute of limitations. Non-aggrieved parties may also inform the Commission of sexual harassment offenses, and the Commission may, on the basis of that information, issue a complaint on its own motion. Workers have **3 years** to file a civil action in state Circuit Court. CITE.

After filing with a state, local or federal anti-discrimination agency, employees have the right to bring their claims for sexual harassment in Maryland court. Please see the section that covers [Maryland](#) in this manual's [Discrimination](#) Chapter.

## **Virginia**

There is no statute in the State of Virginia that governs sexual harassment. Claims in Virginia should be brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

## Sexual Harassment

For information on how to file a claim under Title VII in Virginia, please see this manual's chapter on [Discrimination](#).

# **WORKERS'** **COMPENSATION**

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D.C. Government Employees	D.C. Code §§ 1-623.01 <i>et seq.</i> 7 DCMR §§ 100 to 199
D.C. Police & Firefighters	D.C. Code §§ 5-701 <i>et seq.</i>
D.C. Private Employees	D.C. Code §§ 32-1501 to 32-1545 (1999) 7 DCMR §§ 200 to 299 (1986)
MD Private Employees	MD Code §§ 9-101 <i>et seq.</i>
VA Private Employees	VA Code §§ 65.2-100 <i>et seq.</i>



## **Workers' Compensation Concepts**

Workers' compensation is a "no-fault" compensation system based on insurance principles. Under the workers' compensation system, if a worker is injured on the job, she no longer has a traditional tort claim against the employer; instead, the employee's exclusive remedy is an award of workers' compensation, whether the injury was "caused" by the employer, the worker, a third party, or a natural disaster.

### **Compensable Injury Requirement**

An employee is automatically entitled to certain benefits whenever the employee suffers from an **accidental personal injury (or in some states, occupational disease) arising out of and in the course or scope of employment**. There are differences among the states as to the exact language employed, and different states give various meanings to these words. However, courts tend to find that if the activity that caused the injury was for the benefit of the employer, the activity was work-related and the injury is covered by workers' compensation.

- *"Arising out of"* - The injury was caused by a risk to which the worker was subjected by his or her employment.
- *"In the course of"* - This is a term of art involving consideration of the time, place and circumstances of the accident in relation to the employment. Thousands of state court decisions discuss such issues as going to and from work, walking into the plant from the parking lot, coffee breaks, lunch breaks, trips between employment locations, company-sponsored picnics or sporting events, etc.

### **Fault Is Irrelevant**

Fault on the part of the employer and/or the employee is largely immaterial, although exceptions generally can be found in cases of intoxication, intentionally self-inflicted injury and willful disobedience to the instructions of the employer.

### **Employee vs. Independent Contractor**

Workers' compensation laws cover only those having the status of an *employee*, as opposed to an *independent contractor*.

## **Statutory Immunity of Employer & Third Party Suits**

Under most states' laws, the employee, in exchange for the certainty of receipt of benefits regardless of fault, is deemed to have given up his or her common law right to sue the employer for negligence and damages for any statutorily covered injury. This is called the "*statutory immunity*" of employers. Most states retain the right of the employee to sue an outsider (a person or company other than the employer) for negligence or any other tort theory of liability, such as product liability or medical malpractice (associated with the rendering of medical care for the workers' compensation injury). These are called *third party suits*. However, an employee injured in the course of employment by a third party must generally choose between receiving workers' compensation benefits or suing the third party.

## **Insurance**

In most states, employers are required to purchase insurance to cover workers' compensation claims. In most jurisdictions, employers without insurance are subject to fines, including possible daily fines for each day an injured worker goes uncompensated. As a result, most cases involve third party insurance carriers. Some states, however, allow larger employers to self-insure.

## **Distinction between Covered Injuries & Occupational Diseases**

*Covered Injury* - In many states an injury must be an event taking place within a relatively short time frame, producing physical harm to the injured worker. Some states require a form of trauma. Some states with laws containing the term "accidental injury" disallow claims for lifting or strain injuries not produced by a traumatic event such as slipping, tripping, or falling, unless the amount of lifting required of the employee can be shown to be unusual for the particular employment.

*Occupational Disease* - The common element in most occupational disease statutes is a disease or condition which is characteristic of the worker's trade or occupation and is shown by medical evidence to be causally related to the trade. In other words, diseases that might be contracted in other occupations or in everyday life apart from employment are usually not compensable. Among the most common forms of occupational disease are repetitive stress injuries (also known as cumulative trauma disorders) such as carpal tunnel syndrome.

## **Types of Disability Benefits**

*Temporary Total Disability Benefits* - These benefits are payable when the injured worker has an injury that prevents him or her from working for a limited period of time.

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*Temporary Partial Disability Benefits* - An employee may be eligible for temporary partial disability benefits when she is able to do some work but is still recuperating from the effects of the injury, and thus temporarily limited in the amount or type of work that she can perform compared to the pre-injury work.

*Permanent Total Disability Benefits* - To receive this type of benefit, the employee typically must be unable to return to work in any capacity at any time in the future.

*Permanent Partial Disability Benefits* - These benefits are awarded for certain types of permanent conditions that do not cause the employee to be totally unable to work.

*Disfigurement/Mutilation* - A state's workers' compensation law may permit the employee to be compensated for disfigurement or scarring, frequently in the absence of any actual impairment, and sometimes in addition to actual impairment.

*Death Benefits* - Most states provide some form of compensation for survivors of workers who are killed as a result of job-related accidents. Death benefits are generally paid to replace the lost stream of income to the decedent's surviving dependents. However, there is great variability among the compensation laws of the various states regarding who can qualify as a survivor entitled to compensation for the death of the worker and the amount they are entitled to receive. It is important to note that, unlike a civil damage claim in the court system, workers' compensation claims for death benefits do not focus on grief, mental pain and suffering, or loss of society and companionship. Rather, the focus is on the surviving beneficiaries' loss of income earned by the deceased worker.

*Hospital, Medical and Vocational Rehabilitation Expenses* - All reasonable and necessary medical care required by the injured worker is generally covered, including prescriptions, medical appliances, etc. The medical condition requiring treatment must be causally related to the injury. Some states regulate the amount the medical care providers may charge for treatment; in these states, charges by a medical care provider that are in excess of the permitted amounts are unenforceable. States differ on the right of the injured worker to choose the medical care provider, with some states leaving this choice entirely up to the claimant and other states heavily regulating it by requiring that physicians be chosen from panels or selected by the employer.

## **Where to File**

When evaluating a workers' compensation case, it is first important to determine under which workers' compensation system a worker should file. This is typically determined by where the employee worked and was injured, and whether the employee worked for the government or a private employer.

- If the employee worked in the private sector in D.C., she must file with the D.C. Office

## Workers' Compensation

of Workers' Compensation at the D.C. Department of Employment Services. See [D.C. Employees of Private Companies](#) section below.

- If the employee worked for the D.C. government, she must file under the D.C. Government Comprehensive Merit Personnel Act. See [D.C. Government Employees](#) section below.
- If the employee worked for the federal government, she must file with the U.S. Department of Labor's Office of Workers' Compensation Programs. See [Federal Employees](#) section below.
- If the employee worked in the private or public sector in Maryland, she must file with the Maryland Workers' Compensation Commission. See [Maryland Employees](#) section below.
- If the employee worked in the private or public sector in Virginia, she must file with the Virginia Workers' Compensation Commission. See [Virginia Employees](#) section below.

It may be difficult to decide where a worker should file if the employee worked in more than one locality, was injured in a jurisdiction where she typically did not work, or if the worker was not located in the employer's principal place of business. There may be advantages and disadvantages to filing in a particular jurisdiction depending on the specific situation.

### **D.C. Employees of Private Companies**

Employees of private companies in the District of Columbia are covered by the 1979 District of Columbia Workers' Compensation Act and its amendments. The office that administers this law is the Office of Workers' Compensation of the D.C. Department of Employment Services, 4058 Minnesota Ave., NE, 3<sup>rd</sup> Floor, Washington, D.C. 20019. The telephone number is (202) 724-7000. The office is open Monday through Thursday from 8:30 a.m. to 4:30 p.m. and Friday from 9:30 a.m. to 4:30 p.m.

### **Jurisdiction**

To be compensable, the injury or death must occur in the District of Columbia or, if it occurs outside D.C., the employment must be **localized principally** in D.C. See D.C. Code § 32-1503(a); 7 DCMR § 201.2. An injury is not compensable, however, just because it occurs in the District of Columbia. Employees working for non-resident companies who temporarily enter D.C. are not covered. See D.C. Code § 32-1503(a-3); see also *Petrilli v. District of Columbia Dep't of Emp't Servs.*, 509 A.2d 629 (D.C. 1986).

Because D.C. is so small and many companies do work in D.C., Maryland and Virginia, a number of workers' compensation cases have turned on the interpretation of the phrase, "localized principally." The leading case is *Hughes v. District of Columbia Dep't of*

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*Emp't Servs.*, 498 A.2d 567 (D.C. 1985). *Hughes* lists factors to determine if the employment is localized principally in D.C.:

- (1) The location of the employer's business office or facility at which or from which the worker performs the principal services for which she was hired;
- (2) If no such office exists, the employee's residence, the place where the contract is made, and the place of performance; or
- (3) If neither (1) nor (2) is applicable, the location of the worker's base of operations.

*Id.* at 569.

After establishing the location of the employment relationship, the contacts between the District and the employment relationship must be more substantial than the contacts with any other jurisdiction. *See also, Shipkey v. District of Columbia Dep't of Emp't Servs.*, 955 A.2d 718 (D.C. 2008) (holding the most important factor to be the percentage of time worked in D.C. compared to Maryland and Virginia). A statutory exception to the principally localized rule is non-prisoners working in prison industries programs of D.C. correctional facilities and certain other prison industry programs. *See* D.C. Code § 32-1503(e).

## Coverage

### Is the Worker an Employee?

"Employee" is defined as "every person, including a minor, in the service of another under any contract of hire or apprenticeship, written or implied[.]" D.C. Code § 32-1501 (9).

In the past, D.C. courts have used two tests to determine whether an employee-employer relationship exists: right to control and relative nature of the work. In *Munson v. District of Columbia Dep't of Emp't Servs.*, 721 A.2d 623 (D.C. 1998), the Court of Appeals remanded the case for the director to determine which test should be used to make "employee" determinations. On remand, the director determined that the "relative nature of the work" test was the exclusive test for determining whether an employee-employer relationship existed. *See Munson v. Hardy & Son Trucking Co., Inc.*, Dir. Dkt. No. 96-176, OWC No. 0029805 (April 19, 1999). The "relative nature of the work" test has two parts: the first part examines the nature of the work, while the second part considers the relationship of the claimant's work to the employer's business. *Gross v. District of Columbia Dep't of Emp't Servs.*, 826 A.2d 393, 396 n.5 (D.C. 2003). Under the first prong, there are three factors to consider: (1) the degree of skill involved in the work; (2) the degree to which the work is a separate calling or business; and (3) the extent to which the work can be expected to carry its own accident burden. *Id.* The second prong also requires analysis of three factors: (1) the extent to which the claimant's work is a regular part of the employer's

regular work; (2) whether the claimant's work is continuous or intermittent; and (3) whether the duration of the work amounts to the hiring of continuous services, as opposed to contracting for a particular job. *Id.* The first part of the test is accorded less weight and courts place emphasis on the second part of the test. *See Reyes v. District of Columbia Dep't of Emp't Servs.*, 48 A.3d 159, 165 (D.C. 2012).

### **Contractors are Liable for Employees of Subcontractors**

The employer who subcontracts with another is liable for compensation to employees of the subcontractor unless the subcontractor secures payment. *See* D.C. Code §32-1503(c); 7 DCMR § 201.4.

### **Exemptions from Coverage**

The following employees are exempt from coverage under D.C.'s private workers' compensation statute:

- Federal government employees. *See* D.C. Code § 32-1501(9)(A).
- D.C. government employees. *See id.* § 32-1501(9)(B).
- Casual employees who do not work in the usual course of trade, business, occupation, or profession of the employer. The best example is someone who cuts the lawn of a private homeowner. Someone who mows lawns for a landscape company, however, is not a casual employee. *Id.* § 32-1501 (9)(E).<sup>95</sup>
- Domestic workers employed in and around a private home by someone who employed domestic household workers for less than 240 hours during any calendar quarter in the same or previous year.<sup>96</sup> *Id.*
- Non-D.C. residents working for non-D.C. employers provided that 1) they entered into a contract for hire in another state; and 2) the employer has workers' compensation coverage in another state. *Id.* § 32-1503(a-3).
- Workers with injuries caused solely by the worker's own intoxication. *Id.* § 32-1503(d).
- Workers with injuries that occur because of the worker's own willful intention to injure or kill himself or another. *Id.*
- Workers with injuries that occurred before July 26, 1982. Such injuries are covered by the Longshoremen's and Harbor Workers' Compensation Act, a federal law

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<sup>95</sup> Whether employment is casual, and thus excluded from coverage under D.C. law regarding workers' compensation, is determined by the employment contract, or if one does not exist, by the nature of the services rendered. Determination of whether an employee is casual requires an evaluation of the service performed and whether or not it is stable and settled, or casual and incidental. Employment is considered casual when it arises fortuitously and has no fixed duration. Employment of brief duration, such as a few hours or days, is typically considered casual. Unanticipated employment is also considered casual.

<sup>96</sup> For example, if the injury occurred on October 31, 1998, did the employer employ one or more domestic workers (including the injured worker) for more than 240 hours in any calendar quarter of 1998 or 1997? If so, then there is no exemption from coverage. A calendar quarter most likely will be interpreted as January through March, April through June, July through September and October through December. Two hundred and forty hours equals 20 weeks, or 40 hours for 6 weeks.

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administered by the U.S. Department of Labor. *See* 33 U.S.C. § 901.

- Other limited exceptions include service employees of Congress, real estate brokers and railroad employees. *See* D.C. Code § 32-1501(9).

### **Undocumented Workers**

Undocumented workers are not prohibited from receiving workers' compensation benefits in the District of Columbia. *See* D.C. Code § 32-1501(9). This rule may apply even if immigration status has been misrepresented. In *Asylum Co. v. District of Columbia Dep't of Emp't Servs.*, the District of Columbia Court of Appeals held that an undocumented alien was entitled to workers' compensation benefits. 10 A.3d 619, 626 (D.C. 2010) (holding that an undocumented worker is an "employee" under the District of Columbia Workers' Compensation Act.) In practice, however, the Office of Workers' Compensation might initially reject a claim for lacking a Social Security number. In such an event, the Office should be politely informed that an SSN is not required.

## **Compensable Injuries**

### **Causation - Is the Injury, Illness or Disability Work-Related?**

To be **work-related**, the injury or harm to the worker must arise out of and in the course of employment. The definition is very broad and includes specific injuries, such as a broken leg or an occupational disease or infection. *See* D.C. Code § 32-1501(12).

### ***Factual Causation***

Injuries that occur **during the performance of obligations or duties of employment** generally are said to arise out of employment. This includes injuries that occur during paid work time, while the worker is on working premises, and where there is a substantial nexus between the injury and the workplace facility.

The D.C. workers' compensation system also covers injuries caused by the willful act of a third person against a worker because of his or her employment. If the injury is the result of a third person, however, the injured employee may also be able to recover tort remedies against that third person and should consider consulting a personal injury lawyer to determine the best course of action.

Injuries occurring en route to or from work have been held to be non-compensable. *See Grayson v. D.O.E.S.*, 516 A.2d 909 (D.C. 1986) (holding employee injured pulling out of parking lot to go on unsupervised lunch break was not entitled to workers' compensation). An injury was held to be non-compensable when it occurred during off-duty hours in an apartment the employer provided rent-free. *See Mosley v. District of Columbia Dep't of Emp't Servs.*, 573 A.2d 776 (D.C. 1990).

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However, an injury was held compensable based on a traveling exception to the coming or going rule when a bus driver was injured while walking from a bus terminal to his hotel during an out-of-town assignment. *See Kolson v. District of Columbia Dep't of Emp't Servs.*, 699 A.2d 357, 361 (D.C. 1997) (holding that "when a traveling employee is injured while engaging in a reasonable and foreseeable activity that is reasonably related to or incidental to his or her employment, the injury arises in the course of employment").

### ***Medical Causation***

Even if the injury occurs at work and during work hours, the employee may still be called upon to present medical evidence that the event occurring at work could have caused his or her injury within a reasonable degree of medical certainty. Thus, it is always advisable for an employee to request a written medical opinion from his or her treating physician that explains in medical terms the connection between the injury-causing event at work and the resulting injury.

This is particularly important in cases involving the aggravation of a pre-existing condition. If a worker re-injures or aggravates a pre-existing condition, the current employer is completely liable. Liability shall be "as if the subsequent injury alone caused the subsequent amount of disability." D.C. Code § 32-1508(6)(A).

### **Occupational Disease**

Liability for diseases such as pneumoconiosis, radiation diseases, asbestos exposure, and any other recognized occupational disease rests on the employer where the last known exposure occurred. *See* D.C. Code §32-1510; 7 DCMR § 227.1. The employer may not be liable for any occupational diseases resulting from a hazard to which the worker has had greater exposure outside of the employment. 7 DCMR § 227.2.

### **Emotional Injury**

Emotional injury claims are compensable when the actual conditions of employment, as determined by objective standards and not merely the claimant's subjective perception of his working conditions, caused his emotional injury. Many emotional disability claims involve persons with prior psychological histories. Until 2008, the claimant was required to show that the working conditions would have caused a similar disabling emotional condition that was so stressful that a person of ordinary sensibilities would have reacted in the same manner. In *McCamey v. District of Columbia Dep't of Emp't Servs.*, 947 A.2d 1191 (2008), the Court overruled the objective test and held that the "person of ordinary sensibilities" standard was inconsistent with the purposes of the District of Columbia Workers' Compensation Act and the District of Columbia Government Comprehensive Merit Personnel Act.



## **Sexual Harassment**

D.C. courts have held that injuries sustained as the result of sexual harassment are not compensable under the D.C. workers' compensation law. See *Parkhurst v. District of Columbia Dep't of Emp't Servs.*, 710 A.2d 854 (1998), *on remand*, *Parkhurst v. WMATA*, Dir. Dkt. No. 93-96 (Oct. 7, 1998); *Estate of Underwood v. National Credit Union Admin.*, 665 A.2d 621 (D.C. 1995) (holding that as a matter of law, sexual harassment is not a risk involved in or incidental to employment). However, subject matter experts note that workers' compensation claims for injuries resulting from sexual harassment in the workplace may be covered in extreme circumstances. Workers, however, may file lawsuits under the relevant anti-discrimination and harassment laws.

For additional information on this subject, please see this manual's chapters on [\*Discrimination\*](#) and [\*Sexual Harassment\*](#).

## **Compensation**

Under the act, an employer, or its insurance carrier, is required to provide wage loss benefits, if appropriate, and payment of all medical expenses related to a worker's compensable injury. In appropriate cases, the employer, or its insurance carrier, may also be required to pay for scheduled loss benefits, vocational rehabilitation, death benefits, and attorney's fees.

## **Wage Replacement**

Wage replacement is available for as long as the injured worker cannot work, with a maximum of 500 weeks in the case of temporary or permanent partial disability (9.6 years). D.C. Code §§ 32-1508, 32-1505(b).<sup>97</sup> Wage replacement is two-thirds of the worker's previous salary, but cannot be more than the average weekly wages of insured employees in D.C. D.C. Code § 32-1505(b)-(e). Compensation must be made within 14 days of the knowledge of the injury and every two weeks thereafter unless such payment is disputed. D.C. Code §32-1515; 7 DCMR 209.2. If the employer disputes the claim, the employer must notify the Office of Workers' Compensation of such dispute within 14 days. *Id.*

The amount of monetary benefits a claimant is entitled to depends on: (1) whether the injury results in a partial or total disability; and (2) whether the disability is permanent or temporary.

## **Total v. Partial Disability Benefits**

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<sup>97</sup> Workers can apply for an additional 167 weeks if an Independent Medical Exam (IME) ordered by the Mayor finds continued whole body impairment exceeding 20 percent. See D.C. Code § 32-1505(b) (Supp. 1999).

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In accordance with D.C. Code § 32-1508, if a disability is total, the employee should be paid monetary compensation equal to 66 2/3 percent of their monthly pay while the worker is totally disabled.

If a disability is partial, the employee is paid monetary compensation equal to 66 2/3 percent of the difference between her weekly pay before the injury and her weekly pay after becoming disabled. If the employee voluntarily limits her income or fails to accept employment commensurate with her disabilities, then the wages after she becomes disabled will be deemed the amount she would earn if she did not limit her income voluntarily.

### **Permanent v. Temporary Disability**

A disability is permanent if it has continued for a lengthy period, and it appears to be of lasting or indefinite duration. An injury is not permanent if recovery from an injury merely requires a typical healing period. An injury also may be considered permanent when it has reached "maximum medical improvement" or "MMI." An injury has reached MMI if the injury has healed to the extent possible, and is unlikely to be improved by further medical treatment.

If an injury is permanent, the employee is entitled to a "scheduled award." The code and regulations list payment "schedules," a macabre list of what the loss of the use of body parts is worth. D.C. Code § 32-1508(3). For example, a lost arm is entitled to 312 weeks' compensation and a lost thumb is worth 75 weeks' compensation. Note that for injuries occurring after April 16, 1999, the scheduled award is reduced by 25 percent. *Id.* at § 32-1508(3)(V)(iii). This scheduled award is in addition to the compensation awarded for any temporary total or temporary partial disability that might be paid.

### **Three-Day Waiting Period**

There is no compensation allowed for the first three days of the disability unless the injury results in more than 14 days of disability. D.C. Code § 32-1505(a). If the claim is not contested, the first payment should be made within 14 days of the notice of injury. 7 DCMR § 209.2.

### **No Taxes**

Workers' compensation benefits are not taxed as income for federal or D.C. income tax purposes. Thus, the worker should not receive a 1099. If the worker does receive a 1099, she may contact the worker's claims examiner to have it rescinded.

### **Medical Services**

The Workers' Compensation Act requires the provision of medical care for the

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injury, including travel expenses for going to and from the doctor, medicine, false teeth, eye-glasses, and/or artificial or prosthetic appliances. D.C. Code §32-1507(a).

The worker has the right to be examined by the physician of his or her choice, although if the nature of the injury requires immediate care and the worker is unable to select a physician, the employer can choose one. *Id.* at § 32-1507(b)(3). The worker, however, still has the right to select his or her treating physician of choice as soon as she is aware of the right to do so. If the worker does not change doctors, then the worker is deemed to have adopted the employer's doctor.

Medical care is a contentious issue under workers' compensation. Employers can challenge the necessity of medical procedures, and the law provides for utilization reviews as the mechanism for resolving disputes. *Id.* at § 32-1507(b)(6). An organization or individual certified by the Utilization Review Accreditation Commission must conduct this review. The medical care provider can ask for reconsideration of the reviewer's findings within 60 days. *Id.* at § 32-1507(b)(6)(C). Following the utilization review, if a dispute still exists, any party can petition for a hearing (*see below* for hearing procedures). *Id.* at § 32-1507(b)(6)(D). The employer must pay for the cost of the utilization review if the worker seeks the review and is the prevailing party.

**Note:** If a worker receives treatment from an unauthorized physician who is not the treating physician, she may not be able to recover for those costs.

### **Vocational Rehabilitation**

Vocational rehabilitation (often referred to as "voc rehab") is supposed to return the worker to a position similar to the one held before the injury occurred. It can include job training, mandatory attendance at job fairs, or career counseling. The worker may be entitled to reimbursement for the cost of rehabilitation services if the worker requested that the employer supply such services, the employer failed to do so, and it is later determined that the services were appropriate. *See* D.C. Code §32-1507(d); 7 DCMR §229. The employer may be required to pay for the maintenance of an employee undergoing vocational rehabilitation, not to exceed \$50 a week. *Id.* at §32-1507(a).

### **Health Insurance Must Continue**

If the worker had health insurance coverage at the time of injury, it must continue and the employer must pay all premiums (including the employee-paid portion) for the duration of the worker's eligibility for workers' compensation benefits. D.C. Code §32-1507(a-1).

### **Death**

If a worker dies due to a work-related event, the employer must pay for reasonable funeral expenses, up to \$5,000. D.C. Code § 32-1509(1). In addition, a surviving spouse is

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entitled to payments of 50 percent of the deceased's wages. *Id.* at § 32-1509(2). If a surviving spouse remarries or enters into a domestic partnership, he or she is paid one sum equaling 2 years' compensation. *Id.* Children are entitled to an additional one-sixth of the wages each, to a family maximum of two-thirds of the deceased's wages. *Id.* If there are children but no spouse, the first child receives 50 percent of the deceased's wages and each additional child receives one-sixth, to a maximum of two-thirds of the deceased's wages. *Id.* at § 32-1509(3).

Other relatives who are dependent on the worker, such as grandchildren, brothers, sisters, parents, or grandparents, may receive compensation if there is no widow, widower, or child, or if the amount paid to a widow, widower, or child is less than two-thirds of the average wages of the deceased. *Id.* at § 32-1509(4).

### **Misrepresentation of Physical Condition as Bar to Recovery**

A worker is barred from receiving workers' compensation if: (1) the worker knowingly and willfully made a false representation of her physical condition; (2) the employer substantially relied on the misrepresentation when hiring the worker; and (3) there was a causal connection between the false representation and the injury. *See Smith v. George Hyman Construction*, H&AS No. 91-783 (Feb. 26, 1993). In *Castano v American Painting & General Contractors*, H&AS No. 93-115 (Nov. 29, 1993), the claimant was not barred, however, when he misrepresented his immigration status.

## **Workers' Compensation Procedure**

### **Employee Responsibilities – File Notice Form and Claim Form**

#### ***Notice of Injury***

Notice must be given to the employer within 30 days of the injury or within 30 days after the worker becomes aware of the relation between injury and employment. D.C. Code §32-1513; 7 DCMR § 206.1.

The notice should be in writing, and must contain: the name, address, and business of the employer; the name, address, and occupation of the worker; the cause and nature of injury or death; and the year, month, day, hour, and locality where the incident occurred. D.C. Code §32-1513(b); 7 DCMR 206.2 (1994). The notice must be signed by the worker or by any person claiming the benefit or compensation (such as a surviving spouse). However, failure to provide notice does not bar a claim if the employer or insurance carrier has knowledge, or if the mayor excuses the failure to report. D.C. Code § 32-1513(d).

**Practice Tip:** Form 7, "Employee's Notice of Accidental Injury or Occupational Disease," is available from the D.C. Office of Workers' Compensation and is used to provide notice to

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the mayor and the employer. The form is available online at [\[DC GOVERNMENT\] DOES owc form 07 Rev 3-18-20R \(seamlessdocs.com\)](https://dcgov.seamlessdocs.com/f/DOES_owc_form_07_Rev_3-18-20R). This form is also available at the Workers' Rights Clinics. The Workers' Compensation regulations state that the forms must be used, but the office may excuse the failure for good cause shown. 7 DCMR § 202.1.

### ***Filing the Claim***

Claims must be filed within one year of injury or death, but at least three days after the injury. D.C. Code § 32-1514(a); 32-1520(a). Where payment of compensation has been made without an award, a claim may be filed within 1 year after the date of the last payment. D.C. Code § 32-1514(a). As with the notice requirement, the deadline (or statute of limitations) for filing begins to run once the worker becomes aware of the injury and/or the relation between the injury and employment is shown. *Id.* at §32-1514(a); 7 DCMR § 207.2. Expiration of the statute of limitations will not be a bar to recovery unless objection is made at the first hearing. D.C. Code § 32-1514(b). The one-year time limit for filing a claim does not begin to run if the employer fails to file the report required by § 32-1532 and the employer or insurance carrier has been given notice of the injury. (See *Employer Responsibilities*, below). Mental incompetence can extend the time limits, but only if the person has no guardian or other authorized representative. *Id.* at § 32-1514(c).

Once a claim is filed, the OWC is supposed to notify the employer and other interested parties, by personal service or certified mail, that a claim has been filed. *Id.* at § 32-1520(b).

**Practice Tip:** Form 7a "Employee's Claim Application" is available from the Office of Workers' Compensation, (4058 Minnesota Ave. NE) and also at the Workers' Rights Clinics. The form is also available online at: [https://dcgov.seamlessdocs.com/f/DOES\\_owc\\_form\\_07A](https://dcgov.seamlessdocs.com/f/DOES_owc_form_07A). The Workers' Compensation regulations state that the forms must be used, but the office may excuse the failure for good cause shown. 7 DCMR § 202.1.

**Practice Tip:** The notice of injury form and the claim form (Forms 7 and 7a) may be filed at the same time. However, do not file the notice of injury form and the claim form on the same day if the injury did not occur more than three days earlier. Hold the claim form until three days have passed.

### **Employer Responsibilities**

Employers are required to provide a report of the worker's condition to the Office of Workers' Compensation (OWC) within 10 days of the injury or knowledge of the injury. D.C. Code §32-1532; 7 DCMR § 204. The worker's one-year time limit for filing a claim does not begin to run if the employer or insurance carrier has been given notice of the injury and the employer fails to file a report to the OWC. D.C. Code § 32-1532(f).

## **If the Employer Disputes the Claim**

### ***Notice of Controversion***

If payment is contested, the employer must provide notice of controversion to the Office of Workers' Compensation within 14 days after the worker has filed a formal claim. D.C. Code § 32-1515(d); *see also Ratliff v. WMATA*, 159 F.3d 637 (D.C. Cir. 1998).

The notice of controversion must include the name of both the employer and the worker, the date of the injury, a statement that the right to compensation is contested as well as the basis for such a statement, the name and address of the employer's representatives and insurance carrier, and any other information the office requires. 7 DCMR §210.3. The employer must send the notice of controversion by certified mail, return receipt requested, to the worker at the worker's last known address or place of residence. *Id.*

### ***Informal Conference***

The OWC may use informal conferences to resolve a contested claim, provided that both parties participate voluntarily. Informal conferences may be conducted over the phone or at the office. 7 DCMR § 219.

If, after the conference, the parties come to an agreement, a memorandum must be issued within 14 days of making that agreement. If no agreement is reached, the OWC evaluates all the information and prepares a Memorandum of Informal Conference containing recommendations. *Id.* The parties then have 14 working days to respond in writing regarding whether they agree or disagree with the OWC recommendations. If they agree, then a final order is issued. If they do not agree, either party can file for a formal hearing. This must be done within 34 working days after the issuance of the Memorandum of Informal Conference. If no formal hearing is requested, the OWC will issue a final order. *Id.*

**Practice Tip:** Attorney's fees are not allowed if no informal conference was requested. Claimants and advocates, even if representing a client *pro bono*, should request an informal conference. Not requesting an informal conference can cause the claimant problems later if the case needs to be referred to a private attorney. See the Filing Application for Attorney's Fees section below.

### ***Application for Formal Hearing***

An application for a formal hearing must be made in writing and filed with the OWC, with copies to the opposing parties or known representatives. D.C. Code § 32-1520(c); 7 DCMR § 220.

**Practice Tip:** Form 20, Application for Formal Hearing, is available from the OWC.  
<https://does.dc.gov/page/workers-compensation-does>

The Application for Formal Hearing should be filed with the D.C. Government, Department of Employment Services, Office of Hearings and Adjudications, 4058 Minnesota Ave. NE, Washington, D.C. 20019. A formal hearing is supposed to be held within 90 days after applying. D.C. Code § 32-1520(c). Discovery is allowed.

### ***Pre-Hearing Order***

Prior to the formal hearing, a joint pre-hearing order normally is required. 7 DCMR § 222. The pre-hearing order is similar to a pre-trial statement, including a statement of disputed and undisputed facts, list of witness, time estimate, and a statement that settlement was considered. *Id.*

**Note:** A request for an interpreter for people with limited English proficiency must be filed with the administrative law judge (ALJ).

### ***Formal Hearing Procedures***

Formal hearings are conducted by ALJs within the Office of Hearings and Adjudication. The claimant and employer may present evidence at the hearing. D.C. Code § 32-1520(d). Each party may be represented by any person authorized in writing. *Id.*<sup>98</sup>

At the hearing, the following presumptions apply: that the claim comes within the provisions of this chapter; that sufficient notice of the claim was given; that the injury was not occasioned solely by the intoxication of the injured employee; and that the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another. *Id.* at § 32-1521. This means the employer has the burden of proving a controversion of these four items.

Hearing procedures are spelled out in regulations at 7 DCMR § 223. The ALJ should inquire fully into all matters at issue and accept all relevant evidence, but the Memorandum of the Informal Conference is not accepted into evidence under any circumstance. The ALJ may also direct the parties to submit new evidence and allow the parties to open evidence for additional material. *Id.*

### ***Issuance of Compensation Order***

After a formal hearing, the ALJ's decision, called a **compensation order**, is supposed to be handed down within 20 business days of the hearing. *See* D.C. Code § 32-

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<sup>98</sup> Note that the statute allows for non-attorney representatives, but attorney's fees are available only to licensed attorneys. *See* D.C. Code § 32-1530.

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1520(c). In practice, compensation orders rarely are issued within 20 days. It can take three months to a year or more to issue a compensation order.

Either party disagreeing with a compensation order may file an application for review with the Compensation Review Board. *Id.* at § 32-1522. The Board must make its disposition within 30 days. *Id.* If no application is filed, the compensation order becomes final. In making a determination, the Compensation Review Board must defer to the ALJ's decision if the decision (1) states findings of fact on each material, contested factual issue; (2) makes findings of fact based on substantial evidence; and (3) makes conclusions of law that rationally follow findings. *Hyman v. District of Columbia Dep't of Emp't Servs.*, 498 A.2d 563 (D.C. 1985); *Dell v. DOES*, 499 A.2d 102 (D.C. 1985).

### ***Administrative and Judicial Review***

Under D.C. Code § 32-1522(b)(3) and the D.C. Administrative Procedure Act, D.C. Code §§ 1-1501 to 1542, the claimant can appeal an adverse final order to the D.C. Court of Appeals.

### ***Attorney's Fees***

Attorney's fees in connection with the representation of an injured worker are regulated by the District of Columbia Workers' Compensation Act and the Department of Employment Services. An attorney representing an injured worker in a workers' compensation claim in the District of Columbia cannot take a fee unless that fee is approved by the Department of Employment Services, and the attorney cannot charge any fees upfront.

If an employer refuses to pay benefits within 30 days of a claim and the worker or beneficiary thereafter uses an attorney to successfully prosecute his claim, a reasonable counsel fee may be awarded against the employer or carrier in an amount approved by the mayor. *See* D.C. Code § 32-1530.

If the employer pays all requests for compensation within 30 days of an injury, the employer will not be liable for attorney's fees. If the employer agrees to compensate the worker for his or her injuries but disagrees as to the degree of the worker's injuries or the amount to be paid, then the employer will only be required to pay attorney's fees if, after 14 days, it refuses to pay any additional compensation recommended by the mayor. *See* D.C. Code § 32-1530(c); *Nat'l Geographic Soc'y v. District of Columbia Dep't of Emp't Servs.*, 721 A.2d 618, 621 (D.C. 1998).

Attorney's fees are capped at 20 percent of the worker's actual benefits, including medical expenses secured by the claimant through the attorney services. D.C. Code § 32-1530(f). In determining the amount of attorney's fees, the following factors must be considered:



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- a) The nature and complexity of the claim, including the adversarial nature;
- b) The actual time spent on developing and presenting the case;
- c) The dollar amount of potential future benefits obtained and dollar amount of potential future benefits resulting from the efforts of the attorney;
- d) The reasonable and customary local charge for similar services; and
- e) The professional qualifications of the attorney.

7 DCMR § 224.2.

Applications for fees must be filed within one year of the final compensation order and all appeals. DCMR § 224.7.

### ***Other Penalties***

Under § 32-1515, if the employer fails to pay any installment of compensation payable without an award within 14 days after it becomes due, 10% of the amount is added to the unpaid installment. D.C. Code § 32-1515(e). The added amount is to be paid at the same time as the installment, unless a notice of controversion is filed. *Id.*

Under § 32-1528(b), if the court determines that a carrier has delayed the payment of any installment of compensation to an employee in bad faith, the employer shall pay to the injured employee, for the duration of the delay, the actual weekly wage of the employee for the period that the employee is eligible to receive workers' compensation benefits. The penalty shall be in addition to any amount paid pursuant to § 32-1515.

## **Retaliation for Filing a Workers' Compensation Claim**

A worker may not be discharged or discriminated against for making or attempting to make a formal or informal claim regarding workers' compensation, or for testifying or preparing to testify in a workers' compensation proceeding. D.C. Code § 32-1542. A worker whose employer has retaliated against him for filing a workers' compensation claim may raise this matter at the informal conference; however, the employer, not the insurer, must respond to this claim (typically only the insurer attends an informal conference on behalf of the employer). Generally, only limited relief is available – *e.g.*, reinstatement (in the case of a termination) and/or back pay. Workers' compensation retaliation does not give rise to a wrongful termination claim based on a violation of public policy.

Even if a worker is discharged, it should have no effect on his wage replacement benefits, which should continue as long as the worker is unable to work, subject to the statutory maximums discussed above.

### **Enforcement of Retaliation Claims**

Once the notice of injury has been filed in a timely manner, then a claim for

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retaliation may be brought up at any time. Employees who prevail under this section are entitled to reinstatement and back pay. Civil penalties between \$100 and \$1,000 may be assessed by the Mayor. D.C. Code §32-1542.

A worker cannot bring a claim for wrongful discharge as a way to forego pursuing a claim for benefits within the workers' compensation system. *See Nolting v. Nat'l Capital Grp.*, 621 A.2d 1387 (D.C. 1993) (because worker could file claim for benefits, her case was dismissed).

### **The Special Fund**

The special fund is made up of payments from employers such as civil penalties and a \$5,000 payment required when a worker dies as a result of a workplace injury, and no survivor is eligible for compensation. *See* D.C. Code § 32-1540(d); 7 DCMR § 231. Workers may apply to the special fund in order to:

- Pay for vocational rehabilitation benefits when the employer fails or refuses to provide adequate vocational rehabilitation. *See* D.C. Code § 32-1507(c).
- Pay for treatment recommended by a physician, but not generally recognized by the medical community. *Id.* at § 32-1507(e).
- Receive benefits when judgment cannot be satisfied because of the insolvency of the employer or other circumstances precluding payment. *Id.* at § 32-1519(b).

### **Procedures for Accessing the Special Fund**

To apply for money from the special fund, the claimant must have an award and judgment through the hearing process. 7 DCMR § 231.17. Application must be made within 24 months of the date of judgment along with a statement of attempts to enforce the judgment. *Id.* at §231.18.

Applications may be filed with the Custodian of the Special Fund, Office of Workers' Compensation, 4058 Minnesota Ave., NE, Washington, D.C. 20019. Fax (202) 671-1929. The associate director will investigate the claim and issue an order within 20 days of the application. *Id.* at §231.20; § 231.21.

### **Self-Insured Employers**

Most employers pay premiums to an outside insurance company which insures them for workers compensation claims their employees file. Some (usually larger) employers, however, are self-insured. To be a self-insured employer, the employer must be authorized by the Mayor on the basis of proof of its ability to pay compensation awards. *See* D.C. Code § 32-1534 (a)(2). Typical factors the Office of Workers' Compensation examines

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when considering an employer's application to be self-insured are: the financial standing of the employer; the nature of the work in which the employer is engaged; the degree of hazard to which employees are exposed; the amount of the employer's payroll; etc. *See* 7 DCMR § 217.7. Generally, the fact that an employer is self-insured does not substantially impact the process for filing a claim and receiving workers' compensation benefits in D.C.

### **Termination of Benefits**

Workers who collect workers' compensation for a protracted period of time will frequently be sent to Independent Medical Examiners (IMEs). IMEs are doctors retained by employers or insurers to examine recipients of workers' compensation to determine if they are still disabled and entitled to continuing benefits. If an IME believes that the worker is recovered and can go back to work, the worker's benefits might be terminated. If a worker's benefits are terminated as a result of an independent medical exam, the worker will receive a notice of termination of benefits that includes information about the worker's right to appeal the determination. The beneficiary will usually have 30 days to appeal the termination of benefits and the opportunity to request a formal hearing that will follow the same format described above.

Workers' benefits can also be terminated, subject to appeal, if workers do not comply with vocational rehabilitation orders. Employers or their insurance companies cannot set overly-burdensome requirements for vocational rehabilitation on employees, and must reimburse travel expenses to job fairs and other events. If an employee believes the vocational rehabilitation is insufficient to return her to employment or otherwise inadequate, the employee can request a rehabilitation conference with the Office of Workers' Compensation. 7 DCMR § 229. Should an employer/insurer terminate a worker's benefits for failing to comply with vocational rehabilitation, the absence of evidence about the worker's issues with the program, including the worker's failure to request a rehabilitation conference, may adversely impact the worker in a subsequent hearing.

### **Miscellaneous**

#### **Requesting a File**

Interested parties may request copies of any documents related to a workers' compensation claim. D.C. Code § 32-1520(g). Regulations state that the costs of copying should be paid by the requestor. 7 DCMR § 208.7. Indigent claimants and their representatives should request a waiver of any fees, or ask to examine the file at the OWC office. 7 DCMR § 208.5.

#### **Dealing with Medical Providers in Workers' Comp Cases**

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A few sections of the workers' compensation law can help claimants who owe money to medical providers. First, the law says that "[m]edical care providers shall not hold employees liable for services rendered in connection with a compensable injury under [the workers' compensation law]." D.C. Code § 32-1507(b)(7). The regulations further provide that "[i]n no event shall a physician attempt to collect a disputed bill for medical services provided pursuant to the act from the claimant or beneficiary prior to a final determination by the office that the insurer is not liable to pay the bill." 7 DCMR §212.8.

Doctors' offices and hospitals that are having problems being paid by the insurers can file a complaint with the Office of Workers' Compensation, which will investigate and attempt to resolve the complaint. 7 DCMR §212.6; 212.7.

### **D.C. Government Employees**

**Note:** The cited codes and cases, while accurate, are not always adhered to by the third party administrator or the Office of Hearings and Adjudication. The claimant and her advocate must be diligent in knowing and protecting the claimant's rights.

Workers' Compensation claims of D.C. government employees are governed by different legal standards and procedures than claims of private sector workers within the District of Columbia. The claims of D.C. government employees injured on the job are considered under the 1978 District of Columbia Government Comprehensive Merit Personnel Act, as amended, D.C. Code 1-623.01, *et seq.* (the "act"). The program, referred to as the D.C. Public Sector Workers' Compensation Program (PSWCP), is administered by the Office of Risk Management (ORM) and a third party administrator contracted by ORM, with adjudicatory functions delegated to the Department of Employment Services (DOES) Office of Hearings and Adjudication.

### **Coverage**

The D.C. public sector workers' compensation system applies to paid civil officers and employees, as well as those rendering personal service without pay or for nominal pay, and petit and grand jurors. Student employees, as defined under 5 U.S.C. § 5351, also are covered. Members of the Metropolitan Police Department and the D.C. Fire Department who are pensioned or pensionable under sections 701 through 724 of chapter 6 of the D.C. Code, however, are not covered under the act. Employees are also ineligible for compensation if they were "employed by the District of Columbia or the federal government before October 1, 1987, and [are] receiving disability benefits from the federal government for the same injury." D.C. Code §1-623.16(a-1).

To be eligible for public sector workers' compensation benefits, the employee must sustain an injury while in the "performance of . . . duty." *See* D.C. Code §1-623.02. The specific statutory language is as follows:

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The District of Columbia government shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty, unless the injury or death is:

- (1) Caused by willful misconduct of the employee;
- (2) Caused by the employee's intention to bring about the injury or death of herself or another; or
- (3) Proximately caused by the intoxication of the injured employee. *Id.*

Whereas the private sector Workers' Compensation Act contains a presumption that the disability is caused by an accident at work, the public sector act contains no such presumption. Claimants must establish the link between their disability and their work. *Lerner v. Dept. of Human Svcs.*, 2005 WL 1904495, CRB No. 05-216 (2005) (“[U]nlike the D.C. Workers' Compensation Act which governs ‘private sector’ claims, there is no such presumption under the ‘public sector’ statute[.]”).

### **Definition of “Injury”**

The term “injury” under the act is defined as an “accidental injury or death arising out of and in the course and scope of employment, and such occupational disease or infection as arises naturally out of such employment, or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of third persons directed against an employee because of his or her employment. The term ‘injury’ also includes damage to or destruction of eyeglasses, hearing aids, medical braces, artificial limbs, and other medical devices and such time lost while such device is being replaced or repaired.” D.C. Code § 1-623.01(5).

### **While in the Performance of Duty**

The phrase “while in the performance of duty” is not defined in the act itself; however, it has been interpreted as mandating that the injury arise both out of and occur in the course of the claimant's employment. *See Nixon v. District of Columbia Dep't of Emp't Svcs.*, 954 A.2d 1016, 1024-25 (D.C. 2008). First, the injury must take place where the employee may reasonably be expected to be (“occur in the course of claimant's employment”). Second, the injury must be causally related to (“arise out of”) the duties and responsibilities of the employment. *Anderson v. D.C. Child and Family Svcs.*, 2012 D.C. Wrk. Comp. LEXIS 138, AHD No. PBL: 11-045 (Mar. 8, 2012) (claimant who suffered an injury to her back while handling files, bending, stooping, sitting, and walking at work was injured in the performance of her duties). In meeting this test, the claimant bears the burden of both proof and production of evidence. *See Stevenson v. Dep't of Human Svcs.*, 2004 WL 3606427, OHA No. PBL 03-034 (Sept. 13, 2004).

### **Going and Coming Rule**

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The “going and coming rule” refers to the fact that, generally, a worker’s injury sustained off the employer’s premises or en route to or from work “do[es] not occur in the course of employment” and thus is not compensable under workers’ compensation law. *See Vieira v. District of Columbia Dep’t of Emp’t Servs.*, 721 A.2d 579, 582 (D.C. 1998).

There is an exception, however, to the going and coming rule for traveling employees. “When a traveling employee is injured while engaging in a reasonable and foreseeable activity that is reasonably related to or incidental to his or her employment, the injury arises in the course of employment.” *Kolson v. District of Columbia Dep’t of Emp’t Servs.*, 699 A.2d 357, 361 (D.C. 1997). In *Kolson*, a Greyhound bus driver was assaulted while walking to a hotel provided by his employer after finishing his shift at 4:00 a.m. *Id.* at 358. The court held that Kolson’s injury arose out of the course of his employment because his walk to the hotel was related to his employment. *Id.* at 362; *see also Stevenson v. Dep’t of Human Servs.*, 2004 WL 3606427, OHA No. PBL 03-034 (Sept.13, 2004) (finding compensable a worker’s slip and fall injury that occurred while he was walking to the entrance of the work building long before his shift began to conduct union business involving the employer).

### **Mental Injuries**

The statute was amended by the fiscal year 2011 Budget Support Emergency Act of 2010 to preclude mental injuries. The act now excludes from coverage “mental stress or an emotional condition or disease resulting from a reaction to the work environment” or a reaction to a variety of enumerated employment actions, such as denial of promotion or adverse personnel action. D.C. Code §1-623.02(b). This exclusion does not apply to employees hired before January 1, 1980. *Id.* at §1-623.02(c).

### **Workplace Harassment**

Injuries that arise out of workplace harassment usually are not compensable. *See Robinson v. District of Columbia*, 748 A.2d 409, 412 (D.C. 2000). The rationale is that although the injuries might have been sustained within the temporal and spatial boundaries of the claimant’s employment, the injury is not causally related to the duties and responsibilities of the employment.

**Note:** If the worker has been harassed, there may be remedies under Title VII, the D.C. Human Rights Act, the collective bargaining agreement (if the worker is covered by one), or other D.C. or federal law.

### **Aggravation is Compensable**

The “aggravation of a pre-existing condition by work related events or conditions is a compensable injury.” *Lerner v. Dep’t of Human Servs.*, 2005 WL 1904495, CRB No. 05-216 (2005); *see also Metropolitan Poultry v. District of Columbia Dep’t of Emp’t Servs.*, 706 A.2d 33, 35 (D.C. 1998) (truck driver whose angina and underlying arteriosclerosis were

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triggered by unloading truck awarded workers' compensation because conditions arose out of and in the course of his employment); *Ferreira v. District of Columbia Dep't of Emp't Servs.*, 531 A.2d 651 (D.C. 1987) (caterer whose severe cervical spine disability arose on the job awarded workers' compensation); *Hensley v. Wash. Metro. Area Transit Auth.*, 655 F.2d 264, 268 (D.C. Cir. 1981) (bus driver whose psoriasis was severely aggravated by construction on bus route awarded workers' compensation after court determined aggravation arose in the course of employment).

### **Cumulative Trauma is Compensable**

The statute does not require that an injury be the result of a single event or accident. Injuries caused by repeated trauma or cumulative exposure to harmful conditions which contribute to disability or death satisfy the causation requirement. *See Washington Post v. District of Columbia Dep't of Emp't Servs.*, 853 A.2d 704, 707-08 (D.C. 2004) (former newspaper press operator entitled to partial benefits based on continued suffering from a disability as result of allergic reaction caused by exposure to chemical used in printing press); *Ferreira*, 531 A.2d at 656 (1987) (worker not required to show that her severe cervical spine disability was caused by specific traumatic injury to establish that her disability was compensable).

### **Recurrence of Injury**

The recurrence of an injury is compensable as long as the injury had already been accepted as work-related. *See Harris v. District of Columbia Office of Workers' Compensation*, 660 A.2d 404, 408 (D.C. 1995) (worker's post-Workers' Compensation Act aggravation of preexisting back injury was compensable). The prevailing law governing a recurrence of injury does not place a time limit on when a petitioner can file a notice of recurrence. Where a recurrence is alleged, there is no need to prove a continuous entitlement to compensation. The claimant only needs to prove by substantial, reliable, and probative evidence that the current disability is causally related to the previous work-related injury. If the claimant cannot prove the recurrence, he or she may be able to prove, alternatively, that the injury is an aggravation or exacerbation of a pre-existing condition.

## **Compensation**

The compensation provided under the Public Sector Workers' Compensation Program is similar to that of private sector workers' compensation systems.

### **Continuation of Pay Benefits**

When an employee misses work due to a work-related injury, she is entitled to continuation of pay. If the employee was hired before January 1, 1980, the continuation of pay is for up to 45 days. D.C. Code § 1-623.18(b)(2). For all other employees, continuation

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of pay benefits are for 21 days or until the disability compensation program has either upheld or denied the employee's right to continuation of pay or issued its determination upon the claim. *Id.* at § 1-623.18; 7 DCMR §109.4. An employee however is not entitled to continuation of pay benefits if her injury only forced her to miss a total of three or fewer work days. No compensation is allowed for the first three days of the disability unless the injury results in more than 14 days of disability. 7 DCMR § 109.2. Injuries of less than four days generally are not considered disabling events.

If an employee wishes to claim continuation of pay benefits, she should inform the agency for which she works as well as the third party administrator (TPA). *See* D.C. Code 1-623.18. The PSWCP may challenge the worker's entitled to continuation of pay benefits by issuing a notice of controversion. *See* 7 DCMR § 109.1(c). If a worker is awarded continuation of pay benefits and it is later determined that she was not eligible, she must elect whether to pay back the money or have the days deducted for sick or annual leave. *See* 7 DCMR § 109.6.

### **Wage Replacement**

Wage replacement is available for as long as the injured worker cannot work. *See* D.C. Code §§ 1-623.05, 1-623.06. Wage replacement is 66 2/3 percent of the worker's previous salary, but there are minimum and maximum compensation levels set by statute that vary depending on when the claimant began employment with the D.C. government. *Id.* at § 1-623.12.

The amount and length of receipt of wage replacement benefits a worker will receive depends on: (1) whether the injury results in a partial or total disability; and (2) whether the disability is permanent or temporary.

### **Total v. Partial Disability Benefits**

*Total Disability Benefits:* In accordance with D.C. Code § 1-623.05, if a disability is total, the employee should be paid monetary compensation equal to 66 2/3 percent of his or her monthly pay while the worker is totally disabled.

*Partial Disability Benefits:* In accordance with D.C. Code § 1-623.06, if a disability is partial, the employee should be paid monetary compensation equal to 66 2/3 percent of the difference between his or her weekly pay before the injury, and his or her weekly pay after becoming disabled. If the employee voluntarily limits her income or fails to accept employment commensurate with her disabilities, the wages after becoming disabled will be deemed the amount she would earn if she did not voluntarily limit her income.

### **Permanent v. Temporary Disability**

A disability is *permanent* if it has continued for a lengthy period, and it appears to be of lasting or indefinite duration. An injury is not permanent if recovery merely awaits a



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typical healing period. An injury also may be considered permanent when it has reached "maximum medical improvement" or "MMI." An injury has reached MMI if it has healed to the extent possible, and is unlikely to be improved by further medical treatment.

When an injury is permanent and accompanied by a loss of function or disfigurement of a body part, the employee is entitled to a "schedule award." D.C. Code § 1-623.07. The statute and regulations specify compensation levels for different body parts and levels of function lost. *See* D.C. Code § 1-623.07; 7 DCMR § 121. For example, the total loss of one arm is worth 312 weeks of compensation at 66 2/3 percent of the worker's former weekly wage. If a medical evaluation determines that the employee has lost 50 percent of the use of one arm, the employee is entitled to 156 weeks of compensation at 66 2/3 percent of the former weekly wage.

To be awarded permanent total disability, a claimant must present substantial credible evidence that (1) the condition is maximally medically improved, and (2) she is unable to return to her usual employment or any other employment as a result of the injury. *See Logan v. District of Columbia Dep't of Emp't Servs.*, 805 A.2d 237, 239 (D.C. 2002).

For all injuries classified as temporary total or temporary partial disability, the payment for benefits cannot exceed 500 weeks. The claimant is entitled to a hearing before an ALJ within the last 52 weeks of this 500-week period to determine whether she has a permanent disability. There appears to be no method before the 448th week through which claimants can seek a move from temporarily to permanently disabled.

### **No Taxes**

Workers' compensation benefits are not taxed as income for federal or D.C. income tax purposes. Thus, the worker should not receive a 1099. If the worker does receive a 1099, she should contact the claims examiner to have it rescinded.

### **Cost of Living Adjustments**

Under D.C. Code §1-623.41, the PSWCP is required to increase compensation levels to adjust for increases in the cost of living. Such adjustments are tied to the percentage increase in salary granted to the category of D.C. employees who are not covered by a collective bargaining agreement. To be eligible for the cost-of-living adjustment, the disability must have occurred at least one year before the effective date of the increase.

### **Increase or Decrease of Compensation**

*Injured as a student:* If a worker was injured while a student, the worker's wage-earning capacity would probably have increased over time but for the injury. *See* D.C. Code § 1-623.13(a). On review of the award, pay must be recomputed prospectively "on the basis of an assumed monthly pay corresponding to the probable increased wage-earning capacity." *Id.*

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*Failure to comply with vocational rehabilitation:* Compensation can be decreased or suspended if the employee does not in good faith comply with vocational rehabilitation when directed to do so by the PSWCP. D.C. Code §1-623.13(b).

*Augmented compensation for dependents:* If an injured worker has dependents (minor children, children who are students, disabled children, or dependent parents), he is entitled to have the basic compensation for disability augmented upward. D.C. Code § 1-623.10.

*Additional compensation for services of attendants:* The Mayor may provide an additional sum of up to \$500 per month to employees who are so disabled that they are in need of a personal attendant. D.C. Code § 1-623.11.

*Additional compensation for vocational rehabilitation:* The PSWCP may pay employees undergoing vocational rehabilitation additional compensation necessary for their maintenance, but the amount may not exceed \$200 per month. *Id.*

*Income off-sets:* While an employee is receiving PSWCP benefits, she cannot receive any other form of remuneration from the D.C. government except payment for services actually performed and military benefits. D.C. Code § 1-623.16(a). A claimant's receipt of other government benefits may impact the amount of workers' compensation benefits that can be received under the act at the same time. *See id.* at § 1-623.16. Although the private sector Workers' Compensation Act has a provision for offsetting workers' compensation with SSDI benefits, the public sector act does not contain a similar provision. The Social Security Act and Regulations, however, do contain provisions that may result in a reduction of SSDI benefits based on receipt of workers' compensation benefits. *See* 20 C.F.R. 404.408(a)(2). So, the appropriate offset will likely have already occurred.

### **Medical Care: Restrictions on Treatment**

To be reimbursed for medical treatment, an employee must only seek treatment from certain physicians the Mayor approves. *See* D.C. Code § 1-623.03. An injured employee initially may select one of these pre-approved physicians to provide treatment. *See* 7 DCMR §123.2. Once an employee has selected a physician, he cannot change to another physician without authorization (except in an emergency). 7 DCMR §123.4. If a worker wants to change physicians, he must do so by written request to the third party administrator (TPA). 7 DCMR § 123.5. This request should include justifications for why the worker wants to switch physicians, including reasons why he is not satisfied with the medical care his current physician provides. *Id.*

A physician is prohibited from attempting to collect from the employee a disputed payment for medical services provided to an employee in connection with a compensable claim under the act. *See* D.C. Code §1-623.23(a-3).

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The Mayor or the TPA must provide the claimant with written authorization for payment of any treatment or procedure within 30 days after the physician files a written request to the Mayor or the TPA. *Id.* at 1-623.03(f). If the Mayor or the TPA fails to provide the claimant with written authorization for treatment within 30 days of the request, the treatment is deemed to be authorized, unless they commence a utilization review within 30 days of the request. *Id.*

In cases of emergency where the employee is unable to contact a physician, the employee may seek treatment at an emergency care facility. 7 DCMR § 123.2(b). If emergency services are used, the employee must provide the TPA with notice of these services within 30 days afterwards. *Id.*

Any medical care provided or scheduled to be provided is subject to a utilization review. An employee or the PSWCP may initiate a utilization review of the medical services provided if it appears that the necessity, character, or sufficiency of medical treatment is improper or if clarification is needed on medical services. *See* D.C. Code § 1-623.23(a-2)(1)-(3); 7 DCMR §126.3. When a utilization review is conducted, a report must be provided to the PSWCP and the employee who sets forth rational medical evidence to support each finding. 7 DCMR §127.6. The utilization review must be completed within 60 days. D.C. Code §1-623.23(a-2). If the utilization review is not completed within 120 days of the request, then the medical treatment under review is deemed approved. *Id.* If the Mayor or the TPA does not approve the treatment because the medical care provider or the claimant has not provided enough information, the provider or the claimant may re-request approval for the treatment by providing new information. *Id.*

If a medical care provider disagrees with the opinion in the utilization review report, that provider may submit a written request to the utilization review organization asking for reconsideration of the opinion. The request should contain reasonable medical justification for the request and should be made within 60 days from the receipt of the utilization review report. *Id.* at § 1-623.23(a-2)(3); 7 DCMR §127.9.

If a dispute arises between the medical care provider, the employee, and the PSWCP about the necessity or sufficiency of medical care, the dispute must be resolved by the Department of Employment Services director at an administrative hearing. D.C. Code §1-623.23(a-2)(4); 7 DCMR §127.11. If an employee seeks utilization review and wins, the PSWCP must bear the cost of utilization review. D.C. Code § 1-623.23(a-2)(5); 7 DCMR §127.14.

### **Restoration of Leave**

When an employee is forced to use leave as a result of an injury approved by the PSWCP, he or she may be able to get that leave restored. D.C. Code § 1-623.43. Claimants should advocate with their employing agencies and work with their union representatives to make sure that their leave is properly restored.

### **Career Retention Rights**

If the injured worker is able to return to work with the District government, the time the employee was receiving compensation will be credited to the employee for purposes of seniority and benefits based upon length of service. D.C. Code §1-623.45(a). If the injury or disability is overcome within two years of the date compensation began, the agency where the employee was last employed is required to give the employee the right to resume his former position, or an equivalent position. *Id.* at §1-623.45(b)(2). If the employee overcomes the injury after more than two years has passed, the agency is required to make all reasonable efforts to place the employee in his former position or an equivalent position within that agency or another agency. *Id.*

**Note:** Injured workers should advocate with their employing agencies and work with their union representatives to make sure they are not terminated in violation of this provision. In addition, workers should consult with their unions to see if their collective bargaining agreement provides additional protections from termination and attempt to pursue claims under the 1990 Americans with Disabilities Act, arguing that leave is a reasonable accommodation and not an undue hardship on the employer.

### **Rights to Retain Health Insurance**

Workers covered by employer-sponsored health care insurance at the time of the injury will continue to receive health insurance coverage while on workers' compensation, with the premiums deducted from their workers' compensation benefits. 7 DCMR § 113.1.

### **Death Benefits**

Section 1-623.33 of the D.C. Code provides that if an employee dies as a result of an injury sustained in the performance of duty, the government shall pay a monthly compensation equal to a percentage of the monthly pay of the deceased employee in accordance with a specific schedule based on family status.

## **Special Note Re: D.C. Public School Teachers' Disability Retirement**

This is an alternative to public sector workers' compensation for D.C. teachers. The teacher must meet the following conditions to be eligible for disability retirement in D.C.:

- be physically or mentally disabled ("not due to vicious habits, intemperance, or willful misconduct");

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- be incapable of satisfactorily performing the duties of the teacher's position;<sup>99</sup>
- have completed five years of eligible service; and
- apply for disability retirement before leaving DCPS or within six months of leaving.

See D.C. Code § 38-2021.04(a)

The teacher must be examined under the direction of a D.C. health officer of and be found disabled. Alternatively, a two-thirds majority of the members of the Board of Education can qualify a teacher for disability retirement. *Id.* Every worker who retires because of a disability is subject to an annual medical examination to ascertain the nature and degree of disability. If the worker recovers before reaching retirement age, she will be reinstated in accord with the applicable rules (similar or equal position). Payment will continue until the worker is reinstated. D.C. Code at § 38-2021.04(b).

If, before reaching the age of retirement but after retiring due to a disability, the worker earns income of not less than 80 percent of the current rate of pay for the position that the worker occupied before retirement, the retirement income will be terminated. D.C. Code § 38-2021.04(c). The retired worker can have her payments reinstated if she shows that she is earning less than the 80 percent and demonstrates that the reduction in wage is not due to normal income fluctuations. *Id.*

## Claims Procedures

ORM has subcontracted the process of claims administration to a private, third party sub-contractor, commonly referred to as a third party administrator (TPA). TPA processes workers' compensation claims for all D.C. government workers (except fire personnel and police).

### Giving Notice

An employee injured on the job must **give written notice of the injury to his supervisor within 30 days**. D.C. Code § 1-623.19.

D.C. Code § 1-623.19 provides that notice must be given by the employee or someone acting on his or her behalf, and must: (1) be given within 30 days; (2) be given to the immediate superior by personal delivery, or by depositing it in the mail properly stamped and addressed; (3) be in writing; (4) state the name and address of the employee; (5) state the year, month, day, hour, and location where the injury was suffered; (6) state the cause and nature of the injury, or in the case of death, the employment factors believed to be the cause; (7) be signed and contain the address of the person giving the notice; and (8) be accompanied by a form authorizing access to related medical and earnings data

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<sup>99</sup> This is exact language from the statute, so advocates can resist an attempt by the DCPS to suggest other suitable employment or arguments that the person is not disabled from all employment.

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concerning the claimant.

After the claimant provides the initial notice, the official superior of the employee is supposed to notify the TPA immediately by telephone. If this does not happen, or if the employee wants to check on the status of the notice, the employee should contact the TPA or ORM at (202) 727-8600.

Once the supervisor has given the employee's notice to the TPA, the TPA is required to complete the proper form and return it to the claimant or claimant's representative for review, revision, and execution. *See* 7 DCMR §109.1. The TPA is also required to enclose a medical release form for execution by the claimant employee. *Id.* at 108.6. Once the claimant receives the form from the TPA, she must return it to the TPA within 30 days of the injury or within 15 days of the date from which it was mailed or delivered, whichever is later. *Id.* at § 7-108.9. The claimant is also required to provide a copy of the completed form to his immediate supervisor. *Id.* at 7 DCMR § 108.8.

Failure to meet these notice requirements can result in the loss of the claim, even if it seems clear that the person was injured on the job and would otherwise be entitled to benefits. If the 30-day period has passed, the employee should still give notice as soon as possible and attempt to establish an excuse that is allowed by statute or case law. *See* D.C. Code § 1-623.03.

The code provides that in the case of a latent disability, "the time for giving notice of injury begins to run when the employee is aware or, by the exercise of reasonable diligence, should have been aware that his or her condition is causally related to his or her employment, whether or not there is a compensable disability." *Id.* at § 1-623.22(b).

Section 1-623.22(d) of the D.C. Code provides some excuses for the late filing of claims. That section provides that the time period for filing claims will not apply (1) against a minor until he reaches 21 or has a legal representative appointed; (2) against an incompetent individual while he is incompetent and has no legal representative; or (3) against any individual whose failure to comply is excused by the Mayor on the ground that such notice could not be given due to "exceptional circumstances." *Id.* at § 1-623.22(d).

Although the "exceptional circumstances" provision is found in a section primarily pertaining to untimely claims, the director has interpreted this section as excusing untimely notice regardless of whether the claim was timely filed. *See Nickelson v. District of Columbia Dep't of Human Servs.*, 1998 D.C. Wrk. Comp. LEXIS 630 (Feb. 20, 1998). In *Nickelson*, the claimant failed to give written notice of injury until more than six months after the injury, but filed the claim for compensation on time. *Id.* at \*4-5. The claimant argued that this failure to give notice should have been excused because the agency lost her original claim file, which thereby prejudiced her rights. *Id.* at \*6. The director explained that Section 1-623.22(d)(3) "does excuse noncompliance with the notice provisions if the failure to comply was due to exceptional circumstances," and that in that case the claimant's noncompliance was due to such exceptional circumstances. *Id.*

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Claimants also can argue that verbal notice was sufficient if they could not give written notice, *see e.g., Nickelson v. District of Columbia Dep't of Human Servs.*, 1998 D.C. Wrk. Comp. LEXIS 630 (Feb. 20, 1998) (verbal notice may be sufficient when the employee is unable to provide written notice) (citing *Delany v. Dep't of Recreation*, ECAB No. 90-8 (April 16, 1991)), or that the employer had actual notice of the injury and was not prejudiced by the claimant's failure. Finally, claimants can attempt to make equitable arguments, although it is not clear whether such arguments would be successful.

### **Filing a Claim**

In addition to giving notice of the injury, a claimant also must file a claim for benefits to receive compensation.

Claims for compensation must be **filed within two years** after the injury or death for which compensation is sought. D.C. Code § 1-623.22(a); 7 DCMR § 115. A claim filed after two years might be allowed in cases where the supervisor had actual knowledge of the injury within 30 days, D.C. Code § 1-623.22(a)(1); where written notice was given within 30 days, *Id.* at § 1-623.22(a)(2); in the case of latent disability, *Id.* at § 1-623.22(b); in the case of a minor for the period in which she is under age 21 and does not have a legal representative, *Id.* at § 1-623.22(d)(1); in the case of an incompetent individual who does not have a legal representative, *Id.* at § 1-623.22(d)(2); or where failure to comply is excused by the Mayor because of "exceptional circumstances," *Id.* at § 1-623.22(d)(3).

Claims must be made in accordance with the requirements of D.C. Code § 1-623.21 and 7DCMR § 7-108, on forms approved by the Mayor, D.C. Code § 1-623.21(a)(3), and submitted to the TPA.

Once a claim is submitted, the TPA is required to complete the claim form and send it back to the claimant for review, revision, and execution. The processing of a claim can be delayed while the TPA waits for the claimant's supervisor and doctor to return forms, so claimants must send in forms in a timely manner and also prod their supervisor and doctor to do the same.

**Note:** Claimants should contact the TPA to make sure that they are using the most current forms. Despite the requirement for a claim form that is distinct from the notice form, it is not clear whether the TPA actually requires the submission of a separate claim form. To avoid confusion, it is recommended that claimants file a separate written claim following submission of the written notice of accident.

ALJs do not have the authority to award compensation if a claim has not been filed for the disability. *See Jones v. D.C. Dep't of Corrections*, 2001 D.C. Wrk. Comp. LEXIS 363; Dir. Dkt. No. 22-00 (Apr. 20, 2001) (Dir. Irish) ("Compensation for a disability only may be made if a claim is filed.") (citing D.C. Code § 1-623.21 (1981)). Hearing examiners will not consider claims at the formal hearing if it is not clear that a claim was filed and considered

by the TPA.

## **Investigation & Consideration of Claim**

### ***Submission to Physical Examination***

Claimants can be required to submit "to examination by a medical officer of the District of Columbia government, or by a physician designated or approved by the Mayor, after the injury and as frequently and at the times and places as may be reasonably required." D.C. Code § 1-623.23; 7 DCMR § 124.5. If a claimant refuses to submit to an examination, her right to compensation can be suspended until the refusal or obstruction stops. D.C. Code § 1-623.23(d). Claimants can have their own physician present to participate in the examination; however, claimants must bear the cost. *Id.* at § 1-623.23(a). Claimants are entitled to be reimbursed for expenses incident to an examination required by the PSWCP. These expenses include transportation and loss of wages incurred as a result of the time spent attending the examination. These expenses are paid to claimants out of the Employees' Compensation Fund. *See id.* at § 1-623.23(b). The fees paid to doctors performing examinations are set by the PSWCP and are paid from the Employees' Compensation Fund. *See id.* at §1-623.23(c).

**Note:** PSWCP will provide transportation to an examination when the worker cannot otherwise get to the appointment. The worker should request transportation from the claims examiner in advance if she thinks it will be necessary.

### ***Consideration of Claims***

The TPA is required to make a decision on the claim, which includes making a finding of facts and an award or denial, within 30 days of the application for benefits. *See* D.C. Code § 1-623.24(a); 7 DCMR § 120.1-120.2. The TPA is required to consider the claim presented by the employee and the report from the claimant's supervisor. The TPA also must complete whatever other investigation it deems necessary. If the TPA does not make an eligibility determination within 30 days on a newly filed claim, the claim is automatically deemed approved and the government must begin payment of benefits. D.C. Code § 1-623.24(a-3)(1). Unfortunately, the application of this code provision is often thwarted by a later denial of eligibility or decision to controvert the claim. In practice, the TPA rarely meets its 30-day requirement.

## **Accepted Claims**

During the period that a claimant is receiving benefits, the TPA will administer the claim, and the claimant will be assigned a claims examiner. The claimant should communicate with his/her claims examiner regarding any issues that arise, such as the need for medical care or monetary benefits.



### ***Report of Earnings***

Claimants can be required to file a report of earnings, which includes a release of income tax returns and a signed, notarized affidavit reporting any other earnings. 7 DCMR § 104. Failure to respond on time to a request for a report of earnings can be the basis for suspension of benefits. D.C. Code 1-623.06(b)(2) & (4); 7 DCMR §104.2. The report will be used to determine whether the claimant is receiving the correct amount of partial disability wage replacement benefits, or as a basis for terminating the benefits of a claimant who appears to have returned to work.

### ***Vocational Rehabilitation***

While receiving benefits, claimants have a duty to cooperate with any vocational rehabilitation that the PSWCP arranges. If an individual without good cause fails to apply for and/or undergo vocational rehabilitation when so directed, his/her benefits may be suspended until the non-compliance ceases. D.C. Code § 1-623.13(b); 7 DCMR § 141.1. *See Smith v. Dist. of Columbia Pub. Schs.*, 2000 D.C. Wrk. Comp. LEXIS 115 (April 7, 2000) (claimant was found able to participate in vocational rehabilitation process and termination of benefits was upheld); *but see, Dua v. Dist. of Columbia Pub. Schs.*, 2000 D.C. Wrk. Comp. LEXIS 360; Dir. Dkt. No. 04-99 (Aug. 11, 2000) (suspension overturned on the grounds that there was no evidence the vocational rehabilitation requirements were within the claimant's medical restrictions).

In addition to vocational rehabilitation, the employer sometimes will send recovering claimants to a work hardening program. The purpose of such programs is to improve their physical strength so that they can return to work. Failure to cooperate with work hardening may lead to suspension of benefits.

The act was amended by the fiscal 2011 Budget Support Act of 2010 to place limits on the duration of vocational rehabilitation. D.C. Code § 1-623.04 now states:

“(c) The initial vocational rehabilitation services provided pursuant to this section shall be for a period not to exceed 90 days after the claimant reaches maximum medical improvement and vocational rehabilitation is initiated.

(d) After the initial 90-day period has expired, the vocational rehabilitation services may be extended, at the discretion of the Mayor, for good cause shown, for incremental periods of 90 days, not to exceed one year from the initiation of the initial vocational rehabilitation plan.”

### **Denial of Benefits**

If a claim is denied, the claimant will receive a Notice of Determination (“NOD” or “notice”) denying his or her claim. A claimant not satisfied with the eligibility decision can request a hearing within 30 days of the decision.

**Note:** If any adverse determination is made and the claimant does not receive a notice (if it is made by letter or orally, for example), the claimant or his/her advocate can make a request in writing to the claims examiner in charge of the claim that a formal notice be issued. It is the notice that will trigger the reconsideration and appeal rights.

### ***Application for Formal Hearing***

Claimants who wish to appeal a denial of benefits have to submit an application for a formal hearing before an ALJ to the Office of Hearings and Adjudication **within 30 days** of the issuance of the decision being appealed. D.C. Code § 1-623.24(b)(1); 7 DCMR § 155. A blank form for submission is normally attached to the notice or the final order for which the claimant seeks review. If it is not attached, a copy may be obtained by contacting OHA or the Office of Risk Management. The application must be filed at OHA, and a copy must be sent to the Chief for the Office of Personnel and Labor Relations, Office of the Attorney General ("OAG") for D.C. *See generally* 7 DCMR § 106. The D.C. OAG is located at 441 4<sup>th</sup> Street, NW, Suite 1060N, Washington, D.C. 20001.

If an application for hearing is not filed in a timely manner, the request can be dismissed for lack of jurisdiction. *See Chambers v. Dist. of Columbia St. Elizabeths Hosp.*, 2001 D.C. Wrk. Comp. LEXIS 317; Dir. Dkt. No. 02-01 (Dec. 17, 2001) (no jurisdiction for hearing). If the claimant does not receive notice of the decision sought to be appealed, or notice of appeal rights, the 30-day period will not begin to run. *See Thomas v. Dist. of Columbia Dep't of Emp't Servs.*, 490 A.2d 1162 (D.C. 1985) ("Limitation on appeal rights does not begin to run until adequate notice of those rights has been received."); *see also Wells v. Dist. of Columbia Dep't of Pub. Works*, 2003 D.C. Wrk. Comp. LEXIS 13 at \* 3-4 (Jan. 30, 2003) (Middleton, J.) (employer's reference to the "standard procedures" used by the TPA was insufficient to meet employer's burden of demonstrating claimant had been properly informed of his rights); *Morgan v. Dist. of Columbia Dep't of Emp't Servs.*, 2001 D.C. Wrk. Comp. LEXIS 21; Dir. Dkt. No. 27-00 (Feb. 26, 2001) (Dir. Irish) (affirming finding that notice had been received based on signature on return receipt card and history of cashing checks mailed to the same address).

After the claimant files an application for formal hearing, an ALJ will be assigned to the claim, and a scheduling order will be issued to the parties. In addition to setting the hearing date, the scheduling order will provide the rules and deadlines for other portions of the proceedings such as deadlines for discovery, requests for extensions of time, requests for interpreters, requests for a pre-hearing conference, and sanctions for failure to comply with the scheduling order.

**Note:** Because the deadlines are very short in these proceedings, it is critical that advocates study the contents of the scheduling order as soon as it arrives. If the scheduling order is not received within two to three weeks of filing the request for hearing, OHA should be contacted.

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Hearings before the ALJ are typically conducted in the same manner as other hearings or bench trials, with openings, closings, direct and cross examination, and evidentiary objections. *See* 7 DCMR § 157. The treating physicians and AME (Additional Medical Examination) doctors generally will not appear in person. The doctors' reports will, however, be accepted into evidence as their testimony.

A decision, called a recommended Final Compensation Order (FCO), is supposed to be issued within 30 days of the close of the hearing. D.C. Code § 1-623.24(b)(1); 7 DCMR § 160.1. This rarely occurs in practice. It generally takes six months to a year, and sometimes longer, to get a decision.

### ***Appeals to the Compensation Review Board***

If a party is not satisfied with the FCO, she may petition for review by the Compensation Review Board. The petition must be filed **within 30 days** following date of issuance of the FCO. D.C. Code § 1-623.28(a). Instructions for filing are generally included with the FCO. These instructions should be reviewed carefully.

The petition for review should contain the claimant's name, address, and telephone number; a statement about whether the claimant is injured or deceased; a detailed description of the claimant's injury; the identity of the claimant's D.C. government agency employer; the name and telephone number of the claimant's immediate supervisor; the case file number; the effective date of the FCO; a statement regarding what relief is sought; a list of the documents the claimant wants considered (attaching the same); the representative's name, address, telephone number, and bar number; and a statement of the claimant's objections to the FCO. The claimant also may submit a brief for consideration. The opposing party will then have 15 days to file a brief in opposition. *See* 7 DCMR § 258.7-258.8.

The D.C. Code and regulations provides that the FCO "shall be affirmed if supported by substantial competent evidence on the record." D.C. Code § 1-623.28(a). "Substantial evidence," as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *See Marriott Int'l v. Dist. of Columbia Dep't of Emp't Servs.*, 834 A.2d 882, 885 (D.C. 2003) (citing *Children's Defense Fund v. Dist. of Columbia Dep't of Emp't Servs.*, 726 A.2d 1242, 1247 (D.C. 1999)).

Additionally, three requirements must be met. First, the findings must address each material issue of fact. Second, there must be sufficient evidence to support the factual findings made, i.e., such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Finally, there must be a rational connection between the findings made and the decision reached. *See Link v. Dist. of Columbia Dep't of Corrections*, 2000 D.C. Wrk. Comp. LEXIS 440; Dir. Dkt. No. 18-99 (Sept. 25, 2000) (citing *Douglas M. Riggans*, ECAB No. 84-3 (Dec. 20, 1985)); *see also George Hyman Construction Co. v. Dist. of Columbia Dep't of Emp't Servs.*, 498 A.2d 563 (D.C. 1985) (explaining and applying substantial evidence review of hearing examiner's decision).

### ***Appeals to the D.C. Court of Appeals***

A party dissatisfied with a decision of the Compensation Review Board can seek review in the D.C. Court of Appeals. The petition for review must be filed in the Court of Appeals within 30 days of the issuance of the director's decision. *See* D.C. Code § 1-623.28(b); D.C. Ct. App. R. 15.

**Note:** Because so few claimants are represented by counsel, very few cases under the act reach the Court of Appeals. Thus, there are very few published decisions interpreting the act. Pro bono attorneys are encouraged to take cases to the Court of Appeals, especially when valuable precedent can be established.

On legal issues, the Court of Appeals reviews the decisions de novo. *See Harris v. Dist. of Columbia Dep't of Emp't Servs.*, 660 A.2d 404, 407 (D.C. 1995) (The court's "review of the agency's legal rulings is de novo, for 'it is emphatically the province and duty of the judicial department to say what the law is,' and the judiciary is the final authority on issues of statutory construction.") Otherwise, the D.C. Court of Appeals is substantially constrained and reluctant to overrule agency decisions.

### **Termination, Suspension or Modification of Benefits**

The D.C. Code provides that the PSWCP may modify (including terminate, suspend, or reduce) an award of compensation if it has reason to believe that a change of condition has occurred. *See generally* D.C. Code § 1-623.24(d)(1); 7 DCMR § 144.

Most of these actions are taken on the basis of an additional medical exam (AME). The D.C. government hires the doctors who perform these exams. Under the 2006 regulations, "[p]rior to any determination of coverage based upon the recommendation(s) of an AME, the injured employee's treating physician shall have thirty (30) days from receipt of a copy of the AME to submit written comments to the program regarding the AME finding(s)."

Once the claimant receives a notice of determination denying, terminating, suspending, or modifying his or her benefits, the claimant has 30 days to file a request for reconsideration or a request for a formal hearing. The claimant must elect one of these two options for challenging the notice of determination.

### ***Requests for Reconsideration***

There are benefits to requesting reconsideration, as opposed to requesting a formal hearing. In some instances, benefits currently being paid will continue during the reconsideration process, until ORM makes a decision on the request for reconsideration, whereas a request for a formal hearing will discontinue the payment of benefits. The regulations specify that benefits will continue while a request for reconsideration is

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pending, where the modification, suspension, or termination of benefits is based upon the following: (1) the cessation or lessening of a compensable injury; (2) the condition is no longer causally related to the claimant's former employment; (3) the condition has changed from a total disability to a partial disability; (4) the initial award of benefits was in error; or (5) any other circumstance not listed in section 127.3 (a) through (k). 7 DCMR §127.10.

Benefits will not continue pending decision on a request for reconsideration in many circumstances, including the following: (1) the award for compensation was for a specific period of time, which has now expired; (2) claimant has returned to work; (3) claimant has died; (4) benefits were suspended due to claimant's failure to participate in vocational rehabilitation, failure to cooperate with a request for an AME, or failure to follow prescribed courses of medical treatment; or (5) claimant has been released to return to work, either by his or her treating physician or by an AME, where the treating physician has either agreed with the AME physician's opinion or has not responded to the AME report. 7 DCMR §128.4, 127.5. In these cases, the claimant may want to go directly to a formal hearing, rather than incurring the delay of waiting for a decision on a request for reconsideration.

### ***Formal Hearings***

Hearings are held before an ALJ at the DOES Office of Hearings and Adjudication. At the hearing, it is the employer's burden to demonstrate that the modification or termination of benefits is justified. *See Stith v. Dist. of Columbia Pub. Schs.*, 2002 D.C. Wrk. Comp. LEXIS 31; Dir. Dkt. No. 25-00 (Jan. 27, 2002) ("It is well established that once a claim has been accepted for work-related injury, employer must produce persuasive evidence to modify or terminate an award of benefits."); *Chase*, ECAB No. 82-9 (July 9, 1992); *Mitchell*, ECAB No. 82-28 (May 28, 1983); and *Stokes*, ECAB No. 82-33 (June 8, 1983). In addition, the evidence relied upon to support a modification or termination of compensation benefits must be current and fresh, in addition to being probative and persuasive of a change in medical status. *See Robinson*, ECAB No. 90-15 (September 16, 1992).

For the employer to meet its burden of proof, it must show three things: (1) that the employee's condition does not prevent him or her from returning to work; (2) that persuasive medical evidence exists to justify the modification; and (3) that the employer has made certain efforts to assist the worker in returning to work.

If the employer can meet its burden of proving that a change in condition has occurred, the burden switches to the claimant to show a continuing entitlement to benefits. *See Lucas v. Dist. of Columbia Nat'l Guard/Armory Board*, 2000 D.C. Wrk. Comp. LEXIS 22 (Jan. 2000) (Middleton, J.) (once employer met its burden, the burden of adducing evidence shifted to claimant, who was required to bring forth persuasive medical evidence sufficient to prove any present disability was causally related to work injury).

### ***Evidence Regarding Ability to Work***

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Whether a claimant will be able to perform the duties of a position will depend on the employee's background, education, experience, and physical limitations. *See Kelpy v. Metro. Police Dep't*, 2000 D.C. Wrk. Comp. LEXIS 114 (Apr. 28, 2000) (Russell, J.) ("Employer has produced insufficient evidence that there exist any jobs or class of jobs in the Washington, D.C. metropolitan area that are suitable alternative employment in light of claimant's background, education, experience, and the physical limitations caused by the injury to his back.").

To do this, the employer will generally introduce medical evidence that the claimant's condition has resolved. It will then use the claimant's old job description to show that s/he can now perform the requirements of his or her previous job. If the employer cannot show this, it may conduct and use a labor-market survey that an AME has reviewed to show the claimant can do other alternative jobs currently available in the area.

### ***Medical Evidence to Justify Modification***

The employer "must adduce persuasive medical evidence sufficient to substantiate a modification or termination of an award of benefits." *Cooper v. Dist. of Columbia Dep't of Human Servs.*, 2002 D.C. Wrk. Comp. LEXIS 83; OHA no. PBL 01-043 (Mar. 12, 2002) (Middleton, J.).

For example, the employer also will need to introduce medical evidence of the worker's ability to perform the physical requirements of the position. *See Queen v. Dist. of Columbia Dep't of Human Servs.*, 1996 D.C. Wrk. Comp. LEXIS 393 at \*5-8; ECAB No. 95-13 (Aug. 23, 1996) (internal citations omitted) ("This board held previously that the office should inquire definitively whether a [claimant] could perform the duties of the selected position. In order to make this determination the office must refer a [claimant], along with his/her medical history and file to a physician for an opinion regarding whether the [claimant] can perform the position chosen by the office. The physician's opinion should include whether the [claimant] would be able to perform the duties given the restrictions placed upon him or her.... Until a medical opinion regarding whether the physical requirements of a position match or come close to the limitations of a particular petitioner the [employer] has not sustained its burden to modify benefits.").

The employer generally uses the AME report for this purpose. The AME report, however, must be fresh to have any value. *See Jones v. Dist. of Columbia Dep't of Corrections*, 2000 D.C. Wrk. Comp. LEXIS 534; Dir. Dkt. No. 07-99 (Dec. 19, 2000) (Director Irish) (hearing examiner should not have relied on medical opinions from mid-1990s during 1998 hearing).

### ***Efforts to Assist Worker in Finding Employment***

The employer must also make certain efforts to assist a disabled worker in returning to the labor force:

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The office's investigation should not, however, end with the doctor's opinion. After the physician renders a determination whether the [claimant] can perform the duties of a certain position, the office should, as they had in this case, do a market survey to determine if there are positions in the commuting area which are commensurate with the [claimant's] limitations. Thereafter, the office should provide the [claimant] with the identified positions and schedule interviews with the prospective employers.

*See Queen v. Dist. of Columbia Dep't of Human Servs.*, 1996 D.C. Wrk. Comp. LEXIS 393 at \*5-6; ECAB No. 95-13 (Aug. 23, 1996) (internal citations omitted); *Lightfoot v. Dist. of Columbia Dep't of Consumer and Regulatory Affairs*, 1986 D.C. Wrk. Comp. LEXIS 386; ECAB No. 94-25 (July 30, 1996).

Efforts may include vocational rehabilitation. Claimants remain entitled to benefits, however, while they are attending these sessions and until they are able to return to their jobs or a suitable alternative job. *See Amaechi v. Dist. of Columbia Dep't of Corrs.*, 2002 D.C. Wrk. Comp. LEXIS 47 at \*6; Dir. Dkt. No. 12-00 (Jan. 9, 2002) (Dir. Irish); *Lightfoot v. Dist. of Columbia Dep't of Consumer and Regulatory Affairs*, 1986 D.C. Wrk. Comp. LEXIS 386; ECAB No. 94-25 (July 30, 1996).

### **Applications for Attorneys' Fees & Penalties**

A claimant who wishes to be represented in a proceeding before an ALJ must submit a written appointment of the individual to the OHA, or on the record during a hearing. 7 DCMR § 131.1. A claimant who is represented by an attorney in the successful prosecution of his/her claim is entitled to reasonable attorney's fees. D.C. Code § 1-623.27(b)(2). The award for attorneys' fees may not exceed 20 percent of the benefit awarded.

Claimants are entitled to penalty payments when benefits are paid late. The penalty amount is roughly one month of compensation for every 30 days that the compensation is late, not to exceed 12 months of compensation. *Id.* at § 1-623.24(g). A claimant also may also file a lien with the D.C. Superior Court against the Disability Compensation Fund, the D.C. General Fund, or any other District fund or property to pay the compensation award. *Id.* The court determines the terms and manner of enforcement of the lien.

### **Settlements**

OAG occasionally will pursue settlement agreements with claimants. *See* 7 DCMR § 136. Settlement agreements must be in writing and signed by the Mayor or his designee. D.C. Code § 1-623.35(a); *Leonard v. District of Columbia*, 801 A.2d 82 (D.C. 2002).

### **Recovery of Overpayments**

The act provides that the government may seek to recover money incorrectly paid to a claimant. "When an overpayment has been made to an individual under this

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subchapter because of an error of fact or law, under rules and regulations prescribed by the Mayor, either recovery of the overpayments shall be required of the individual or adjustment shall be made by decreasing later payments to which the individual is entitled." D.C. Code § 1-623.29(a).

If the government seeks to recover an overpayment from the employee, the employee can seek a waiver of the recovery. The act provides that recovery or adjustment "may be waived when incorrect payment has been made to an individual who is without fault and when recovery would defeat the purpose of this subchapter or would be against equity and good conscience." D.C. Code § 1-623.29(b)(1); *see also Meachum v. D.C. Pub. Sch.*, 1997 D.C. Wrk. Comp. Lexis 184; H&AS No. PBL 97-28 (July 7, 1997). Claimants for whom repayment would cause significant financial hardship, or who may not be able to repay the money at all, may be candidates for a waiver. In addition, if the employer shares in the fault for the overpayment, the equities may dictate that waiver would be appropriate.

## **Maryland Workers' Compensation**

Workers' compensation in Maryland is administered by the Maryland Workers' Compensation Commission, located at 10 E. Baltimore St., Baltimore, Maryland 21202. The telephone number is (800) 492-0479, and it is open from 8:00 a.m. to 4:30 p.m. on Monday through Friday. The website for the commission (<http://www.wcc.state.md.us/>) is very helpful.

## **Coverage**

### **Types of Employees Covered & Excluded**

Similar to the law in other states, Maryland Workers' Compensation law only protects employees. An employee is defined as an individual "in the service of an employer under an express or implied contract of apprenticeship or hire." *See* Md. Code Ann., Lab. & Empl. § 9-202. This definition includes, among others:

- Workers who regularly distribute or sell newspapers, *see* Md. Code Ann., Lab. & Empl. §9-208;
- Individuals who are employed as a domestic servants in a private home if the individual earns at least \$750 in cash in a calendar quarter from that household, *see* Md. Code Ann., Lab. & Empl. §9-209;
- Certain migrant farmworkers are covered by the statute and some are not, *see* Md. Code Ann., Lab. & Empl. §9-210; and
- Workers on welfare to work programs, *see* Md. Code Ann., Lab. & Empl. §9-224;



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The definition does not include casual employees. *See* Md. Code Ann, Lab. & Empl. § 9-205. Consult Md. Code Ann., Lab. & Empl. §§ 9-205 – 9-236 for more information about exceptions to the definition of employee, including discussions of whether the statute covers such categories of employees as “helper,” “jockey,” “juror,” “miner,” member of a “militia,” “corporate or limited liability company officer,” “crew member” for the Department of Natural Resources, “fire fighters,” “official of a political subdivision,” “owner operator of a Class F tractor,” “partner,” “police officer,” “prisoner,” “maintenance worker,” “school aid,” and “worker for aid or sustenance,” among others.

### ***Undocumented Workers***

Undocumented workers are not prohibited from receiving workers' compensation benefits in Maryland. Thus, undocumented workers should be encouraged to apply for benefits.

### **Covered Injuries**

#### ***Accidental Personal Injury***

Just as in other workers' compensation systems, an injury must be work-related for it to be compensable under Maryland workers' compensation law. Unlike many other jurisdictions, however, simply being hurt on the job is not necessarily enough to qualify for benefits. Instead, in Maryland, workers' compensation only covers an accidental personal injury sustained by a covered employee. *See* Md. Code Ann., Lab. & Empl. § 9-501. In *Harris v. Board of Education*, 825 A.2d 365 (2003), the Maryland Court of Appeals overruled many years of previous decisions which had held that the term “accidental” required that an injury result from an unusual strain or exertion, or a true accident such as slipping, tripping, etc. The court ruled that what must be accidental is the injury and not the incident giving rise to the injury and that an injury is accidental as long as it was unexpected or unintended. Therefore, if a claimant injures his/her back while lifting, it should be considered an accident.

#### ***Arising in the Course of Employment***

The injury also must arise in the “course of employment,” which refers to the time, place, and circumstances of the injury. A worker's injury will be said to arise in the “course of employment” and will likely be covered if it occurred during work hours, at work or some other place where the employer told the employee to go, and while the employee was completing work duties. *See Technologies v. Ludemann*, 811 A.2d 845 (2002).

Injuries that are intentional or self-inflicted, or result from the attempt to injure another, are not covered injuries. *See* Md. Code Ann., Lab. & Empl. § 9-506(a). Additionally, injuries that are caused by certain types of drugs or intoxication are not covered injuries. *See id.* at § 9-506(b) and (c).

## Compensation

After establishing that the injury is covered, an injured worker in Maryland may receive wage benefits (temporary total, temporary partial, permanent partial, or permanent total disability benefits), death benefits, vocational rehabilitation, and/or medical benefits.<sup>100</sup>

Maryland's workers' compensation law provides that an injured worker who has a temporary total disability is entitled to receive two-thirds of his average weekly wage at the time of his injury. Md. Code Ann., Lab. & Empl. § 9-621. There is no time limit on the duration of temporary total disability benefits, but there is a cap on the weekly amount of benefits. *See id.* The cap is based on a formula that takes into account the average weekly wage of all workers in the state of Maryland for the year of the injury. *See id.*

Temporary partial disability benefits are 50 percent of the difference between the workers' average weekly wage before the injury and the wage-earning capacity upon return to part-time or light-duty work. *Id.* at § 9-615. Again, there is a cap on the weekly benefit. *See Id.*

If an injured worker reaches maximum medical improvement (MMI), but is unable to return to the job he previously performed, he is entitled to vocational rehabilitation services, such as additional training, education, or job placement services. *Id.* at § 9-672. During the period in which an evaluation for vocational rehabilitation is taking place and then during the period of vocational rehabilitation itself, the worker is entitled to payment as if he has a temporary total disability.

Permanent partial disability benefits are calculated based on a complex formula that includes the percentage of permanent partial industrial disability sustained by the injured worker, a statutory number of weeks set forth in the law for the particular type of injury, the employee's average weekly wage, and a cap on the weekly benefit for the year of the injury. The worker must obtain a disability rating from a doctor to either the body as a whole or to the injured limb or extremity. Injuries limited to individual fingers, hands, arms, toes, feet, legs, eyes and ears are called "scheduled members." Injuries to the head, neck, shoulders, hips, back, and any other part of the body not included within the listed "scheduled members" are called "other cases" injuries, and compensation is awarded based upon a finding by the commissioner of a percentage of industrial disability to the body as a whole sustained by the claimant. In making this determination, the commissioner will consider, among other things, the percentage impairment ratings of the doctors as well as the age, education, experience, and training of the injured worker. *Id.* at § 9-627. The worker or his representative must present evidence of these factors to the commissioner in

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<sup>100</sup> The definition of each type of wage benefit is discussed in the Workers' Compensation Concepts section at the beginning of this chapter.

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the context of a hearing.

After a claimant receives a permanent partial disability award, he can later reopen the comp claim based upon proof of a worsening condition; however, he may not seek to re-open the claim more than five years after the receipt of his last payment.

Permanent total disability results when the injured worker is rendered permanently unable to return to substantial gainful employment. The weekly benefit is the same as for temporary total disability, but there are annual cost-of-living increases. *See Id.* at § 9-637. A worker with a permanent total disability is entitled to be paid for the rest of his or her life.

If an injury results in the death of the injured worker, the dependents of the injured worker are entitled to file a workers' compensation claim for death benefits. *Id.* at § 9-678.

The injured worker is entitled to have his causally related medical expenses paid for the rest of his life. *Id.* at § 9-660. There is no deductible or dollar limit on the total of all medical expenses. However, there is a medical fee schedule adopted by the Maryland Workers' Compensation Commission to which all medical care providers must adhere, and the injured worker cannot be made to pay the balance of a doctor's bill over the amount permitted under the medical fee schedule. Although insurance carriers pay most medical bills voluntarily, in the absence of such a voluntary agreement, the Maryland Workers' Compensation Commission must first approve medical fees before collection.

Similarly, the Maryland Workers' Compensation Commission regulates all attorney's fees in accordance with an attorney fee schedule adopted by the commission. *See* COMAR §§ 14.09.01.24-25. The attorney fee schedule is binding upon all attorneys, and attorneys must first get approval before collecting a fee. Attorney's fees are based on a contingency fee system, meaning they are a percentage of the benefits collected. If no benefits are collected, no attorney's fee is owed. The Maryland Workers' Compensation Commission's attorney's fee schedule is structured in such a way that anyone can afford to have an attorney, and since even the most experienced workers' compensation attorneys are bound by the fee schedule, it will not cost the injured worker any more money to have an attorney from a large, experienced firm that has handled thousands of workers' compensation claims.

## Procedures

### Employee's Notice of Injury

An employee must give oral or written notice of injury to the employer within ten days of the injury. Md. Code Ann., Lab. & Empl. § 9-704(b)(1). When an employee dies, notice must be given within 30 days of the injury. *Id.* at § 9-704(b)(2). Failure to give notice may bar the claim, but some excuses and exceptions are provided by § 9-706 when there is a sufficient reason for failure to comply and the employer has not been prejudiced by the

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failure to comply.

### **Filing a Claim**

Under § 9-709, an employee typically must file a claim of injury within 60 days after the date of the accidental personal injury. The code provides several exceptions if the deadline is missed; however, the claim will be barred completely if the claim is not filed within two years of the injury. *Id.*

### **Contesting a Claim**

Once the employee has filed a claim, the employer has 21 days to start paying the benefits to the employee, or to file a response with the commission contesting the claim. *See id.* at § 9-713.

### **Claim Processing**

Within 30 days of the filing of a claim, the Maryland Workers' Compensation Commission will issue an award or put the case in line for a hearing because the employer has contested the claim.

## **Retaliation Provisions**

Maryland law prohibits retaliating against workers solely for filing a workers' compensation claim. Md. Code Ann., Lab. & Empl. § 9-1105. The Fourth Circuit has recognized a private right of action for a violation of this provision. *Pope v. Bethesda Health Center, Inc.*, 813 F.2d 1306 (4th Cir. 1987); Mazaroff, MARYLAND EMPLOYMENT LAW, § 5.1 (Wrongful Discharge) (1990 and 1996 Cum. Supp.). Remedies for such a violation could include back pay and/or reinstatement.

## **Virginia Workers' Compensation**

### **Introduction**

Both procedurally and substantively, individuals whose injuries fall within the jurisdiction of the Virginia Workers' Compensation Act, Code section 65.2-100 *et. seq.*, are at a disadvantage compared to workers whose injuries are covered by D.C. or Maryland law.

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The Virginia law is uniquely treacherous for injured workers attempting to navigate the system. Obstacles include: the highly restrictive definition of injury by accident; the exclusion of "unexplained" falls; the obscure "arising out of" criteria; the numerous statutes of limitations and multiple filing requirements; the ability of employers to lull injured workers into believing that their claims are protected by paying benefits and providing a claim number; the difficulty of qualifying for temporary partial disability benefits; and benefit forfeitures when employers terminate workers. Virginia ranks in the bottom three states in terms of relative premium costs.

A positive feature of the system is that all claims documents, including medical records, letters, filings, and judicial decisions, are available online on "Webfile."

Since even workers with non-disputed claims are at risk of losing their rights, it is very important for injured workers to seek out and receive competent advice, whether their claims are accepted or disputed.

### **The Virginia Workers' Compensation Commission**

The commission headquarters is located at 333 E. Franklin St., Richmond, VA 23219, and there are regional offices in Fairfax, Manassas, Roanoke, Bristol, Harrisonburg, and Virginia Beach. Evidentiary hearings for disputed claims are heard by deputy commissioners at locations throughout the state. There are 20 deputy commissioners who decide approximately 5,000 cases annually.

Three commissioners head the agency, one of whom serves as chair. The General Assembly elects the commissioners for six-year terms. By statute, no more than one of the commissioners is an employer representative and no more than one is an employee representative. The commissioners serve as an appellate judicial panel, deciding approximately 1,200 cases per year. The commissioners also enforce insurance coverage requirements; manage the uninsured employers' fund and regulate self-insured employers; and administer the Criminal Injuries Compensation Fund. In addition to adjudicating workers' compensation and insurance coverage issues, the commission has jurisdiction over the Virginia Birth-Related Neurological Injury Act. The website address is [www.vwc.state.va.us](http://www.vwc.state.va.us). The toll free phone number is 1-877-664-2566.

### **Jurisdiction**

The Virginia code provides that any employer who has "three or more regular employees" in the same business in Virginia is required to furnish workers' compensation coverage at no cost to the employee. Va. Code Ann. § 65.2-101. "Regular" includes part-time workers. There are certain categories of workers excluded in this section. If an employer defends a claim on the grounds that it is not covered by the act, the employer must prove

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that it had fewer than three employees in service in Virginia, and if so, that its "established mode of performing business" does not regularly require three or more employees.

The worker must prove an employer/employee relationship. This is governed by the common law definition of employment, most importantly right of control of the means and methods of performing the work, as well as the right to hire and fire, etc.

Undocumented workers are covered, but the employer does not have to pay temporary partial disability benefits to any employee not eligible for lawful employment.

An injury that happens outside of the Commonwealth may fall within the jurisdiction of Virginia if: the employment contract of was made in the Commonwealth; and the employer's place of business is in the Commonwealth, provided the contract was not for services exclusively outside of the Commonwealth. *Id.* at § 65.2-508.

### Coverage of Accidental Injuries

The employee has the burden of proving a compensable injury which occurred by accident. Ongoing disability is not presumed, so frequent medical excuses are generally needed. Requirements for compensability are that there must be an **"injury by accident,"** **"arising out of"** and **"in the course of"** the employment. *Id.* at § 65.2-101.

#### **"Injury by accident"**

An injury by accident must be: (1) an identifiable incident; (2) at a reasonably definite time; and (3) causing an obvious sudden structural or mechanical change in the body.

Gradual injuries are not compensable. Cumulative trauma by repetitive motion is not compensable, with specific exceptions for carpal tunnel syndrome and hearing loss, which fall within the occupational disease provision.

**Practice Tip:** Insurance adjusters will frequently take a recorded statement after an accident in which an injured worker might describe generally what he or she was doing when hurt, but not give a specific incident. This can result in a denied claim because of the lack of specificity. The injured worker should reflect back on how the incident happened and try to recall if there was an initial moment when they felt a pull or twinge. Even if the injury got worse gradually, it is compensable if there was a sudden incident that initiated the bodily change.

### ***Compensable consequence vs. a new injury***

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The employer is responsible for a natural consequence that flows from the original injury, if it is a direct and natural result of the primary injury. *See Leonard v. Arnold*, 237 S.E.2d 97, 99 (Va. 1977). There are three exceptions to the employer's responsibility for compensable consequences: (1) an aggravation of an earlier industrial accident is not compensable as a consequence of the first accident if the new injury results from an accident that is independently compensable under the Act, *see First Fed. Savings & Loan v. Gryder*, 383 S.E.2d 755, 757 (Va. Ct. App. 1989); (2) an employer is not responsible for a consequence that results from an "independent intervening cause attributable to a claimant's own intentional conduct," *see Morris v. Badger Powhatan/Figgie Int'l, Inc.*, 348 S.E.2d 876, 879 (Va. Ct. App. 1986) (citing A. Larson, THE LAW OF WORKMEN'S COMPENSATION §§ 13 and 81.30); and (3) the doctrine of compensable consequences does not apply to a compensable consequence of a compensable consequence, *see Amoco Foam Products Co. v. Johnson*, 510 S.E.2d 443, 445 (Va. 1999).

### ***Psychological injuries***

Psychological injuries from "sudden fright or shock" may be compensable as an injury by accident. *See United Parcel Serv., Inc. v. Prince*, 762 S.E.2d 800, 803 (Va. Ct. App. 2014) (holding that a claimant may recover workers' compensation benefits for a purely psychological injury so long as it is "causally related to a sudden shock or fright arising out of and in the course of the claimant's employment"). Post-traumatic stress disorder also may be a disease under the act. *See, e.g., Burlington Mills Corp. v. Hagood*, 13 S.E.2d 291 (Va. 1941).

### ***"Exposure" over time***

Exposure over time may be compensable as an injury by accident. *See Lewis v. Newport News Shipbuilding*, VWC File No. 231-27-21 (2008) (exposure to flood water); *Harrison v. Yellow Transp.*, VWC File No. 229-88-25 (2008) (exposure to exhaust fumes); *Hoffman v. Carter*, 648 S.E.2d 318 (Va. Ct. App. 2007) (exposure to plaster dust); *S. Express v. Green*, 509 S.E.2d 836 (Va. 1999) (exposure to cold for four hours).

### ***Pre-existing conditions***

An employer takes the employee as it finds him or her (Note: this does not apply to pre-existing diseases).

### **"Arising out of"**

The definition of "arising out of" is also restrictive. The injury must generally be caused by the particular conditions of employment and not simply occurring at work. ("actual risk," not "positional risk").

"An injury arises out of the employment when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions

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under which the work is required to be performed and the resulting injury. It excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood..." *Conner v. Bragg*, 123 S.E.2d 393 (Va. 1962).

### ***Unexplained Falls***

It is important to know that unexplained falls are not compensable. This means that if a worker says he or she does not know why the accident occurred, this can cause the claim to fail. It is the employee's burden to prove an explanation for the accident. In *Lazarte v. Century Contracting Corp.*, VWC File No. 214-42-81, 3/22/2004, the claimant fell from a scaffold but did not recall falling. A co-worker witnessed the fall but did not know what caused the claimant to tumble. This was not compensable because it was not explained. *Id.* In *PYA Monarch v. Harris*, 468 S.E.2d 688 (Va. Ct. App. 1996), a trucker slipped and fell while climbing into his truck. He didn't know why he fell. This was not compensable. *Id.*

Sometimes there can be an inference that can explain the fall. In *Basement Waterproofing & Drainage v. Beland*, 597 S.E.2d 286 (Va. Ct. App. 2004), the claimant was applying sealant on a wall with both hands while standing on a ladder and he fell. The Court of Appeals said this was uniquely dangerous and not routinely encountered.

"Idiopathic" falls, as opposed to unexplained falls, may be compensable if the employment increased the dangerous effects of the fall, such as on a height, near machinery, or in a moving vehicle. An idiopathic fall is caused by a pre-existing personal disease such as a syncopal episode.

### ***Injuries not "arising out of" the employment***

Examples of injuries that do not arise out of the employment include simple acts of bending and turning (*Southside Virginia Training Ctr. v. Ellis*, 537 S.E. 2d 35 (Va. Ct. App. 2000)); knee gave way when turning on steps (*County of Chesterfield v. Johnson*, 376 S.E. 2d 73 (Va. 1989)); tying shoelaces (*UPS v. Fetterman*, 336 S.E.2d 892 (Va. 1985)); bending over to pick up a pipe (*Plumb Rite Plumbing Serv. v. Barbour*, 382 S.E.2d 305 (Va. Ct. App. 1989)); falling down steps (*Southside Va. Training Ctr. v. Shell*, 455 S.E.2d 761 (Va. Ct. App. 1995)).

**Practice Tip:** If a worker has fallen down a staircase or step, the worker must provide a specific description explaining why he or she fell, linking the fall to a defect on the step or a condition of employment.

### ***Injuries "arising out of" the employment***

Examples of injuries that were found to arise out of the employment include installing a furnace and leaning over it for four to five minutes and then not being able to



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stand (*Richard E. Brown Inc. v. Caporaletti*, 402 S.E.2d 709 (Va. Ct. App. 1991)); bending and using pipes in an **awkward** position (*Grove v. Allied Signal Inc.*, 421 S.E.2d 32 (Va. Ct. App. 1992)); looking overhead while refueling an aircraft for 15 minutes (*Ogden Allied Aviation Servs. v. Shuck*, 434 S.E.2d 921 (Va. Ct. App. 1993)); slipping on steps while looking back at prison guard (*Marion Correctional Treatment Ctr. v. Henderson*, 458 S.E.2d 301 (Va. Ct. App. 1995)); traveling nurse crashed when driving because she was distracted by cell phone light (*Turpin v. Wythe Cty. Cmty. Hosp.*, VWC File No. VA000000183028, 12/29/2010); claimant looked down to put on ID badge while walking down incline (*Tudor v. Henrico Cty.*, VWC File No. 215-71-76, 5/5/2005).

### ***Assaults***

To be compensable, the assault must be directed against a claimant as an employee, not as a random or personal victim. *See, e.g., Hill City Trucking v. Christian*, 385 S.E.2d 377 (Va. 1989) (long distance driver robbed at night not compensable); *Continental Life Ins. Co. v. Gough*, 172 S.E. 264 (Va. 1934) (robbery of daily business receipts is compensable).

Sexual assault: May be compensable, but the employment must substantially increase the risk. Va. Code Ann. § 65.2-301(c).

Horseplay: Innocent victims of horseplay are entitled to benefits. *See, e.g., Simms v. Ruby Tuesdays*, Rec. No. 091762, 1/13/2011 (victim of throwing ice chips in restaurant is entitled to compensation). *But see Hilton v. Martin*, 654 S.E.2d 572 (Va. 2008) (assault with defibrillator not compensable).

Recreational injury: May be compensable if it is an accepted and normal activity within the employment. For social functions, the consideration is not just whether the attendance was required, but also whether the employer derived a benefit from the activity, sponsored it, participated in it, whether it was on the premises, when it occurred, and the frequency of the activity. *See, e.g., Mullins v. Westmoreland Coal Co.*, 391 S.E.2d 609 (Va. Ct. App. 1990) (basketball before work against employer's instructions not compensable).

Natural environment: Heat stroke may be compensable if working conditions placed the employee at greater risk than the general public. *See Byrd v. Stonega Coke & Coal Co.*, 28 S.E.2d 725 (Va. 1944). The same standard applies for lightning strikes, tornadoes, and insect bites.

Death presumption: When an employee dies in the course of employment and there is no evidence to show why the death occurred, a presumption arises that the death arose out of the employment. This does not apply if the employee is unconscious, but does not immediately die. A new amendment effective July 2011 states that where an employee does not die but is unable to physically or mentally testify about the incident there is a

presumption of compensability if there is un rebutted prima facie evidence that it was work-related.

### **“In the course of employment”**

The requirement that an accident occur in the course of employment refers to the time and place where the accident occurs. This requirement is generally not as contentious or difficult as proving the “injury by accident” and “arising out of” elements.

#### ***When and where***

An accident occurs in the course of the employment when it takes place within the period of employment at a place where the employee may be reasonably fulfilling the duties of his or her employment. Firefighters are in the course of their employment even when off duty or outside an assigned shift or work location when undertaking rescue activity. Va. Code Ann. § 65.2-102.

#### ***Coming and going rule***

In general, accidents sustained while the employee is going to or from work are not compensable, with these exceptions: 1) when the employer provides the means of transportation or pays for the time spent commuting; 2) when the employer furnishes the means of transportation; or 3) when the accident occurs in the sole means of ingress or egress to the place of employment. Accidents while traveling between worksites are in the course of the employment.

#### ***Personal comfort doctrine***

If the employee uses the employer's premises for satisfying personal necessities, such as food, rest or use of restrooms, injuries are in the course of the employment.

#### ***Deviations from employment***

The primary question is whether the deviation was so substantial that it can be said that the activity was personal or forbidden and removed the employee from the course of employment.

## **Employer Defenses**

## Workers' Compensation

While the employee has the burden of proving compensability and entitlement to benefits, the employer has the burden of proving that the accident is not compensable because it was the result of willful misconduct, the violation of a safety rule, or intoxication. Employer defenses are enumerated in Virginia Code section 65.2-306.

### **Willful Misconduct**

The employer must prove that the claimant violated a safety rule that was enforced by the employer and known by the employee.

### **Intoxication**

Benefits are denied if intoxication was a cause of the injury. If the employee has a positive drug test or a blood alcohol level above the legal driving limit, there is a rebuttable presumption of intoxication.

## **Occupational Diseases**

Occupational diseases are diseases that arise out of and in the course of the employment, but not ordinary diseases of life to which the general public is exposed. Va. Code Ann. § 65.2-400. Occupational diseases account for less than 3 percent of all claims in Virginia.

The date of communication to the employee that he or she has a work-related disease is the equivalent of the date of the accident for purposes of statute of limitations and average weekly wage. Medical benefits do not start until 15 days prior to this communication of diagnosis. The statute of limitations is two years from the date of communication of diagnosis or five years from last injurious exposure, whichever is first (with certain exceptions). Notice to the employer must be within 60 days, but there has to be clear prejudice to the employer for this to bar a claim. *Id.* at § 65.2-405.

### **Ordinary diseases of life**

Ordinary diseases of life can be compensable as an occupational disease if causation is established by clear and convincing evidence. Va. Code Ann. § 65.2-401. This includes carpal tunnel syndrome, but not other repetitive motion conditions such as tenosynovitis or epicondylitis. The worker must provide medical evidence proving causation and the doctor must specifically exclude other activities as causative. Other than carpal tunnel syndrome, cumulative trauma diseases are generally not compensable. Hearing loss is compensable as an ordinary disease of life. *Id.* at § 65.2-401.

### **Post-Traumatic Stress Disorder**

Post-traumatic stress disorder can be an occupational disease. In *Fairfax Cty. Fire & Rescue Dep't v. Mottram*, 559 S.E.2d 698 (Va. 2002), the Virginia Supreme Court found PTSD as an occupational disease for a paramedic who suffered repeated exposures to traumatic stressors in his employment. Also, in *Wells v. City of Petersburg Fire and Rescue*, the 16-year firefighter experienced nightmares from events he had observed in the previous five years of work. The commission found this was a compensable occupational disease.

### **Pre-existing Conditions Excluded**

Aggravation of a pre-existing disease is not a compensable disease. *Ashland Oil Co. v. Bean*, 300 S.E.2d 739 (Va. 1983).

### **Presumption as to Death or Disability from Respiratory Disease, Hypertension or Heart Disease, or Cancer**

This applies to firefighters, police and other safety officers. The claimant must establish (1) that he or she is a member of the covered class and (2) that he or she is totally or partially disabled. The burden shifts to the employer to prove that: (1) the work did not cause the disease; and (2) there is a non-work-related cause of the disease. See Va. Code Ann. § 65.2-402.

## **Benefits Provided by the Virginia Workers' Compensation Act**

### **Temporary Total Disability (TTD)**

Compensation for temporary total disability is due when the employee is unable to work in any capacity. A partially disabled employee also may be able to receive TTD if the person proves that he or she has fully marketed their residual capacity in good faith but was unable to obtain employment. Va. Code Ann. § 65.2-500; see also *Nat'l Linen Serv. v. McGuinn*, 380 S.E.2d 31 (Va. Ct. App. 1989).

**Practice Tip:** An injured worker who is capable of performing light duty work should immediately engage in a job search. The job search must be more extensive than the search required by the Virginia Employment Commission to receive unemployment benefits. The worker should keep a log of dates, names of potential employers, and applications filed.

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The commission has issued guidelines for what constitutes an adequate search for light duty work. However, decisions are unpredictable, and workers should search as much as possible for work in order to qualify for benefits.

The burden of proving incapacity and marketing is on the claimant. There is no presumption of ongoing disability. Therefore, injured workers should regularly obtain work excuses from their doctor.

Benefits are payable for up to 500 weeks. The benefit amount is two-thirds of the employee's average weekly wage. It is not paid for first seven days of disability unless there are three weeks or more of disability, in which case the first week is paid. State maximum and minimum benefits change every year based on the state's average weekly wage. The maximum benefit is \$935 until July 1, 2013. The minimum benefit is \$233.75.

A cost of living adjustment is payable annually, but must be requested by the employee.

### **Temporary Partial Disability (TPD)**

Section 65.2-502 of the Virginia Code provides that a partially incapacitated employee earning less than the pre-injury wage may be entitled to 66 2/3 percent of the difference between the pre-injury wage and the post-injury wage. If an employee refuses selective employment suitable to the employee's physical capacity, benefits may be suspended. Case law in recent years makes it extremely difficult to qualify for temporary partial disability benefits. There is an onerous and vague requirement that the partially disabled worker continue to search for higher paying work while employed at light duty, even if working full time. Also, employers who find a reason to terminate a previously injured worker may be absolved of all future liability for partial benefits. Cases involve anomalous labor law concepts such as "justified cause" which is either a conscious act or misconduct, poor performance or something in between.

**Practice Tip:** Injured workers who can perform some work should try to find a job that pays close to what the pre-injury job paid. If a partially disabled worker is terminated by the pre-injury employer, there is a risk of permanent forfeiture of benefits. If a partially disabled worker is terminated from a different job that she found on her own, there is not a risk of permanent forfeiture.

If an employee is terminated from a light duty job for cause of a certain magnitude, benefits for partial incapacity may be forfeited permanently. If an employee is terminated for cause while working at full capacity, and subsequently becomes partially disabled, she also may have permanently forfeited the right to temporary partial disability benefits. *Shenandoah Motors, Inc. v. Smith*, 672 S.E.2d 127 (Va. Ct. App. 2009).

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To be eligible for TPD, the employee must continue to look for more work and higher paying work even while working full time at a light duty job. *See Ford Motor Co. v. Favinger*, 654 S.E.2d 575 (Va. 2008).

**Practice Tip:** Generally speaking, a worker who is terminated from light duty work who finds another comparable job within six months may possibly preserve the right to future disability benefits.

### **Permanent Partial Disability (PPD)**

Virginia Code Section 66.2-503 provides for compensation for the loss of, or loss of use of a member, loss of vision or hearing, disfigurement, and various stages of pneumoconiosis. This does not apply to the neck or spinal column. Eligibility for PPD does not depend on incapacity for work or loss of earnings. PPD may not be awarded until the injury has reached maximum medical improvement. There is a schedule that includes, for example, 60 weeks' compensation for loss of a thumb, 125 weeks for loss of a foot, etc. There is a **three-year** statute of limitations for filing for PPD.

### **Permanent Total Disability**

Total and permanent incapacity for work is defined by Section 65.2-503 as "the loss of both hands, both arms, both feet, both legs, both eyes...[or any] injury for all practical purposes resulting in total paralysis as determined by the commission based on medical evidence, [or an] injury to the brain which is so severe as to render the employee permanently unemployable in gainful employment." The normal 500-week limitation on benefits does not apply.

### **Death Benefits**

Benefits for dependents of employees whose death is the result of a compensable accident are provided for in Section 65.2-512. Burial expenses are up to \$10,000.

### **Medical Benefits**

An employee is entitled to reasonable, necessary and causally related care by an authorized physician for as long as necessary ("lifetime medical benefits"). The employee must choose an authorized treating physician from a panel of at least three physicians provided by the employer. If employer does not offer a valid panel or denies the claim, the employee can select his or her own treating physician. However, by visiting a doctor on several occasions, that physician may be deemed the authorized treating physician, and the employee would have to get permission from the employer to change doctors. An injured worker can request a hearing to change physicians, but there is a high burden.

### **Travel expenses**

An employer must reimburse the injured worker for the cost of travel to treatment (50.5 cents per mile).

### **Refusal of Care**

The employer may suspend wage loss benefits if the employee engages in an unjustified refusal of medical care.

### **Medical Reports**

Under Virginia Code Section 65.2-604, the physician is required to furnish the injured employee with a copy of any medical report.

**Practice Tip:** Medical records are frequently the key to establishing entitlement to benefits. Workers need to request copies of all of their medical records and to send copies to the commission. In addition to requesting copies of all medical reports (not just medical bills), the worker should ask the doctor to write a letter stating that the injury was caused by a sudden accident, and that the claimant was totally disabled for the specific dates being claimed.

## **Vocational Rehabilitation**

Vocational rehabilitation can be a stick the employer uses to pressure the employee to settle his or her case. The claimant must cooperate, and refusal of vocational rehabilitation can result in suspension of disability benefits.

Vocational rehabilitation can include counseling, job placement, on the job training, or retraining. Workers with permanent disabilities can actually request that the commission order the employer to provide specific education or job training, but it is rarely ordered.

## **Procedures under the Virginia Workers' Compensation Act**

Whether the claim is accepted or disputed, the employee has critical responsibilities and deadlines. Never rely on the employer to "take care of" the claim. Employers in Virginia can lull the claimant into a false sense of security by paying all benefits until deadlines are missed.

**Practice Tip:** In Virginia, employers are allowed to tell workers that their claim is accepted, assign the injury a claim number, and pay the worker for two years until the

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claim is time-barred. Workers must always file a claim with the Commission whether the claim is accepted or disputed.

### **Notice**

The injured worker must give notice of the accident to the employer within 30 days. Va. Code Ann. § 65.2-600. The statute says “written” notice, but in practice it is not necessary that it be written. Verbal notice or actual notice will suffice. For occupational diseases, the worker must give notice within 60 days after a diagnosis of a work-related disease is communicated to the employee. *Id.* at § 65.2-405.

Occasionally a claimant can recover even if timely notice was not given. If the employee offers a reasonable excuse for failure to give notice, the employee’s compensation may not be barred. The employer is required to show prejudice barring recovery only after the employee has given a reasonable explanation for failure to give timely notice. If the employee has been prejudiced by the failure to give notice within the 30-day period, compensation will be barred. The employee has the burden of presenting a reasonable excuse, and if the employee satisfies that burden, the burden shifts to the employer to prove prejudice.

### **Filing a Claim**

The right to compensation is forever barred unless the injured worker files a claim with the commission within two years after the accident. Va. Code Ann. § 65.2-601.

**Practice Tip:** Every injured worker should file an initial claim within two years of the accident. Every time a worker misses additional work, a new claim form should be filed using the JCN (Jurisdictional Claim Number) of the initial claim.

Rarely, a claim may be salvaged even though the employee did not file within two years of the accident. If an employer has received timely notice of the accident, and has failed to file a first report of accident as required by Section 65.2-900, and if that conduct prejudices the rights of the employee, the statute of limitations may be tolled until the employer files the first report of accident. However, if the employee has received a notification letter or booklet from the commission, rights are deemed not prejudiced.

If the employer has not filed an accident report (EAR), the claim can’t be filed online, but the worker should file a paper claim.

**Practice Tip:** There is one claim form with Parts A and B. Part A is a protective filing and must always be filled out. Part B is optional. It is filled out when there is a subsequent period of disability, a new body part, a request to change doctors, a request for a hearing on any issue, a request for a specific award, a request for PPD, etc.



## Workers' Compensation

The employer is supposed to file an Employer's Accident Report (EAR) with the commission within 10 days. This is NOT the filing of a claim. Usually employers don't file these reports within 10 days and there is no penalty.

After an employee files a claim, the employer has 30 days to advise the employee whether it intends to accept the claim, deny the claim (and provide reasons for the denial), or if they lack sufficient information to make a determination and what information is required. Va. Code Ann. § 65.2-601.2(A).

### ***How to "associate" your claim on Webfile***

After it receives the Employer's Accident Report, the commission sends the employee a "Notification of Injury." This letter contains a Jurisdictional Claim Number (JCN) for the accident. The commission attaches a Claim Form.

The commission then mails the employee a Notification of Injury Letter Follow Up which contains a PIN number. With the PIN number, the claimant will be able to access her file online and make filings.

To access your claim on line: Go to Webfile at: <https://webfile.workcomp.virginia.gov/>. Click on "Claimant Registration" link in the upper right hand corner and enter your email address. You will receive an email with a temporary password. Log on to Webfile with your user name and password. To "associate your claim," to your account, enter the date of injury, the JCN, and your PIN number. Now you can access your claim.

The most important step is to file a claim for benefits in the "Submit Claim for Benefits/Request Hearing" tab under the Claim Summary.

### **Agreement to Pay Benefits**

If the employer accepts the claim, it should provide an Agreement to Pay Benefits (Award Agreement) for the claimant to sign. However, there is no penalty if employers don't provide the agreement form. The most important section is "Body Parts/Injuries Accepted."

**Practice Tip:** The injured worker needs to make sure he or she files a claim for all injured body parts. Each agreement form and award must reflect all injured body parts. The two year time limit runs for each body part, so don't leave any out.

When the agreement is filed with the commission, the commission enters an Award Order. Check the dates and the body parts. The two-year statute of limitations runs for each body part. This means that if a body part is omitted from the award, even if the employer has accepted and treated that body part, the right to benefits expires after two years.

## Workers' Compensation

If the claimant returns to pre-injury work, the employer can offer an Agreement to Terminate Benefits.

### **Filing Claims for Each Subsequent Period of Disability**

Although workers are entitled to up to 500 weeks of disability benefits, that right expires after a worker has not missed work for two years and not been paid benefits pursuant to an award.

**Practice tip:** Workers with serious injuries should not “tough it out” and keep working beyond two years without missing any work. If you need to miss work for even a day, do so within two years to keep your claim alive.

Every time a worker misses work, he or she should file a claim form with the Commission indicating the dates missed. This is called a “change in condition” claim. Using the JCN number for the initial claim, the employee should file a claim for each subsequent period of disability even if the employer voluntarily pays. The deadline is two years from the final date for which disability benefits were paid pursuant the award, but benefits are only given for 90 days back from the filing. Va. Code Ann. § 65.2-708. So, employees should file Part B of the claim form for each subsequent period of disability within 90 days.

**Practice Tip:** Employers can cause your disability claim to expire by paying wages when you miss work. Be sure to file a claim even if you are partially disabled and being paid.

The injured worker should file Part B of the claim form indicating every subsequent period of disability, within 90 days of the disability, and within two years from the date for which benefits were last paid pursuant to an award.

Under Section 65.2-708(c), the time limit for change in condition may be extended beyond two years where the injured worker has been working light duty for full pay.

### **Filing Claims for Permanent Partial Disability**

A change in condition claim for permanent disability pursuant to Va. Code Section 65.2-503 must be filed within 36 months from the last day for which compensation was paid pursuant to an award.

### **Filing Claims after Expiration of Permanent Partial Award.**

After compensation has been paid pursuant to the schedule in Va. Code Section 65.2-503, a claim for continuing disability must be filed either one year or two years from the date for which benefits were paid pursuant to the PPD award, depending on whether the disability condition has medically changed.

### **Exceptions to the two-year statute of limitations for filing a claim**

The two-year statute of limitations is jurisdictional. However, under the doctrine of imposition, the commission has jurisdiction to pursue full and complete justice. If an employer engages in improper conduct that causes the employee to not file a claim, it is possible to toll the statute of limitations. But in *Adkins v. Nabisco Biscuit*, 456 S.E.2d 140 (Va. Ct. App. 1995), the employer accepted the claim, paid all benefits for over two years, and lulled the severely disabled employee into believing that his benefits were protected. After two years had passed, the employer told the employee it would no longer pay any benefits. The Court of Appeals ruled that the claim was barred because the employee did not file a claim within two years.

### **Disputed Claims Process**

If the employer disputes the claim, the injured worker should file both Part A and Part B of the claim form and request a hearing. An evidentiary hearing by the commission is a judicial proceeding, where all witnesses testify under oath and a record is kept. The hearing officer is a deputy commissioner.

Workers should be prepared with medical evidence and evidence of marketing residual capacity.

#### **Medical Evidence**

The injured workers should get copies of all his or her medical records, and they should be submitted to the commission.

**Practice Tip:** To be successful in a workers' compensation hearing, it is important to ask your treating physician to write a letter supporting your case. That includes a statement that the injury was caused by a sudden accident as well as dates when the worker was totally unable to work or restricted to light duty.

#### **Evidence of Marketing Residual Capacity (job search)**

If the claimant is only partially disabled, he or she must present evidence of an intensive job search, including dates, places, applications filed, etc. The requirements are vague and onerous, so look for work as much as possible and keep a log.

#### **Appeal to Full Commission**

Rule 3 governs the form and filing procedures associated with filing an application for review by the commission. The review request must be in writing and filed with the

## Workers' Compensation

clerk of the commission within 30 days of the date of the decision or award. A copy must be furnished to the opposing party. Rule 3.2 provides that the commission will advise of a briefing schedule. Oral arguments may be requested. The commission's decision is based on the record established at the evidentiary hearing.

### **Appeal to the Court of Appeals**

These appeals are of right. Virginia Code Section 65.2-706(b) provides that notice of appeal must be filed within 30 days of the date of the decision.

## **Federal Government Employees**

The information for this section was adapted from Federal Employees' Legal Survival Guide, by the Attorneys of Passman & Kaplan, P.C., published by the National Employee Rights Institute.

## **Federal Workers' Compensation Procedures**

Injured workers should file Form CA-1, Notice and Claim within 30 days of the injury in order to receive continuation of pay. To make a claim for occupational illness or disease, workers should file Form CA-2, Notice and Claim.

Notice of injury should generally be given within 30 days, and the claim must be filed within three years from the time the worker realized the injury, disease, or illness was caused or aggravated by employment. *See* 5 U.S.C. §§ 8119-8121. The burden is on the claimant to prove that the injury is work-related. If the claim is denied by the District office, workers can ask for a short oral hearing or written review conducted by a hearing officer. The hearing office will issue a recommendation. *Id.* at §§ 8124-8128. The worker can request reconsideration by the Office of Workers' Compensation Programs (OWCP) within one year of the initial decision, and submit additional evidence. Adverse decisions can be appealed within 90 days to the Employee Compensation Appeals Board, U.S. Department of Labor. For good cause, this time limit can be extended to one year. Review is limited to evidence on the record. The decision of the ECAB is not subject to judicial review. *See* 5 U.S.C. § 8128.

### **Attorney's Fees**

Fees must be approved by OWCP. Attorneys have to wait a long period before collecting fees, and as a result, very few attorneys handle federal cases. The National Association of Federal Injured Workers maintains a list of attorneys who do this work. *See* 5 U.S.C. § 8127; 5 U.S.C. § 8130.

## **Coverage Issues Specific to the Federal Government System**

### **Emotional distress**

To make a claim for emotional distress, the disability must result from a worker's "emotional reaction to his regular or specially-assigned work duties or to a requirement imposed by the employment." *Lillian Cutler*, 28 EACB 125.

### **Restoration Rights**

If the worker recovers from disability within one year, s/he should be returned to his/her former, or an equivalent, position. If the disability lasts for more than one year, workers receive priority placement for two years, including "all reasonable efforts" from the agency. *See* 5 U.S.C. § 8151; 5 C.F.R. § 353

## **Miscellaneous Issues Specific to the Federal Government System**

### **Problems with Health Insurance Companies**

Health insurance companies are supposed to pay for work-related injuries and be reimbursed later if the claim is approved. If they fail to do so, the worker can file a complaint with the U.S. Office of Personnel Management, the federal agency charged with managing federal employee health insurance programs.

### **Disability Retirement vs. Workers' Compensation**

In most cases, the coverage under workers' compensation will be better, because under workers' compensation, the benefits are more generous than disability retirement, workers' compensation benefits are not taxable, and employees are entitled to reemployment rights.

# **OCCUPATIONAL** **SAFETY & HEALTH**

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## Occupational Safety & Health

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**Table: Sources of Law – Occupational Safety & Health**

Federal Statute	29 U.S.C. § 651 <i>et seq.</i>
Federal Regulations	29 C.F.R. § 1960
D.C. Statute	D.C. Code § 32-1101 <i>et seq. (not enacted)</i>
D.C. Regulations	None
Federal Employees	29 U.S.C. § 668 <i>et seq.</i> ; 29 C.F.R. § 1960.1
D.C. Employees	29 U.S.C. § 654; D.C. Code § 32-1101 <i>et seq.</i>



Occupational safety and health laws require all employers to maintain a work environment that is safe and healthy for all workers. The main law is the federal Occupational Safety and Health Act (OSHA). *See* 29 U.S.C. § 651 *et seq.* (1999). There is currently no similar D.C. law. (The D.C. Occupational Safety and Health Act, D.C. Code § 32-1101 *et seq.* was never enacted.)

Administered by the federal Occupational Safety and Health Administration (a division of the U.S Department of Labor), OSHA requires employers to eliminate identified hazards from the workplace that may, or are likely to, cause death or serious physical harm or illness to workers. 29 U.S.C. § 654(a)(1). Both employers and workers are required to comply with any regulations issued under the statute that are relevant to their activities. 29 U.S.C. § 654(a)(2) & (b).

Unfortunately, there is no private right of action under OSHA. A worker's only recourse is to complain about the unsafe or unhealthy workplace and ask OSHA to investigate. If violations are found, the employer will be fined.

### **Who Is Covered**

Nearly every employee in the nation is covered by OSHA, with a few exceptions, such as miners, some transportation workers, many public employees, and live-in domestic workers, who are excluded from OSHA by a Department of Labor regulation. *See* 29 U.S.C. § 654; 29 C.F.R. § 1975.6.

State and local government employees are protected by OSHA if they work in states with OSHA-approved state plans. Maryland and Virginia have OSHA-approved state plans, both of which apply to their respective state and local government employers. D.C. falls under federal OSHA jurisdiction and public employees are not covered by federal OSHA, although they are protected under D.C. Occupational Health and Safety Act which mirror federal OSHA. Section 19 of OSHA creates a separate program for federal employees, making federal agencies responsible for federal employee occupational health and safety.

### **Employer's Duties**

#### **Keeping a Safe Workplace**

An employer must keep the workplace "free from recognized hazards that may cause or are likely to cause death or serious physical harm or illness to the employees." This includes complying with all OSHA rules and regulations. Workplace safety also extends to an obligation to keep a workplace free from workplace violence.

#### **Record Keeping & Monitoring**

Federal laws require employers to maintain accurate records of workers' exposure to all potentially toxic materials or harmful physical agents, which employers are required by law to monitor and measure. *See* 29 U.S.C. § 657(c). Workers have the right to observe the monitoring and measuring of hazardous materials, and the right to access any related records, except for medical records of present or former employees. *Id.*

## **Reporting**

Workers who have been exposed to toxic or harmful physical agents in excess of the amount permitted by occupational safety and health rules should be promptly notified of the hazard and informed of the corrective action the employer is taking. *See* 29 U.S.C. § 657(c)(3).

## **Employee's Rights and Duties**

### **Duty to Comply With OSHA Rules**

A worker has the duty to comply with all OSHA rules, regulations and orders that are applicable to a worker's actions and conduct.

### **Right to Request Inspection or Investigation**

Workers have the right to request an inspection or investigation if they believe a violation of the statute or of occupational safety and health standards has occurred, or if they believe an imminent danger exists. *See* 29 U.S.C. § 657(f)(1).

To request an inspection, a worker must provide OSHA with notice (oral or written) that specifically identifies the suspected violation or danger. The employer is then provided with notice of the request for inspection. *Id.* Under federal law, the identity of the person(s) requesting the inspection is not included on the notice to the employer or any other related records published or released pursuant to the statute. Should the Labor Department determine that no danger or violation exists, the Labor Department must notify the worker who requested the inspection and provide a written statement explaining the decision. *Id.*

OSHA requires that notice of a suspected violation must be in writing, and that the identity of the worker shall be withheld only upon request of the worker. *See* 29 U.S.C. § 657(f)(1). Although the statute indicates that a worker's request for inspection must be in writing, informal complaints that are not in writing may also be an adequate means of getting an inspection. *See Burkart Randall Div. of Textron, Inc. v. Marshall*, 625 F.2d 1313, 1321-22 (7th Cir. 1980) (informal worker's complaint that was neither in writing nor signed nonetheless provided justification for inspection).

A worker may file a complaint with the federal OSHA's Washington field office. The

address for the Baltimore/Washington field office is 1099 Winterson Road, Suite 140, Linthicum, MD 21090. Workers can contact the office by phone at (410) 865-2055/2056 or by fax at (410) 865-2068.

### **Imminent Danger**

OSHA applies several criteria to a hazard in order to determine whether it is an imminent danger: (1) there must be a threat of death or serious physical harm; (2) for a health hazard, there must be a reasonable expectation that toxic substances are present and exposure to them will shorten life or “cause substantial reduction in physical or mental efficiency”; and (3) the threat must be immediate – i.e., the serious physical harm or death must be impending.

### **Filing an OSHA Complaint**

A worker may file a Notice of Alleged Safety or Health Hazards with the Federal OSHA using an OSHA-7 form, which may be downloaded in PDF format from the OSHA website: [www.osha.gov/workers/file\\_complaint.html](http://www.osha.gov/workers/file_complaint.html). The online equivalent is available at <http://www.osha.gov/pls/osha7/eComplaintForm.html>. Formal written complaints that are signed by workers or their representative and submitted to an OSHA area or regional office are more likely to result in on-site OSHA inspections in comparison to an informal request via telephone or email.

The notice should be delivered to the OSHA office that handles District of Columbia and Maryland complaints, which is located at 1099 Winterson Road, Suite 140, Linthicum, MD 21090. The telephone and fax numbers are (410) 865-2055/2056 (telephone) / (410) 865-2068 (fax). The regional office for Virginia is located at the federal office building, 200 Granby St., Room 614, Norfolk, VA 23510. The telephone and fax numbers are (757) 441-3820 (telephone) / (757) 441-3594 (fax).

Before an on-site investigation will take place, a “phone-and-fax” investigation will be conducted. OSHA will telephone the employer after the filing of a complaint and then follow up with a fax or a letter. The employer has five days to respond, identifying in writing any problems the employer found and noting corrective actions taken. The worker who filed the complaint will receive a copy of the employer’s written response. If the worker is not satisfied with this response, she may request an on-site investigation.

OSHA investigators will not conduct an on-site investigation unless the written complaint alleges with sufficient detail (1) that a danger exists that threatens physical harm of the workers, (2) that an “imminent danger” exists, or (3) that the complaint fits other specific circumstances, such as:

- The complaint contains an allegation that physical harm has already occurred as a result of the hazard;
- The employer is part of an industry covered by one of OSHA’s targeted programs

(e.g., construction, auto repair, ship building, meat packing), or the alleged hazard is targeted by OSHA's programs;

- The employer provided inadequate information via phone or fax in response to OSHA's inquiries;
- The employer has an egregious past history; or
- The complaint was filed by a whistleblower investigator.

## **On-site Inspections**

### ***Phone/Fax Investigations***

For lower-priority hazards, OSHA may telephone the employer to describe safety and health concerns, following up with a fax detailing the alleged hazards. The employer must respond in writing within five working days, noting corrective actions taken or planned.

The on-site inspection commences with the presentation of the compliance officer's credentials and an opening conference, where the employer will select a representative to lead the compliance officer during the walk-around. During the walk-around of the facilities, the compliance officer will review worksite injury and illness records and verify that the employer has posted the official OSHA poster as well as point out apparent violations that can be corrected immediately. After the walk-around, the compliance officer discusses the findings and employee rights.

If an on-site OSHA inspection is granted, workers and their representatives have the right to talk confidentially with the OSHA inspector and participate in meetings with the inspector and the employer before and after the inspection is conducted. Where there is no union or employee representative, the OSHA inspector must talk confidentially with a reasonable number of workers during the course of the investigation. An OSHA compliance safety and health officer (CSHO) conducts an inspection (usually without advance notice) of the workplace. If there is a violation, OSHA must issue a Citation and Notification of Penalty and proposed penalty within six months of the violation's occurrence. Employees also have the right to find out the results of the OSHA inspection and request a review if OSHA decides not to issue citations.

If a worker feels that she or co-workers are in imminent danger because of a workplace hazard, she also can call (800) 321-OSHA to report it.

## **Citation and Enforcement**

### **Citation**

The OSHA provides that the Secretary or the Secretary's authorized representative

shall issue a citation to any employer who violates any regulation, order or rule issued pursuant to the statute. *See* 29 U.S.C. § 658(a). An employer must post a Citation and Notification of Penalty at or near the place where each violation occurred to make employees aware of the hazards to which they may be exposed. The citation must remain posted in a place where employees can see it for three working days or until the violation is corrected, whichever is longer. The employer must comply with these posting requirements even if they contest the citation.

### **Contesting a Citation or Abatement Period under Federal Law**

The federal statute similarly affords an employer the opportunity to contest a citation issued against it. *See* 29 U.S.C. § 659(a). An employer must notify the Secretary of its intent to contest the citation within 15 working days of receiving the citation. *Id.* The Commission conducts a hearing and makes a final determination as to the validity of the citation. *Id.* § 659(c).

Affected workers are provided an opportunity under the statute to participate in the hearings before the Commission, either by initiating a challenge or by participating as a party in a hearing initiated by the employer. *Id.* First, a worker can challenge the citation based on an unreasonable abatement period, if a worker notifies the Secretary within 15 working days of the date the citation was issued. *Id.* The Secretary will then advise the Commission of the notification, and the Commission will afford the worker an opportunity to participate in a hearing. *Id.* Second, a worker has a right to fully participate as a party in a hearing initiated by the employer to contest a citation. *See Donovan v. Oil, Chem., and Atomic Workers Int'l Union*, 718 F.2d 1341, 1353 (5th Cir. 1983) (holding employees may participate fully as parties when employer disputes citation and are not limited to challenging reasonableness of abatement period established in citation); *OCAW v. OSHRC*, 671 F.2d 643, 648 (D.C. Cir. 1982) (“The employees’ request for party status confers jurisdiction on the commission to entertain the employees’ objections on all matters relating to the citation in question.”).

Judicial review of the Commission’s decision is available in the United States Court of Appeals for the circuit in which the violation allegedly occurred or where the employer has its principal office. *See* 29 U.S.C. § 660(a). An aggrieved party must file a petition for review within 60 days after the Commission issues its order. *Id.*

Employees or authorized representatives may contest any or all of the abatement dates set by filing a written Notice of Intent to Contest with the OSHA Area Director within 15 working days after the employer receives the citation. The filing of an employee contest does not suspend the employer’s obligation to abate. Employees also have the right to object to a Petition for Modification of Abatement by sending a written objection of a PMA to the area office within 10 days of service or posting.

## **Settlement**

Under OSHA, workers are not entitled to contest the terms of a settlement agreement between the Secretary and an employer. *See Donovan v. Local 962, Int'l Chem. Workers Union*, 748 F.2d 1470, 1473 (11th Cir. 1984). Likewise, a Secretary's decision to withdraw a citation against an employer is not subject to any administrative or judicial review. *See Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 8 (1985).

## **Posting**

OSHA mandates that each citation be conspicuously posted at or near the location of the violation. It must remain posted for three working days or until the violation is remedied, whichever is longer. *See* 29 U.S.C. § 658(b).

## **Government Lawsuits against the Employer**

### **Injunction to Protect Against Imminent Danger**

Under federal law, United States District Courts have the authority, upon the request of the Secretary of the Department of Labor, to enjoin dangerous practices or conditions that could reasonably be expected to cause death or serious injury, either imminently, or before the danger can be eliminated by usual enforcement procedures. *See* 29 U.S.C. § 662(a).

Workers have a right to be immediately informed of an inspector's conclusion that an imminent danger exists, and of an inspector's intent to recommend that the Secretary seek an injunction. 29 U.S.C. § 662(c). Workers have recourse should the Secretary or Mayor arbitrarily and capriciously conclude that an imminent danger does not exist. *Id.* at § 662(d). Any worker at risk of injury as a result of a decision that no imminent danger exists may request a writ of mandamus in United States District Court to compel the Secretary to seek an order enjoining the dangerous practices. *Id.*

## **Civil and Criminal Penalties**

### **Civil Penalties**

The federal government has the authority to assess civil penalties for any violations under the relevant statutes. *See* 29 U.S.C. § 666. The federal law provides for an enhanced civil penalty for willful OSHA violations. *See Id.* at § 666(a); *Conie Constr., Inc. v. Reich*, 73 F.3d 382, 384 (D.C. Cir. 1995) (finding willful violation where employer was aware of OSHA

requirements but chose not to comply).

### **Criminal Penalties**

Federal government officials may bring criminal charges against employers whose willful violation of occupational safety and health rules results in the death of a worker. *See* 29 U.S.C. § 666(e). Government officials may also bring charges against persons who give advance notice of inspections, or who make false statements, representations or certifications with regard to documents filed or maintained in accordance with statutory requirements. *See* 29 U.S.C. § 666(f) & (g).

## **Private Causes of Action**

### **Under the Federal Statute**

Employees do not have an express or implied private right of action against their employers. *See Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706, 709 (5th Cir. 1981) (OSHA designed to require employers to provide safe work environment and does not authorize employees to bring civil cause of action against non-compliant employers); *Taylor v. Brighton Corp.*, 616 F.2d 256, 258 (6th Cir. 1980). The specific statutory remedy authorizing the Secretary to bring a suit against the employer in federal court is the exclusive remedy under the federal statute. *See Holmes v. Schneider Power Corp.*, 628 F. Supp. 937 (W.D. Pa. 1986), *aff'd*, 806 F.2d 252 (3rd Cir. 1986).

## **Retaliation/Discrimination against Complaining Employees**

### **OSHA's Non-retaliation Provisions**

Workers are entitled to protection from discrimination and retaliation under federal law. *See* 29 U.S.C. § 660(c); *see also Donovan v. R.D. Andersen Constr. Co.*, 552 F. Supp. 249, 253 (D. Kan. 1982) (holding that a worker's communications with the media concerning working conditions are protected under the nondiscrimination provision). Employers may not discriminate against or discharge workers for filing a complaint, instituting or testifying in a proceeding, or exercising any right or duty afforded by the statute.

In addition, an employer cannot discharge or discipline a worker for refusing to perform work that could create a dangerous situation, or under conditions that violate federal or D.C. health, safety or environmental laws. *See Donovan v. Hahner, Foreman &*

*Harness*, 736 F.2d 1421, 1428-29 (10th Cir. 1984) (finding that the worker was reasonable and justified in refusing to work where a gondola had malfunctioned several times and the employer had a callous attitude toward safety).

## **How to File and the Limitations Period**

Employees who believe they have been discriminated against must file their complaints within **30 days** of the alleged act of discrimination to their local OSHA office. The 30-day time limit is not a jurisdictional requirement; rather, it is a statute of limitations subject to equitable tolling in accordance with the remedial nature of OSHA. *See Hahner, Foreman & Harness, Inc.*, 736 F.2d at 1424. Tolling is justified where an employer misleads the worker as to his or her employment status or conceals the grounds for discharge. *See* 29 C.F.R. § 1977.15(d)(3) (1999); *Hahner*, 736 F.2d at 1427.

To file a complaint, no form is needed; complaints may be submitted in any language. The employee must send a written letter or call the local OSHA office to report the discrimination. The date of the postmark or phone call is considered the date filed. In states with OSHA-approved state programs (including Maryland and Virginia), an employee who believes he/she has been discriminated against under Section 11(c) of the OSHA Act is entitled to file a complaint alleging discrimination under both state and federal procedures.

The Secretary of Labor does not have the authority to order reinstatement or payment of back wages. Instead, if the Secretary determines that an employer has violated the statute, the Secretary can bring an action against the employer in United States District Court, and the court can order reinstatement, back pay and issue injunctions to stop the employer's dangerous practices. *See* 29 U.S.C. § 660(2). The Secretary must notify the worker of the decision concerning the complaint within 90 days of receiving it. *Id.*

Back pay is considered equitable relief under OSHA and is awarded at the court's discretion. *See Martin v. Sharpline Converting, Inc.*, 790 F. Supp. 252, 253 (D. Kan. 1992). Back pay can be reduced by the amount of income a worker earned from employment secured after an unlawful discharge. *See Donovan v. Freeway Constr. Co.*, 551 F. Supp 869, 880 (D. R.I. 1982).

### **After a Complaint for Retaliation is Filed**

OSHA will investigate complaints from employees who believe they have been retaliated or discriminated against. Upon receipt of a retaliation complaint, OSHA will first review it to determine whether it is valid on its face. In order for OSHA to determine retaliation, the investigation must reveal that the employee engaged in protected activity; the employer knew about or suspected the protected activity; the employer took an adverse action; and the protected activity motivated or contributed to the adverse action. If the investigation discloses probable violations of employee rights and a settlement cannot



be reached, OSHA will generally issue an order, which the employer may contest. Under some jurisdictions, the employer must comply with the reinstatement order immediately. If the order is not complied with, then court action may follow.

## **Common Law Action for Wrongful Discharge**

Some courts permit a worker to bring a common law action for wrongful discharge in violation of state public policy when a worker is discharged for exercising rights under OSHA. These claims expand the available remedies beyond those in the OSHA statutes. *See Schweiss v. Chrysler Motors Corp.*, 922 F.2d 473, 475 (8th Cir. 1990); *Sorge v. Wright's Knitwear Corp.*, 832 F. Supp. 118, 121 (E.D. Pa. 1993).

A D.C. court has never expressly held that a worker has a common law cause of action for wrongful discharge against an employer who fires a worker for exercising a right under OSHA. D.C. courts have, however, recognized actions for wrongful discharge in violation of public policy based on the exercise of rights under other statutes. *See Carl v. Children's Hospital*, 702 A.2d 159, 160 (D.C. 1997) (holding that employees who are discharged for exercising their statutory rights may bring a claim for wrongful discharge under the public policy exception to the terminable at will doctrine). D.C. has likewise recognized actions for wrongful discharge when a worker is fired for refusing to violate a statute, and for protesting unsafe and unlawful practices. *See Washington v. Guest Servs.*, 718 A.2d 1071, 1080-81 (D.C. 1998) (holding that firing a worker for refusing to violate food and health regulations and persuading others not to violate the regulations stated a claim for wrongful discharge).

## **Regulations**

Listed below are summaries of some of the OSHA standards covering situations that low-wage workers are most likely to encounter.

### **Food Service**

- **Conveyor** – Where there is a hazard of getting caught on a conveyer, there must be a sufficient number of stop buttons. *See* 29 C.F.R. § 1910.263(i)(7)(iii).
- **Gears** – All gears must be completely enclosed. *See* 29 C.F.R. § 1910.263(c)(2).
- **Ovens** – All ovens must be located so that possible fire or explosions will not expose persons to possible injury. Ovens must not adjoin lockers, lunch or sales rooms, main passageways or exits. *See* 29 C.F.R. § 1910.263(l)(1)(vii).
- **Pan Washing Tanks** – The surface of the floor of pan washing tanks must be kept in a non-slip condition. *See* 29 C.F.R. § 1910.263(i)(15)(ii)
- **Slicers** – The cover of the knife head of reciprocating-blade slicers must be designed

so that the slicer can operate only if the cover is in place. *See* 29 C.F.R. § 1910.263(j)(1)(iii).

- **Latex gloves** – OSHA does not regulate latex gloves for food preparation. However, wearing gloves during preparation of uncooked foods is part of the Food and Drug Administration's food code. *See* 4/7/98 OSHA Standard Interpretation Letter, available at <http://www.osha.gov/>.

## Janitorial & Cleaning Occupations

- Protective equipment shall be "provided, used and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards or mechanical irritants..." 29 C.F.R. § 1910.132. Protective equipment includes personal protective equipment (PPE) for face, eyes, head and extremities, protective clothing, respiratory devices and protective shields and barriers. *Id.* Regulations for equipment are found at §§ 1910.133 - .138.
- **Handling and storage of hazardous materials** – *See* 29 C.F.R. § 1910.101-126.
- **Toxic and hazardous substances** – *See* 20 C.F.R. § 1910.1000-1450.

## Health-care Occupations

- **Bloodborne Pathogens** – Employers that have employees with occupational exposure, meaning "reasonably anticipated skin, eye, mucous membrane, or parenteral contact with blood or other potentially infectious materials that may result from the performance of a worker's duties," must have a written Exposure Control Plan designed to eliminate or minimize worker exposure. *See* 29 C.F.R. § 1910.1030(c)(1)(i).
- Universal precautions must be observed to prevent contact with blood or other potentially infectious materials. *See* 29 C.F.R. § 1910.1030(d)(1).

## Clerical Occupations

- All permanent places of employment (except where domestic, mining or agricultural work only is performed) must keep passageways, storerooms and service rooms clean and orderly and in a sanitary condition. *See* 29 C.F.R. § 1910.22(a)(1).
- Every floor, working place, and passageway must be free from protruding nails, splinters, holes or loose boards. *See* C.F.R. § 1910.22(a)(3).

## **D.C. Government Employees**

Occupational Safety and Health matters affecting D.C. Government employees are handled by the D.C. Office of Risk Management. It is located at 441 4<sup>th</sup> Street, NW. Telephone number: (202) 727-8600. Fax: (202) 727-8319. Email: [orm@DC.gov](mailto:orm@DC.gov).

## **Federal Employees**

There are no special requirements or benefits for federal employees. In addition to regulating private workplaces, the Occupational Safety and Health Act of 1970 put in place federal employee occupational health and safety (FEOSH) requirements for federal agencies. Under Section 19 of the OSH Act, each federal agency must designate officials responsible for ensuring compliance with the Act, must develop plans and programs to ensure compliance, and must develop and distribute informational materials for workers affected.

## **Undocumented Workers**

Undocumented workers may make OSHA complaints. OSHA allows the identity of the complainant to remain confidential.

## **Welfare to Work**

Guidelines and regulations issued by the U.S. Department of Health and Human Services and the U.S. Department of Labor provide that federal OSHA standards apply to welfare to work programs. See "How Workplace Laws Apply to Welfare Recipients," U.S. Department of Labor (Feb. 1999); 64 Fed. Reg. at 17748. In addition, the D.C. welfare reform law states that D.C. and federal OSHA laws apply to welfare to work. See D.C. Code § 4-205.19j.

## **State Pre-emption**

The federal Occupational Safety and Health Act permits a state to assume responsibility for the development and enforcement of occupational safety and health standards pursuant to a plan approved by the United States Secretary of Labor, thereby pre-empting federal OSHA laws. See 29 U.S.C. § 667. Both Maryland and Virginia have complete state plans. Although at one time the D.C. law pre-empted Federal law in accordance with that provision, see *Traudt v. Potomac Elec. Power Co.*, 692 A.2d 1326, 1331 n. 3 (D.C. 1997) (noting Secretary of Labor's approval of D.C. plan for enforcement of

occupational safety and health standards), D.C. currently does not have an approved state plan that pre-empts the Federal Act.

## **Maryland**

Maryland operates under a complete state plan, which covers private sector and state and local government employees. Workers can file complaints with the State OSH agency or with the U.S. OSHA regional administrator.

Technically there is no statute of limitations for filing a complaint with the Maryland Occupational Safety and Health agency (MOSH); however, MOSH must have enough time to produce a finding within six months of the alleged violation. MD Lab. & Emp. Code Ann. § 5-212 (a)(2). The statute of limitations for filing a claim of discrimination or retaliation is 30 days. MD Lab. & Emp. Code Ann. § 5-604(c)(2).

The Maryland Occupational Safety and Health (MOSH) agency is located at 10946 Golden West Drive, Suite 160, Hunt Valley, MD 21031. The telephone and fax numbers are (410) 527-4499, (410) 527-2069 (for Spanish speakers), 1-888-257-MOSH (for emergency situations), fax (410) 527-4481.

The federal OSHA regional administrator's office is located at the 1835 Market Street Mailstop OSHA-RO/19 Philadelphia, PA 19103. The telephone and fax numbers are (215) 861-4900; fax (215) 861-4904. U.S. OSHA also maintains a field office at 10946 Golden West Drive, Suite 160, Hunt Valley, MD 21031. The telephone and fax numbers are (410) 527-4499, fax (410) 527-4481. In emergencies, call 1-800-321-OSHA.

## **Virginia**

Virginia also operates under a complete state plan, which covers both private sector and state and local government employees. Workers can file complaints with the State OSH agency or with the U.S. OSHA regional administrator.

The Virginia Occupational Safety and Health (VOSH) program can be reached at 600 East Main Street, Suite 207, Richmond, VA 23219. A complaint form is available online at <http://www.doli.virginia.gov/>.

VOSH Health Compliance can be reached by calling (804) 786-0574, Safety Compliance can be reached by calling (804) 786-7776, and Compliance can be reached by calling (703) 392-0900 in Manassas, Va. For training, consultation or information, call the Cooperative Programs office at (804) 786-6359. The U.S. OSHA regional administrator's office is located at the Curtis Center, 170 S. Independence Mall West, Suite 740 West, Philadelphia, PA 19106-3309. The telephone and fax numbers are (215) 861-4900; fax (215) 861-4904. U.S. OSHA maintains an office at the Federal Office Building, 200 Granby

## Occupational Safety & Health

St., Room 614, Norfolk, VA 23510. The telephone and fax numbers are (757) 441-3820, fax (757) 441-3594

# **TERMINATION: EXCEPTIONS to EMPLOYMENT AT- WILL**

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## **Table: Sources of Law - Exceptions to Employment At Will**

Federal Statute	None. State or local common law controls.
Federal Regulations	None.
D.C. Statute	None. State or local common law controls.
D.C. Regulations	None.
Federal Employees	Most federal employees are not at-will employees. <i>See</i> 5 U.S.C. § 1201-1222 for ways to protest termination of federal employees.
D.C. Employees	Most D.C. government employees are not at-will employees. <i>See</i> D.C. Code § 1-606.01 to 1-606.11 for ways to protest termination of D.C. employees.

### **D.C. Law**

#### **Employment-At-Will Doctrine**

“Employment-at-will” is a common law doctrine which states that either party in an employment contract can walk away at any time for any reason. Employees in D.C. are presumed to be employees-at-will unless they have signed a contract for a definite period of time. In accordance with this doctrine, **“an employer may discharge an at-will employee at any time and for any reason, or for no reason at all.”** *See Adams v. George W. Cochran & Co.*, 597 A.2d 28, 30 (1991). There are, however, exceptions to the employment-at-will doctrine, which are discussed below.

**Practice Tip:** The employment-at-will rule has one advantage for workers: they can walk away at any time without damages. There is no law requiring two weeks’ notice before quitting, and an employer would have no cause of action against a worker who failed to give two weeks’ notice. Of course, the employer can give a bad reference for failure to follow this convention.

#### **Exceptions to Employment-At-Will Doctrine**

##### **Expressed Contracts - Breach of Employment Contract for Specific Term**

If a worker has an oral or written contract for a specific term, and the worker is terminated before the end of the contract term, she may be able to sue the employer for



## Termination: Exceptions to Employment at Will

breach of contract to collect money damages. The terms of any written contract should be reviewed carefully. An employment contract usually contains mutual obligations, e.g., the employer may not be able to terminate the worker under the contract, but the worker may not be allowed to quit either, without giving rise to a breach of contract action against the worker.

The general statute of limitations for contract actions in D.C. is **three years**. See D.C. Code § 12-301(7).

**Note:** As a matter of practice, low-wage workers rarely are employed via contracts for a specific term.

### **Oral Contracts & Statute of Frauds**

Oral employment contracts are generally enforceable and do not violate the statute of frauds requirement that certain contracts be in writing because they *can be* performed within one year. See D.C. Code § 28-3502; See also *Hodge v. Evans Fin. Corp.*, 823 F.2d 559 (D.C. Cir. 1987) (court found oral promise of lifetime employment did not need to be in writing because, for example, employee could have died within first year, and thus fully performed contract within one year); *Stone v. International Broth. of Teamsters, Chauffeurs, Warehousemen & Helpers of America*, 865 F.2d 1330 (D.C. Cir. Dec 30, 1988) (finding alleged oral contract of employment “until you retire” need not be in writing).

### **Oral Promise of Employment for Specific Term Beyond Two Years Violates Statute of Frauds**

In other cases when the employment contract was for a fixed duration, such as “until the age of 65” or for a fixed term longer than a year (e.g., two years), the statute of frauds applies. See e.g., *Gebhard v. GAF Corp.*, 59 F.R.D. 504 (D.D.C. 1973); *Prouty v. National R.R. Passenger Corp.*, 572 F. Supp. 200 (D.D.C. 1983). In both *Prouty* and *Gebhard*, the court noted in dicta that because of the statute of frauds the contracts needed to be in writing.

### **Collective Bargaining Agreements - Union Contracts**

Most union collective bargaining agreements (CBAs) are for a fixed duration; therefore, employees covered by such contracts are not at-will employees. In addition, most CBAs state that all terminations must be for just cause and require employers to use progressive discipline (e.g., for most offenses, first a verbal warning, then a written warning, then a suspension, then termination). Finally, most union contracts also describe specific procedures that must be used to terminate an employee or allow an employee to protest a termination, called a grievance procedure.

For more information, please see this manual’s [Labor Laws & Union](#) chapter.

## **Implied Contracts**

### ***Employee Handbooks***

Implied contracts most often are created and found in an employer's personnel policy manual (or "employee handbook"). For example, if a manual states preconditions for terminating a worker, then the workers are not at-will employees. The leading cases in D.C. for this issue are *Washington Welfare Ass'n v. Wheeler*, 496 A.2d 613 (D.C. 1985) and *Sisco v. GSA National Capitol Federal Credit Union*, 689 A.2d 52 (D.C. 1997).

In *Wheeler*, an employee of a non-profit organization was terminated after uncovering and exposing embezzlement of funds by a business manager, who also was fired. When she was hired, Wheeler had received a letter informing her of her salary but no specified period of employment; the appellants therefore argued she was an at-will employee. However, the personnel manual made a distinction between "probationary" and "permanent" employees, and stated that permanent employees could not be fired except for just cause. The D.C. Court of Appeals found that Wheeler was a permanent employee who could be fired only for just cause and upheld the jury verdict in her favor for \$26,000 in back pay. *See Wheeler*, 496 A. 2d 613 (D.C. 1985).

Similarly, in *Sisco*, an employee was discharged in contravention of the "Discharge and Discipline" chapter of the "Policy Manual." The plaintiff had been fired for refusing to come in to work on a snowy day and was not subjected to progressive discipline, as required by the personnel manual. *See Sisco*, 689 A 2d 52 (D.C. 1997). A personnel manual creates an implied employment contract when it sets out preconditions that must be met before termination of employment, *Strass v. Kaiser Found. Health Plan*, 744 A.2d 1000, 1013-14 (D.C. 2000).

On the other hand, the D.C. Court of Appeals has also held that a personnel manual which makes general references to "permanent employees" and discusses *reasons* management can terminate them (as opposed to *procedures* by which they may be terminated) is too ambiguous to counteract the presumption of at-will employment. *See Perkins v. District Gov't Employees Fed. Credit Union*, 653 A.2d 842, 843 (D.C. 1995).

When reviewing an employee handbook to find language that can be used to create an implied contract, advocates should look for the following:

- Procedural guidelines or instructions as to discipline and discharge of workers, or grievance procedures for workers;
- "Good cause" or "just cause" termination clauses; and
- Two-week notice requirements for discharged workers.

The statement in the handbook constitutes the "offer" of the contract, and it is, generally, enough to aver that the worker's "retention of his employment" constitutes

## Termination: Exceptions to Employment at Will

“acceptance.” Continuing to work for the employer is sufficient consideration. *See* Richard Harrison Winters, *Employee Handbooks and Employment At-Will Contracts*, 1985 Duke L. J. 196 (1985).

The employee handbook also should be reviewed for disclaimers of contracts, expressed or implied, or statements that nothing in the manual is intended to alter the at-will nature of employment. Employers may, however, “effectively disclaim any implied contractual obligations arising from such provisions.” *Boulton v. Inst. of Int’l Educ.*, 808 A.2d 499, 505 (D.C. 2002). “The legal effect of such a disclaimer is, in the first instance, a question for the court to decide.” *Id.* If disclaimers are clearly and carefully written, courts generally uphold them and will dismiss any breach of implied contract claim on that basis.

### ***Other Sources of Implied Contracts***

General statements not contained in an employee handbook, if made with sufficient clarity, will be enough to defeat the at-will presumption of employment. *See Rinck v. Association of Reserve City Bankers*, 676 A.2d 12 (D.C. 1996) (Employer’s oral statement that employee would not be terminated as result of merger enough to rebut presumption of at-will employment).<sup>101</sup>

### **Promissory Estoppel**

A worker may be able to challenge a termination on the grounds of promissory estoppel if she can prove (1) the existence of a promise, (2) on which she reasonably relied, (3) to her detriment. *See Bible Way Church of Our Lord Jesus Christ v. Beards*, 680 A.2d 419 (D.C. 1996), citing *Bender v. Design Store Corp.*, 404 A.2d 194 (1979).

### **Public Policy**

An employee may sue his or her employer for wrongful discharge when his or her discharge violates a clear mandate of public policy. *See Adams v. George W. Cochran & Co.*, 597 A.2d 28, 30 (1991). Generally, these cases fall into three categories: (1) the employee is fired for refusing to engage in illegal conduct; (2) the employee is fired for exercising a statutory right; or (3) the employee is fired for reporting the illegal conduct of his or her employer or co-worker. Each of these three categories is discussed below.

### ***Employee’s Refusal to Engage in Illegal Conduct***

The D.C. Court of Appeals first recognized a narrow public policy exception to the employment-at-will doctrine in *Adams v. George W. Cochran & Co.*, 597 A.2d 28, 30 (1991). In *Adams*, the D.C. Court of Appeals held that an at-will employee, a delivery truck driver discharged solely for refusing to drive a truck without a required inspection sticker, may

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<sup>101</sup> An at-will employee cannot bring a claim for breach of an implied covenant of good faith and fair dealing. *See Kerrigan v. Britches of Georgetowne, Inc.*, 705 A.2d 624, 627 (1997).

sue for wrongful discharge because the discharge was for the worker's refusal to violate the law, specifically a statute or municipal regulation. *Id.* at 34. The worker was awarded back pay and emotional damages. This exception has been broadened somewhat to encompass other public policy concerns, as discussed below.

### ***Employee's Exercise of a Statutory Right***

In 1997, the public policy exception was broadened to include termination of a worker for exercising a statutory right. *See Carl v. Children's Hosp.*, 702 A.2d 159 (1997). In *Carl*, the plaintiff, a nurse, was fired because she testified before the D.C. Council and the courts on tort reform and her advocacy position on patients' rights ran counter to her employer's position. *Id.* at 160. Although the plaintiff was not discharged because she refused to violate the law, the court found that her termination contravened public policy embodied in a D.C. statute which protected individuals against harassment for testifying before the D.C. City Council. However, the Court in *Carl* made clear that in order to establish a public policy exception to the at-will doctrine there must be a "close fit between the policy thus declared and the conduct at issue in the allegedly wrongful termination." *Id.* at 164.

In *Liberatore v. Melville Corporation, T/A CVS*, 168 F.3d 1326 (1999), a pharmacist who threatened to inform the Food and Drug Administration about drugs being kept at the wrong temperature stated a cause of action under the expanded public policy exception. Additionally, the court held that the worker does not actually have to file a complaint to be protected; rather, a mere threat to file a complaint is enough to warrant protection under the expanded public policy exception.

**Note:** For this exception to apply, there must be a right embodied in a written law or regulation that the employee is exercising.

### ***Termination for Reporting Illegal Conduct of an Employer or a Co-Worker***

A worker can bring a wrongful discharge claim under the public policy exception if terminated for reporting an employer's illegal conduct. *See Freas v. Archer Services, Inc.*, 716 A.2d 998 (1998). In *Freas*, the court held that a worker could bring a claim for wrongful discharge when he was terminated in retaliation for initiating a lawsuit against his employer for violating D.C.'s minimum wage and wage payment statutes.

A worker may also bring a wrongful discharge claim for being terminated for reporting a co-worker's illegal conduct. *See Washington v. Guest Services, Inc.*, 718 A.2d 1071 (1998) (reversing summary judgment where plaintiff claimed she was terminated because she attempted to persuade a co-worker not to violate the health code and for protesting the co-worker's alleged health code violation).

### ***Exception cannot go beyond Public Policy of the Statute***

The public policy exception cannot be invoked to require the employer to act beyond the public policy concerns contained in the statute. *See Duncan v. Children's Nat. Medical Center*, 702 A.2d 207 (D.C. 1997). Duncan refused to work where she was exposed to radiation, alleging she was terminated in violation of the “public policy of not exposing pregnant women to radiation” as embodied in the 1977 District of Columbia Human Rights Act. *Id.* at 210. Because the Human Rights Act prohibited only discrimination based on pregnancy and did not require special treatment for pregnant women, Duncan’s case failed to state a claim for wrongful discharge based on public policy. *Id.*

### ***Termination must be “Substantially” because of the Public Policy***

The worker must have been terminated “substantially” for the reason of engaging in conduct protected by the public policy exception. *See Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 886 (1998) (finding plaintiff failed to show she was terminated “substantially” for threatening to report her employer’s illegal behavior where plaintiff alleged that she was terminated for a number of reasons).

### **Remedies & Statute of Limitations**

A wrongful termination action is a tort action, so tort-like remedies are available, including loss of pay, pain and suffering, compensatory and punitive damages. There are few caps on damages in a tort action in D.C.

Wrongful discharge claims are subject to a three-year statute of limitations. D.C. Code §§ 12-301 (7)–(8).

**Note:** Statutory attorney’s fees are *not* available in wrongful termination actions.

### **Employment Laws as Exceptions to the At-Will Doctrine**

Although the at-will rule says an employer can discharge a worker at any time for any reason—good reason, bad reason or no reason at all—there are a number of “reasons” that are illegal. For example, it is illegal to terminate a worker because of his or her race, sex or other protected basis under Title VII of the Civil Rights Act or the D.C. Human Rights Act. *See* [Discrimination](#) chapter. It is also illegal to terminate a worker for exercising his or her rights under the 1993 Family and Medical Leave Act. *See* [Family and Medical Leave](#) chapter. Additional employment laws that may be invoked as exceptions to the employment-at-will doctrine are discussed below.

### ***Jury Duty***

## Termination: Exceptions to Employment at Will

It is illegal to fire a worker because he has jury duty. *See* D.C. Code § 11-1913(a). A worker has nine months to bring a case against his employer for violation of this statute. *Id.* at (c).

### ***Termination by Employer Who Takes Over a Service Contract***

Food service, janitorial, hospital and nursing home workers can be terminated only in limited circumstances when their employer changes due to a change in contractors. For example, when a downtown office building changes cleaning companies, some workers retain rights to their jobs. This law applies to any individual or company, including subcontractors, that employ 25 or more people. The following classes of employees are covered:

- food service workers (in a hotel, restaurant, cafeteria, apartment building, hospital, nursing care facility, or similar place);
- janitorial, building maintenance service workers (in an office building, institution, or similar facility); and
- non-professional employees hired to perform health care or related support services (in a hospital, nursing care facility, or similar facility).

The law does not apply to:

- employees who work fewer than 15 hours per week
- executive, administrative, or professional workers, as defined by the Fair Labor Standards Act; or
- those employees required by law to possess an occupational license (e.g., security guards, nurses not covered).

The “old” contractor must notify the “new” contractor of the names, date of hire, and occupation classification of each employee within a period of 10 days. Then, the new contractor must:

- retain for 90 days workers who have been employed for eight months or longer;
- maintain a preferential hiring list of eligible covered employees not retained;
- not discharge any employee without cause during the 90-day transition; and
- after 90 days, the new contractor must conduct performance evaluations of each employee. If the evaluation is satisfactory, the worker must be offered continued employment.

Further, if a company’s contract is not renewed, but a similar one is awarded in the District of Columbia within 30 days, the company must retain 50 percent of the workers “as needed” to perform the contract. *See* D.C. Code 32-101 to 103.

In order to seek recourse under this law, a worker may bring a civil action in Superior Court for back pay, the cost of benefits the employer would have incurred and

## Termination: Exceptions to Employment at Will

attorney's fees. There is no administrative enforcement mechanism and the law is not preempted by federal labor law. *See* D.C. Code 32-103. *See also, Washington Serv. Contractors Coalition v. District of Columbia*, 858 F.Supp 1219 (D.C. 1994), *aff'd*, 54 F.3d 811, (D.C. Cir 1995).

Montgomery County has a very similar law, the Displaced Service Workers Act, effective December 21, 2012.

### ***Displaced by Participants in Publicly-Funded Jobs Programs***

Federal Temporary Assistance for Needy Families and Welfare-to-Work laws contain anti-displacement provisions that protect non-TANF recipients from replacement by "cheaper" TANF workers. Employers may not employ a TANF recipient when any other worker is on layoff from the same or substantially the same job. Nor may the employer terminate a worker to be replaced by the recipient. *See* 42 U.S.C. § 607(f)(2). In addition, an employer may not reduce the hours of non-recipients below full-time to make space for a TANF recipient to take the same or substantially the same job. *Id.* at § 603(a)(5)(J)(i)(III).

The TANF and Welfare-to-Work laws require states to include in their state plans grievance procedures for displacement provisions. *Id.* at § 607(f)(3).

### ***Wage Garnishment***

A worker cannot be terminated because his or her wages are being garnished. *See* D.C. Code § 16-584.

### ***Tobacco Use***

A worker cannot be terminated because of tobacco use. *See* D.C. Code § 7-1703.03.

## **Whistleblower Protections for Private-Sector Employees**

The Sarbanes-Oxley Act ("SOX") and section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") provide employees of private-sector employers with whistleblower protections and incentives for reporting violations of securities laws or bank or mail fraud. The Securities and Exchange Commission's Office of the Whistleblower is responsible for investigating tips, prosecuting cases, and distributing awards to whistleblowers. Whistleblowers can obtain between 10% and 30% of the money collected in successful enforcement actions. 18 U.S.C. § 1514a(a); 15 U.S.C. §78u.

In addition to providing for awards for whistleblowers, SOX and Dodd-Frank also provide anti-retaliation protections to whistleblowers. In particular, Dodd-Frank provides a private right of action for employees fired or disciplined for (a) providing tips to the SEC;

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(b) initiating or testifying in an investigation; or (c) making disclosures required under SOX or Dodd-Frank. 15 U.S.C. § 78u-6. For retaliation for reporting a SOX violation (securities law violations in publicly-traded companies), employees must first file a complaint with the Secretary of Labor. If, following an investigation, the Secretary of Labor fails to issue a final decision within 180 days, the employee can then bring a case in the appropriate federal district court. 18 U.S.C. § 1514A(b)(2)(E). In such an action, the employee would be entitled to make-whole relief, or compensatory damages, including reasonable attorneys' fees. 18 U.S.C. § 1514A(c). Under Dodd-Frank,<sup>102</sup> whistleblowers suffering retaliation can file directly in the appropriate federal district court within 6 years of the alleged violation. Under Dodd-Frank, a successful plaintiff can obtain reinstatement, double back pay, and reasonable attorneys' fees. 15 U.S.C. § 78u-6(h)(1)(c).

## **Government Employees**

Many public employees have constitutional rights that might prevent their termination, including procedural due process rights to notice and a hearing before the deprivation of the employee's property interest in employment, and the protection of free speech rights. As a result, many are protected from termination without just cause. *See e.g., Pickering v. Board of Education*, 391 U.S. 563 (1968) (finding public school teacher illegally discharged for violating constitutional right to free speech). In D.C., however, not all government employment creates a property interest. *See Holland v. Board of Trustees*, 794 F. Supp. 420, 423 (D.D.C. 1992).

## **Federal Employees**

### **Termination for Misconduct**

Prior to terminating a federal employee for misconduct (or taking an adverse action against a federal employee), the agency/employer must first send the employee a "notice of proposed removal/demotion/suspension" containing specific reasons for the action, and provide the worker a chance to review the material relied on by the agency for the removal.<sup>103</sup> The worker will have at least seven days after the receipt of the notice to respond in writing and/or orally.

An adverse action is defined as a termination, demotion, or suspension of more than 15 days.

After the employee presents her reply to the notice of proposed adverse action, the

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<sup>102</sup> Dodd-Frank covers much of SOX's territory but also covers: corporate disclosure and financial violations such as issuing false or misleading financial statements; Ponzi schemes; and violations of the Foreign Corrupt Practices Act, among others. 15 U.S.C. § 78u-6.

<sup>103</sup> These are sometimes referred to as Chapter 75 removals.



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agency must issue a written decision explaining whether or not it is going to terminate, suspend, or demote the employee. The agency has the burden to establish by a preponderance of the evidence that the adverse action “promotes the efficiency of the federal service,” and it can choose to mitigate the penalty to a lesser one.

In any event, no official agency action can be taken for 30 days. *See* 5 U.S.C. § 7512; 5 C.F.R. § 752.404. If, after 30 days, the agency decides to move forward with its decision to terminate (or demote or suspend for 15 or more calendar days), **the worker then has 30 days from the effective date of the removal to appeal in writing to the Merit Systems Protection Board or 45 days to file a discrimination complaint with the agency’s Equal Employment Opportunity office.**

If the worker is a **union member**, however, she must check her union contract because it will specify the **maximum number of days within which to file an appeal**. THIS TIME PERIOD COULD BE AS SHORT AS FIVE DAYS!

### **Removal for Poor Performance**

An employee whose performance is unacceptable either must be removed, demoted or reassigned.<sup>104</sup> The major difference between this type of removal and a removal for misconduct is the necessity of creating performance improvement plans for the affected worker.

A performance improvement plan (PIP) is designed to spell out in writing what a worker must do to effectively perform his or her job, and it must be approved by the Office of Personnel Management. *See* 5 U.S.C. § 4303; 5 C.F.R. § 432.104. The discharge then must be related to the criteria outlined in the plan, and at least one of the plan components must be “crucial” to the worker’s position.

Prior to issuing a PIP, the agency/employer must determine that the employee’s performance is unacceptable. Once the PIP is issued, the employee has at least 30 calendar days to improve his or her performance to an acceptable level, but employees typically are given 90 days. If the employee does not demonstrate acceptable performance during the PIP, the agency will either demote or remove the employee.

Prior to demoting or removing the employee, however, the agency must follow the same procedures outlined above for removing an employee for misconduct.

### **Notice of Proposed Removal**

**Practice Tip:** Some unions are inactive and workers are unaware they are members. Read the Notice of Proposed Removal carefully to see whether it references a union. If it does,

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<sup>104</sup> These are sometimes referred to as Chapter 43 removals (*i.e.* performance-based removals). They are less common than those under Chapter 75.

immediately request a copy of the collective bargaining agreement from the union AND the agency, and ask the union for assistance with preparing the appeal.

### **Appeals to the MSPB<sup>105</sup>**

Federal employees who are (1) not on probation (e.g., competitive service federal workers who have been employed for more than a year), or (2) excepted service workers who have been employed in the same or similar position for two years, have due process rights which allow them to appeal a termination or other “adverse action” to the Merit Systems Protection Board (MSPB).<sup>106</sup>

Other “adverse actions” include suspensions of *more than* 15 calendar days, a demotion, a loss in pay, or a reduction-in-force (RIF). A suspension for less than 15 days is not appealable to the MSPB unless the worker claims retaliation and has raised that claim with the Office of Special Counsel.<sup>107</sup>

Workers have **30 calendar days** (or the next business day after the thirtieth day) from the effective date of the adverse action to appeal the action to the MSPB.

The MSPB provides an optional form (a letter is also fine) for filing an appeal, available online at <http://www.mspb.gov>. The worker should provide two copies of the appeal, filed with the regional office. If the worker was terminated prior to filing an appeal, she no longer will be on payroll. However, if the MSPB orders her re-instated, she will receive back pay and interest for the time of the appeal, so long as she was “ready, willing and able to work.” If the worker was suspended, she will remain on payroll pending the appeal; however, she will not receive income for the time she was suspended, unless the MSPB orders otherwise.

**Federal employees who are covered by union contracts** must choose to use either the union grievance procedures as negotiated in the collective bargaining agreement OR the above outlined procedure.

The MSPB, in the *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981), established a number of factors it uses to determine whether a removal was proper. The

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<sup>105</sup> Although many federal employees have the right to file an appeal to the MSPB from an adverse action, some do not, due to the nature of their appointment or the agency for whom she works. For example, employees of the FBI generally do not have MSPB appeal rights.

<sup>106</sup> Federal workers are hired and employed under one of two categories of service: “competitive service,” which requires a preliminary civil service examination and a probationary employment period, are the presumptive category, while “excepted service,” which requires no examination and has at least a two-year probationary period, must be approved by the Office of Personnel Management. There are further sub-categories, such as temporary, term, career-conditional, and career.

<sup>107</sup> Much of this section is culled from James M. Eisenmann, Esq., *Overview of Rights of Federal Government and District of Columbia Employees* (September 23, 1999) (unpublished paper included in D.C. Bar PSAC Pro Bono Program – Employment Law Training).

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factors include the following:

- (1) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical, or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
- (2) The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and the prominence of the position;
- (3) The employee's past disciplinary record;
- (4) The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
- (5) The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
- (6) Consistency of the penalty with those imposed upon other employees for the same or similar offenses;
- (7) Consistency of the penalty with any applicable agency table of penalties;
- (8) The notoriety of the offense or its impact upon the reputation of the agency;
- (9) The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
- (10) Potential for the employee's rehabilitation;
- (11) Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
- (12) The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

One can use these factors to argue that the adverse action was not proper. To review post-1994 MSPB case law, go to [www.mspb.gov](http://www.mspb.gov).

Federal workers who work in D.C. file MSPB cases with the Washington Regional Office, 1901 S. Bell Street, Suite 950, Arlington, Virginia 22202; telephone: (703) 756-6250; fax: (703) 756-7112.

At the MSPB, the case is assigned to an administrative law judge. It is common practice for the administrative judges to actively try to get the parties to settle the case.

## **D.C. Government Employees**

### **Relevant Agency**

**The D.C. Office of Employee Appeals (OEA)** is the D.C. agency that functions as the administrative appeals court for District of Columbia public employees in the following types of issues: disciplinary removal from employment (wrongful termination) for alleged

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misconduct; disciplinary suspensions of more than 10 days in length for misconduct; appeals of workplace reductions-in-force; review of position classifications of District public employees; review of performance issues involving District public employees; other issues. *See* D.C. Code 1-606.03 (a). Probationary employees are not permitted to appeal a termination or other adverse action during their probationary period. It is located at 955 L'Enfant Plaza, SW, Suite 2500, Washington, DC 20024. The telephone number is 202-727-0004, and its website address is <http://www.oea.dc.gov>.

**Note:** Like federal government employees, D.C. government workers who are represented by a union may not seek recourse for an adverse employment decision through the union grievance procedure *and* the OEA process; rather, aggrieved employees must choose which course to take to the exclusion of the other.

**Note:** An employee of a D.C. public charter school shall not be considered an employee of the District of Columbia. *See* D.C. Code § 38-1802.7(c).

### **Filing an Appeal**

The employee must file a petition for appeal (one original and two copies) with the OEA within 30 calendar days of the effective date of the action being appealed. *See* D.C. Official Code 1-606.03. A form petition can be found on the OEA website <https://oea.dc.gov/service/file-employee-appeal>.

Along with the petition for appeal, the employee also should submit:

- a statement as to whether the employee requests an evidentiary hearing or oral argument;
- a concise statement of the facts giving rise to the appeal;
- an explanation as to why the employee believes the agency's action was unwarranted; and
- a statement of the specific relief the employee is requesting.

Employees should not wait to file because the petition for appeal will be deemed filed on the date it is received by OEA. OEA will then serve a copy of the petition on the agency and request a response. The response may include a motion to dismiss on jurisdictional grounds.

If jurisdiction is proper, the parties typically will proceed to mediation. If mediation fails, the parties are assigned to an administrative judge for a hearing. After a hearing, the administrative judge will issue an initial decision. The rules for proceedings before the administrative judge, including the rules for discovery, any pre-hearing conference, or hearing, can be found on the OEA website.

In evaluating the appropriateness of a D.C. government agency's penalty (significant suspension, termination, etc.), OEA judges first determine whether the penalty fit within

the range allowed by law, regulation, or an agency's applicable Table of Penalties. OEA judges then ask whether the penalty is based upon a consideration of the relevant factors; and whether there is a clear error of judgment by the agency. *See Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985). For the most part, the factors agencies are permitted to consider mirror the 12 *Douglas* factors used by the MSPB, listed in the Federal Employees section above.

Prevailing workers in these cases may be entitled to attorney's fees, and either party may appeal the administrative judge's initial decision to the OEA Board or to D.C. Superior Court.

## **Whistleblower and Anti-Retaliation Protections for Government Employees**

### **Employees of the D.C. Government and D.C. Government Contractors**

#### ***D.C.'s Whistleblower Law***

The District of Columbia's whistleblower law protects workers who complain about fraud and abuse, or about health and safety dangers. *See* D.C. Code § 1-615.51 *et seq.* The law protects former employees, current employees and applicants for employment by the D.C. government, including but not limited to employees of subordinate agencies, independent agencies, the Board of Education, the UDC Board of Trustees, the D.C. Housing Authority and the Metropolitan Police Department. However, the D.C. Council is excluded. *See* D.C. Code § 1-615.52(a)(3).

The law provides that it is illegal to take retaliatory actions against employees who make protected disclosures or against employees who refuse to comply with an illegal order. *See* D.C. Code § 1-615.53. "Protected" disclosures are defined as disclosures not prohibited by law, by an employee to a supervisor or a public body, that the employee believes reasonably evidences: gross mismanagement; gross misuse or waste of public resources or funds; abuse of authority in connection with a public program or public contract; violation of a law, rule or regulation; violation of a term of a contract between the D.C. government and a government contractor that is not merely of a technical or minimal nature; or a "substantial and specific danger to the public health and safety." D.C. Code § 1-615.52(a)(6).

The law further provides that an employee who was wrongfully retaliated against has a private right of action in D.C. Superior Court, and that the court may award relief and damages, including but not limited to an injunction, reinstatement to the prior position, reinstatement of seniority rights, restoration of lost benefits, back pay and interest on back pay, compensatory damages, and reasonable costs and attorney's fees. *See* D.C. Code § 1-615.54(a). For filing purposes, the action must be filed within **three years** after the

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violation occurs or within one year after the employee first becomes aware of the violation, whichever “occurs” first. *Id.* at § 1-615.54(a)(2). Further, an aggrieved employee need not comply with the notice requirements of D.C. Code § 12-309,<sup>108</sup> and need not first exhaust administrative or union contract remedies. *See Sharma v. District of Columbia*, 791 F. Supp. 2d 207, 216 (D.D.C. 2011) (interpreting the DCWPA’s provision on election of remedies, D.C. Code § 1-615.56, in light of legislative intent); *See also* D.C. Code § 1-615.54(a)(1).

In a court or administrative proceeding, once the employee demonstrates that the prohibited activity was a “contributing factor” in the alleged prohibited personnel action, the burden of proof shifts to the employing agency to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by the act. *See* D.C. Code § 1-615.54(b).

**Note:** An employee who institutes a civil action under the act is precluded from pursuing administrative remedies in the Office of Employee Appeals or pursuant to a “negotiated grievance and arbitration procedure or an employment contract.” *See* D.C. Code § 1-615.56(a).

The law further enumerates related rights and responsibilities of employees:

- **Free Speech.** Employees have the right “to freely express their opinions on all public issues” subject to reasonable agency rules and regulations. *See* D.C. Code § 1-615.58(1).
- **Right to Disclose Certain Information.** Employees have the right to “disclose information unlawfully suppressed, information concerning illegal or unethical conduct which threatens or which is likely to threaten public health or safety, or which involves the unlawful appropriation or use of public funds, and information which would tend to impeach the testimony of employees of the District government before committees of the Council or the responses of employees to inquiries from members of the Council concerning the implementation of programs, information which would involve expenditure of public funds, and the protection of the constitutional rights of citizens and the rights of government employees under this chapter and under any other laws, rules or regulations for the protection of the rights of employees.” *See* D.C. Code § 1-615.58(2).
- **Right to Communicate with D.C. Council.** Employees have the right to communicate with members of the D.C. Council. *See* D.C. Code § 1-615.58(3).
- **Right to Assemble.** Employees have the right to assemble in public places “for the free discussion of matters of interest to themselves and the public and the right to notify, on their own time, fellow employees and the public of these meetings.” *See* D.C. Code § 1-615.58(4).

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<sup>108</sup> The 2009 Whistleblower Protection Amendment Act extended the statute of limitations from one to three years and eliminated the “pre-suit notice” requirement of D.C. Code § 12-309.

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- Right to Humane Employment. Employees have the right “to humane, dignified, and reasonable conditions of employment, which allow for personal growth and self-fulfillment, and for the unhindered discharge of job responsibilities.” See D.C. Code § 1-615.58(5).
- Obligation to Make “Protected Disclosures.” Employees are required to make “protected disclosures” concerning violations of law and misuse of government resources as soon as the employee becomes aware of the violation or misuse of resources. See D.C. Code § 1-615.58(7).
- Right to Personnel File. An employee has the right to access his or her personnel file, medical file, or any other file or document concerning his or her status of performance within the agency. See D.C. Code § 1-615.58 (6).

### ***D.C.’s False Claims Law***

D.C.’s false claims law applies to workers at companies or organizations that contract with the D.C. government. It is unlawful to “discharge, demote, suspend, threaten, harass, deny promotion to or in any other manner discriminate against” a worker because of lawful acts of the worker in disclosing information to a government or law enforcement agency in a false claims<sup>109</sup> action by the D.C. government. See D. C. Code §2-308.16(b). Further, a worker who assists, supports or testifies on behalf of another worker who filed a whistleblower claim, is protected. *Id.* In addition, if a worker participated in conduct that either directly or indirectly led to the filing of a claim, she is protected by the law. § 2-381.04(d).

Claims under D.C.’s false claims law are enforced by filing a civil action in D.C. Superior Court. Remedies for retaliation include reinstatement, back pay (plus double back pay, for a total of treble damages), and punitive damages. D.C. Code § 2-381.04(c). Attorney’s fees may be awarded to successful plaintiffs. Additionally, workers, like other individuals, may file a *qui tam* suit in the D.C. Superior Court to claim damages on behalf of the District. Violators of D.C.’s false claims law are liable to the District for three times the amount of damages the District sustains as a result of the violator’s act, plus costs and potentially a \$5,500 to \$11,000 civil penalty per false claim; individuals initiating *qui tam* litigation are entitled to 10 to 40 percent of the proceeds of a successful claim, depending on whether the District intervenes.<sup>110</sup> D.C. Code §§ 2-381.02(a), 2-381.03.

**Note:** If a worker is fired because of his or her participation in a false claim,

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<sup>109</sup> Actions constituting false claims under D.C. law include: (1) claims for products or services not provided; (2) material misstatements on a bid or request for payments, including those that inflate the amount of a claim; (3) conspiracy; (4) delivering deficient or defective products; (5) the false receipt of property; (6) buying from unauthorized sellers; and (7) using a false record or statement to avoid payment. See D. C. Code §2-381.02(a).

<sup>110</sup> *Qui tam* complaints must first be filed under seal with the court and notice given to D.C. Corporation Counsel, after which Corporation Counsel has 180 days to decide if the District will intervene. See D.C. Code § 2-381.03.

retaliation protection is available only if the worker voluntarily discloses all relevant information and the employer had harassed or threatened the worker into engaging in the activity that gave rise to the false claim. D.C. Code § 2-381.04(d).

## **Employees of the Federal Government and Employees of Federal Government Contractors**

### ***Federal Employee Whistleblowers***

The 1978 Civil Service Reform Act, 5 U.S.C. § 2302, protects many categories of federal government employees (and applicants for employment) from retaliation for whistleblowing. Under the law, it is unlawful to retaliate against such employees or applicants who have (1) complained that a law, rule or regulation has been violated; (2) complained of gross mismanagement, gross waste of funds, abuse of authority, or a “substantial and specific danger to public health or safety;” or (3) disclosed to the Special Counsel or Inspector General that there has been such a legal violation, gross mismanagement, gross waste, abuse of authority or substantial danger to health or safety. 5 U.S.C. § 2302(b)(8).

The act also makes it unlawful to do the following:

- Discriminate (or threaten to discriminate) against federal government employees (or applicants for employment) because of “the exercise of any appeal, complaint, or grievance right granted by any law, rule or regulation.” 5 U.S.C. § 2302(b)(9)(A).
- Discriminate against a federal government employee or applicant on the basis of the employee’s testifying or assisting another individual in the exercise of any right referred to in subsection (b)(9)(A). 5 U.S.C. § 2302(b)(9)(B).
- Discriminate (or threaten to discriminate) against federal government employees (or applicants for employment) because the employee is “cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law.” 5 U.S.C. § 2302(b)(9)(C).
- Discriminate (or threaten to discriminate) against federal government employees (or applicants for employment) because of their refusal to obey an order that “would require the individual to violate a law.” 5 U.S.C. § 2302(b)(9)(D).

The 2012 Whistleblower Protection Enhancement Act, Pub. L. No. 112-199, 126 Stat. 1465 (“WPEA”), strengthened protections under 5 U.S.C. § 2302. Disclosures can no longer be excluded from protections because (1) the disclosure was made to a supervisor or to a person participating in the legal violation, gross mismanagement, gross waste, abuse of authority or substantial danger to health or safety; (2) the disclosure revealed information that had been previously disclosed; (3) of the employee’s motive for making the disclosure; (3) the disclosure was not made in writing; (4) the disclosure was made while the employee was off duty; or (5) of the amount of time passed since the occurrence of the events described in the disclosure. 5 U.S.C. § 2302(f)(1). The WPEA expressly protects



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employees who make disclosures in the normal course of their duties and up the chain of command. *See* 5 U.S.C. § 2302(f). Transportation Security Administration security officers are no longer excluded from whistleblower protections. *See* 5 U.S.C. § 2304(a).

Additionally, the Inspector General for each agency must now designate a Whistleblower Protection Ombudsman tasked with explaining to employees the process for submitting retaliation claims with the Office of Special Counsel as well as the process for filing whistleblower disclosures. *See* 5 U.S.C.A. App. 3 § 3(d),

The WPEA expands the remedies available in whistleblower claims. Employees may now pursue compensatory damages in addition to reversal of adverse personnel actions. 5 U.S.C. § 1221(g)(1)(A)(ii), (g)(2).

**Note:** Under the WPEA, whistleblower protections supersede agency non-disclosure agreements, and all such agreements signed after the WPEA went into effect must advise employees of this exception. *See* 5 U.S.C. § 2302(a)(2)(xi), (b)(13)

### ***False Claims Act Claims***

Please see the [Wage & Hour](#) Chapter of this manual for a detailed discussion about bringing and enforcing claims under the False Claims Act.

## **Maryland**

Maryland also subscribes to the general employment-at-will common law doctrine; however, it recognizes a narrowly defined public policy exception in wrongful discharge claims.

First, the exception may only apply when it provides a remedy for an “otherwise unremedied violation of public policy.” *See Wholey v. Sears, Roebuck & Co.*, 370 Md. 38, 52 (Md. 2002). Generally, this operates to bar retaliatory discrimination claims that could otherwise be brought under Title VII or the Maryland Human Rights Act. The Maryland courts, however, have held that where Title VII or the Maryland Human Rights Act do not apply, because, for example, the employer has less than 15 employees, the employee can sue in court under a wrongful discharge cause of action. *See Kerrigan v. Magnum Entertainment, Inc.*, 804 F. Supp. 733, 736-37 (D. Md. 1992).

Second, the “public policy” must be “reasonably discernible from prescribed constitutional or statutory mandates.” *Id.* at 53. In *Wholey*, the Maryland Court of Appeals held that a wrongful termination claim could fall within the public policy exception if the employee gave testimony (as a victim or a witness) at an official proceeding or reported a suspected crime to the appropriate law enforcement or judicial officer. *Id.* at 61.

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The Maryland courts have also recognized wrongful termination claims in cases where workers were fired for: (1) filing workers' compensation claims, *see Finch v. Holladay-Tyler Printing, Inc.*, 586 A.2d 1275 (Md. 1991); (2) refusing to commit the tort of invasion of privacy of a third person, *see Kessler v. Equity Mgmt., Inc.*, 572 A.2d 1144 (Md. Ct. Spec. App. 1990); (3) filing assault and battery charges against a supervisor, *see Watson v. Peoples Sec. Lif Ins. Co.*, 588 A.2d 760 (Md. 1991); (4) reporting abuse and neglect of children to the proper authorities, *see Bleich v. Florence Crittendon Servs. Of Baltimore, Inc.*, 632 A.2d 463 (Md. Ct. Spec. App. 1993); and (5) exercising the right to free speech, *see DeBleecker v. Montgomery County*, 438 A.2d 1348 (Md. 1982).

## **Virginia**

Virginia also adheres to the employment-at-will doctrine, and like D.C. and Maryland, it also applies a public policy exception to the doctrine. In order to invoke this exception, a worker must be a member of class of individuals that the specific public policy, enunciated in a Virginia state statute, is intended to benefit. *See Dray v. New Mkt. Poultry Prods., Inc.*, 518 S.E.2d 312 (Va. 1999); *Lawrence Chrysler Plymouth Corp. v. Brooks*, 465 S.E.2d 806 (Va. 1996). Like Maryland, if the statute enunciating the public policy already provides the worker with a remedy, such as the Virginia Human Rights Act, the worker cannot also maintain a wrongful termination claim. *See Doss v. Jamco, Inc.*, 492 S.E.2d 441 (Va. 1997).

The Virginia Supreme Court has recognized a cause of action for retaliatory termination in violation of public policy. This is a tort claim. *Bowman v. State Bank of Keysville*, 229 Va. 534, 540, 331 S.E.2d 797, 801, 1985 Va. LEXIS 228, \*13 (VA 1985)(stockholders had a statutory right to vote on corporate matters, and therefore their termination for exercising this right was in violation of public policy). Subsequent cases have since clarified that this cause of action is available in only narrow, specific circumstances. *See Francis v. Nat'l Accrediting Comm'n of Career Arts & Scis., Inc.*, 293 Va. 167, 172 (VA 2017)(viable claim requires a showing that the termination itself violates a public policy protected by applicable statutes); *City of Virginia Beach v. Harris*, 259 Va. 220, 232 (Va. 2000)(police officer terminated for swearing out a warrant against a co-worker police officer could not state cause of action, because relevant statutes were meant to protect public, not police officers using them as shield against disobeying supervisory order).

## **Virginia Whistleblower Protections**

Virginia now provides a private right of action for whistleblowers, providing broad prohibitions against retaliatory action where an employee reported a violation of any federal or state law or regulation to a supervisor, any governmental body, or a law enforcement official. These prohibitions also protect employees who refused to perform an action that would violated any federal or state law or regulation. Affected employees have one year to bring a civil action. VA. Code Ann. § 40.1-27.3.

## **Welfare to Work**

When a participant in a welfare-to-work program is terminated, she may be able to demand a hearing to protest the termination under the due process clause of the Fifth Amendment of U.S. Constitution. *See Goldberg v. Kelly*, 397 U.S. 254 (1970).

## **Undocumented Workers**

While there is no law that prevents undocumented workers from bringing claims for wrongful discharge, such claims may not be welcome in certain jurisdictions. For example, in *Egbuna v. Time-Life Libraries*, the Fourth Circuit found that the plaintiff could not demonstrate that he was a victim of discrimination because at the time he sought employment, he was unqualified for the position he sought by virtue of his failure to possess legal documentation authorizing him (an alien) to work in the United States. 153 F.3d 184 (4th Cir. 1998). *See also Chaudhry v. Mobil Oil Corp.*, 186 F.3d 502 (4th Cir. 1999) (undocumented worker not eligible for Title VII or ADEA protection); *Reyes-Gaona v. North Carolina Growers Assoc.*, 2000 U.S. Dist. LEXIS 14701 (4th Cir. 2000) (undocumented worker cannot bring claim under the 1967 Age Discrimination in Employment Act).

The 4<sup>th</sup> Circuit's approach most likely precludes the bringing of such actions in the District of Columbia. So far, the D.C. Circuit has not reached this issue, and there is no requirement that a worker be "qualified" to sustain a cause of action for wrongful discharge.

# **EMPLOYMENT**

# **TORT CLAIMS**

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## **Intentional Interference**

An “intentional interference with contract” in the employment context occurs when the employer interferes with a contract between the worker and a third party. The elements of intentional interference with contract are the following: (1) existence of a contract; (2) the tortfeasor’s (in this context, the employer’s) knowledge of the contract; (3) intentional procurement of its breach; and (4) resultant damages. *See Sorrells v. Garfinkel’s*, 565 A.2d 285, 289 (D.C. 1989).

The alleged contract must be more explicit than just the expectation of continued employment, because the courts do not consider such an expectation a tangible contract. *See Dale v. Thomason*, 962 F. Supp. 181, 184 (D.D.C. 1997). It is equally important to note that the alleged “interferer” must not be a party to the contract interfered with; therefore, an employee of the company with whom the plaintiff has the contract cannot be liable for intentional interference with contract, because that employee is an agent of one of the parties to the contract. *See Press v. Howard Univ.*, 540 A.2d 733, 736 (D.C. 1988).

A similar cause of action may lie for intentional interference with business expectations. The D.C. Court of Appeals held in *Carr v. Brown*, 395 A.2d 79, 84 (D.C. 1978), “business expectancies, not grounded on present contractual relationships but which are commercially reasonable to anticipate, are considered to be property, and therefore protected from unjustified interference.” Among those expectancies is “the prospect of obtaining employment or employees, or the opportunity of obtaining customers.” *Id.* This tort might arise in the employment context when an employer, for example, interferes with an employee’s ability to get a new job.

To sustain a claim for intentional interference with business relations, the worker needs to prove an “expectancy” that is “commercially reasonable” to anticipate. Be warned, however, that although there is authority to support this cause of action, courts are nonetheless reluctant to entertain it. This is a claim best brought in conjunction with other causes of action.

Under D.C. law, the statute of limitations to bring an interference claim is three years. *See* D.C. Code § 12-301(8) (2001).

## **Defamation**

Most people do not ordinarily think about “defamation” in connection with the relations between employer and employee. Defamation principles, however, have become increasingly important on the job. According to one commentator, more than 40 percent of the reported defamation cases relate to the workplace.<sup>111</sup>

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<sup>111</sup> Duffy, *Big Brother in the Workplace: Privacy Rights Versus Employer Needs*, 9 Indus. Rel. L. J. 30, 36 (1987).

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Defamation encompasses both libel (written defamation) and slander (spoken defamation), and the elements are as follows: (1) the statement is false; (2) it was defamatory (injurious to the worker's reputation); (3) the statement was published (uttered, written, etc.) to a third party by the defendant with some degree of fault; and (4) the plaintiff was injured. *See Armstrong v. Thompson*, 80 A.3d 177, 183 (D.C. 2013); *Vereen v. Clayborne*, 623 A.2d 1190, 1195 (D.C. 1993).

A statement is considered to be defamatory if it could injure a worker in her trade, profession, or community standing. *See Howard Univ. v. Best*, 484 A.2d 958, 989 (D.C. 1984). Courts in this jurisdiction apply a high standard to determine if a statement is defamatory; it must be more than unpleasant or offensive, and must make the plaintiff seem "odious, infamous, or ridiculous." *Id.*

The statute of limitations for a defamation claim is only **one** year under D.C. law. *See* D.C. Code § 12-301(4). Defamation occurs at the time of publication, and its statute of limitations begins to run from that date. *See Foretich v. Glamour*, 741 F. Supp. 247, 252 (D.D.C. 1990). Because the statute of limitations is shorter here than with most torts, claimants need to act quickly in order to preserve their rights.

### **Defenses to Defamation**

The most obvious defense to defamation is that the statement uttered was true or substantially true. Courts generally discount minor inaccuracies in the statement so long as "the substance, the gist, the sting" of the statement is justified by fact. *Moldea v. New York Times Co.*, 22 F.3d 310, 318 (D.C. Cir. 1994).

Opinion is also a defense to defamation. In other words, if the statement is merely the defendant's opinion rather than one intended to be—or capable of being—objectively verified, then the defamation claim will not survive. *Rosen v. American Israel Pub. Affairs Comm., Inc.*, 41 A.3d 1250, 1255 (D.C. 2012) (affirming trial court's ruling that defendant's statement that the plaintiff did not comply with company "standards" was not objectively verifiable because "standards" can have multiple meanings, not only the arguably verifiable meaning the plaintiff suggested); *McClure v. American Family Mut. Ins. Co.*, 223 F.3d 845, 857 (8th Cir. 2000) (affirming district court ruling that statement about plaintiff's conduct being "prejudicial to the company" could not be proved false, and therefore was not defamatory).

There are also two common privileges that apply to the tort of defamation. The first is consent and the second is the common interest privilege.

Consent is established if the defendant proves that (1) there was express or implied consent to the publication; (2) the statement was relevant to the purpose for which consent

was given; and (3) the publication was limited to those with a legitimate interest in its content. *See Farrington v. Bureau of Nat'l Affairs*, 596 A.2d 58 (D.C. 1991).

The common interest privilege is a qualified one, most frequently used in the context of employment references. This privilege has three elements: (1) the statement is made in good faith; (2) by a person who reasonably believes that she has a legitimate interest in making the statement; (3) to a person with a similarly legitimate interest in hearing it. *See Columbia First Bank v. Ferguson*, 665 A.2d 650, 655 (D.C. 1995). This qualified privilege is also applicable to performance evaluations. Like most qualified privileges, it can be overcome if a plaintiff can prove that the statements were made with malice. *Id.* at 656.

### **Intentional Infliction of Emotional Distress**

Intentional infliction of emotional distress is a popular claim for plaintiffs to bring in employment-related cases. Because it is a tort, a plaintiff can receive punitive damages for this claim, and such damages are not subject to any statutory caps. However, courts are very skeptical about intentional infliction of emotional distress claims and plaintiffs rarely prevail on them, even in the most seemingly egregious circumstances. Thus, an attorney should bring this claim only in particularly outrageous circumstances.

In order to set forth a claim of intentional infliction of emotional distress in D.C., a claimant must allege (1) extreme and outrageous conduct that (2) intentionally or recklessly caused (3) severe emotional distress to another. *See Cooke-Seals v. District of Columbia*, 973 F. Supp. 184, 188 (D.D.C. 1997). The plaintiff must demonstrate that the employer's actions were "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Sere v. Group Hospitalization, Inc.*, 443 A.2d 33, 37 (D.C. 1982).

Courts have held that an action by an employer that violates public policy may qualify as intentional infliction of emotional distress. *See Howard Univ. v. Best*, 484 A.2d 958, 986 (D.C. App. 1984) (violation of D.C. Human Rights Act.). Moreover, employers are held to heightened standards of behavior when they have employees "who it is reasonable to assume are particularly susceptible to emotional distress." *Drejza v. Vaccaro*, 650 A.2d 1308, 1313 (D.C. App. 1994) (refusing to dismiss claim by rape victim against police interrogator). In such a situation,

"The extreme and outrageous character of the conduct may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity. The conduct may become heartless, flagrant, and outrageous when the actor proceeds in

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the face of such knowledge, where it would not be so if he did not know.”

*Id.*, quoting Restatement (Second) of Torts, § 46, comment (f).

As noted earlier, courts in this jurisdiction are extremely wary of emotional distress claims in the employment context. *See, e.g. Cooke-Seals v. District of Columbia*, 973 F. Supp. 184, 188-89 (D.D.C. 1997) (dismissing emotional distress claim based on allegations that employee was subjected to “unmeritorious investigation” and “negative and false employment references”).

The statute of limitations to bring this claim is **three years** under D.C. law. *See* D.C. Code § 12-301(8).

### **False Imprisonment**

False imprisonment is the restraint of a person’s physical liberty by another without consent or legal justification. *See Faniel v. Chesapeake & Potomac Tel. Co. of Md.*, 404 A.2d 147, 150 (D.C. 1979). The essential elements of the tort are (1) the detention or restraint of one against his will, within boundaries fixed by the defendant, and (2) the unlawfulness of the restraint. *Id.*; *see also Tocker v. Great Atlantic & Pacific Tea Company*, D.C. App., 190 A.2d 822, 824 (1963).

This claim is most frequently brought in the context of investigations and interviews of employees. To meet the requirements of false imprisonment, [t]he evidence must establish a restraint against the plaintiff’s will, as where she yields to force, to the threat of force or to the assertion of authority.” *Faniel*, 404 A.2d at 151-52. That said, fear of losing one’s job does not mean that the behavior was induced. *See, e.g., PROSSER, TORTS, supra* § 11, at 106; *Moen v. Las Vegas International Hotel, Inc.*, 90 Nev. 176, 521 P.2d 370, 371 (1974).

The statute of limitations to bring this claim is only **one** year under D.C. law. *See* D.C. Code § 12-301(4) (2001).

### **Negligent Hiring and Supervision**

An employer can be held liable for negligently hiring an incompetent or unfit employee if the plaintiff can show that the employer knew or should have known that another worker had a propensity to commit some sort of job-related misconduct. *See Moseley v. Second New St. Paul Baptist Church*, 534 A.2d 346 (D.C. 1987).

Similarly, if, during the course of employment, an employer becomes aware of a worker’s unfitness and fails to take any action to correct the problem, the employer can be



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held liable for negligent supervision. *See Daka, Inc. v. McCrae*, 2003 D.C. App. LEXIS 752 (D.C. 2003) (affirming jury verdict in plaintiff's favor on negligent supervision claim where plaintiff provided evidence to his employer over several months that he was being subjected to sexual harassment). A plaintiff must establish that the employer was negligent or reckless (1) in giving ambiguous or improper orders, or (2) in supervising activities of its employees. *See Tarpeh-Doe v. United States*, 28 F.3d 120, 123 (D.C. Cir. 1994).

The statute of limitations to bring this claim is **three years** under D.C. law. *See* D.C. Code § 12-301(8) (2001).

## **Public Disclosure of Private Facts**

"Public disclosure of private facts," also known as "unreasonable publicity," is a recognized claim of tort liability against an employer. Public disclosure of private facts occurs when an employer discloses information concerning the private life of another (in this context, an employee) that would be highly offensive to a reasonable person and is not of legitimate concern to the public. *Restatement (Second) of Torts*, § 652D. A situation involving this tort usually arises when an employer uses information about the employee or applicant received during the job application, screening, orientation, or medical examination process and maintained in the personnel record.

The disclosure must also concern genuinely private information, be sufficiently widespread, and unauthorized. For example, to be genuinely private the disclosure of details of a separation agreement may not be actionable, whereas disclosing information about an employee's psychiatric evaluation may be actionable. *See Wells v. Thomas*, 569 F. Supp. 426, 437 (E.D. Pa. 1983); *Wagner v. City of Holyoke*, 404 F.3d 504 (1st Cir. 2005).

## **Tort Claims against the Federal Government - Federal Torts Claims Act**

The 1946 Federal Torts Claims Act provides a waiver of sovereign immunity where the federal government may be held responsible for the acts of its employees. *See* Jacob A. Stein, *Stein on Personal Injury Damages* § 5:26 (2006). **Liability will be imposed on the government for: "injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment** under the circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C.A. § 1346(b).

The Federal Tort Claims Act confers judgment through substantive state law against the federal government. *Id.* at § 2679. Thus, if no parallel liability exists under the

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applicable state law, under the Federal Tort Claims Act, the action must be dismissed. 28 U.S.C.A. § 1346.

In the District of Columbia, an employee's behavior is within scope of his employment if the employee acted to serve his employer's interest. *See Kalil v. Johanns*, 407 F.Supp.2d 94 (D.C. 2005). An employee under this statute includes: "officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States." 28 U.S.C.A. § 1346(b). A deciding factor is the degree of control the United States can exercise over the person's work. *See* 20 Am. Jur. Proof of Facts § 375 (2006).

### **Procedure for Filing a Claim**

A claimant must first file an administrative claim to the federal agency at bar. A Standard Form 95 is not required to present an FTCA claim, but is a convenient form for supplying the information necessary to bring such a claim. The administrative claim must include a brief notice or statement to the relevant federal agency containing a general description of the time, place, cause, and general nature of injury, as well as the amount of compensation demanded. *See* 28 U.S.C.A. § 2675(a); 20 Am. Jur. Proof of Facts § 375. Exhaustion of administrative remedies is a jurisdictional prerequisite to a FTCA claim. *See Koch v. U.S.*, 209 F.Supp. 2d 89 (D.C. 2002). The claimant cannot prosecute an action until a claim has been rejected by the agency or the agency has not acted within six months. *See Kirkland v. District of Columbia*, 789 F. Supp. 3 (D.C. 1992); 28 U.S.C.A. § 2672. A claimant may also file a case with the federal district court if they are not satisfied with the settlement or decision of the agency.

Exceptions of the Federal Torts Claims Act are listed under 28 U.S.C.A. § 2680(h). The most notable are the due care exception and the intentional torts exception. The due care exception bars government responsibility when the employee's actions were exercised under due care. The intentional torts exception bars government responsibility when the claim, "arise(s) out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C.A. § 2680(h). Note that some intentional torts remain unlisted under this statutory exception and may be open to action; trespass, conversion, and invasion of privacy. *See* Jacob A. Stein, *Stein on Personal Injury Damages* § 5:26 (2006).

### **Tort Claims against the D.C. Government**

Before filing a tort claim against the D.C. government, the worker **must** notify the Mayor in writing within **six months** of the injury. *See* D.C. Code § 12-309. The written notice must include the approximate time, place, cause, and circumstances of the injury or damage.

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Notice of claim letters must be received by the Office of Risk Management, and will be accepted on behalf of the Mayor.

The mailing address for claims is:

D.C. Office of Risk Management  
One Judiciary Square  
441 4<sup>th</sup> Street, NW, Suite 800 South  
Washington, D.C. 20001  
(202) 727-8600

Claims filing instructions and forms can be found at:

<http://orm.dc.gov/service/tort-liability-claim>.

This requirement is only applicable for claims against the District of Columbia and does not affect claims against individual tortfeasors sued in their individual capacities. *George v. Dade*, 769 A.2d 760 (D.C. 2001). This requirement does not apply to any claims brought under federal law, the D.C. Human Rights Act, or the D.C. Whistleblower Protection Act. D.C. Code § 12-309(b).

### **Employment Related Tort Claims in Maryland**

Maryland recognizes the same torts as discussed above. In addition, Maryland recognizes claims for fraudulent misrepresentation and deceit and negligent misrepresentation. A thorough discussion of these torts is beyond the scope of this manual, but they could be applicable. *See Miller v. Fairchild Indus.*, 629 A.2d 1293, 1302 (Md. App. 1993) and *Lubore v. RPM Assocs., Inc.*, 674 A.2d 547, 555 (Md. App. 1996).

### **Employment Related Tort Claims in Virginia**

Virginia recognizes the same torts as the District of Columbia. Advocates should note, however, that as a general rule, Virginia law is less protective of the worker than the District of Columbia and Maryland.

In addition, under Virginia law, the **statute of limitations** begins when the cause of action accrues, not when the damage has been sustained. *See VA. Code Ann. § 8.01-230; Owens v. Combustion Engineering*, 279 F. Supp. 257 (1967).

# **LABOR UNIONS &** **LABOR LAW**

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## **Introduction**

The relationships among employers, labor organizations and union-represented employees are governed primarily by the Labor Management Relations Act, 29 U.S.C. §§ 141-87. (As originally enacted in 1935, the law was called the National Labor Relations Act, and most practitioners still call it that.) That law was enacted in 1935 as the Wagner Act and amended in 1947 by the Taft-Hartley Act and in 1959 by the Landrum-Griffin Act.

The NLRA, among other things, creates the National Labor Relations Board, establishes the procedure for conducting representation elections, prohibits “unfair labor practices” by employers and unions, limits the circumstances under which unions can engage in picketing, permits lawsuits to enforce collective bargaining agreements and union constitutions, places restrictions on financial transactions between unions and employers, allows businesses injured by unlawful secondary boycotts to sue for damages, and imposes a duty of fair representation on unions.

The protection of the NLRA is not confined to union-represented employees or to employees involved in an organizing campaign. Employees who are merely complaining to their employer about working conditions might be engaged in protected activity and any retaliatory action by their employer could constitute an unfair labor practice.

The procedure for prosecuting unfair labor practices—under which charges are investigated by NLRB field examiners and then prosecuted by NLRB field attorneys if deemed meritorious—makes the NLRA a particularly useful law for workers who cannot afford to hire an attorney and who may be unable to litigate a case as a pro se party. Accordingly, in any case in which an employee seeking assistance may have been engaged in protected activity, the attorney should consider whether a violation of the NLRA has occurred.

**Practice Tip:** As a general practice, the Washington Lawyers’ Committee Workers’ Rights Clinics cannot provide legal advice in areas exclusively governed by a workplace collective bargaining agreement (CBA). In such a case, the worker’s union would be the sole entity capable of representing the worker on these issues. Workers should be instructed to consult with their union on such matters, and if they have not initially had success, consult with individuals higher in the union hierarchy. See the section on **Dealing with Labor Unions**, below. If, in addition to being a CBA issue, the workers’ issue touches on other employment laws (e.g. discrimination, FMLA, paid sick days, overtime), the Washington Lawyers’ Committee may be able to offer limited legal advice with respect to those employment laws.

## **Covered Employers**

In general, the NLRA applies to private employers whose operations affect interstate commerce. The NLRB has adopted a series of standards that it applies in determining whether to assert jurisdiction over different types of employers. The board, for example, will not assert jurisdiction over a non-retail employer unless the employer annually ships goods, provides services or purchases goods from across state lines valued at \$50,000 or more. *Siemons Mailing Service*, 122 NLRB 81 (1958). The board will not assert jurisdiction over a retail establishment unless its annual gross volume of business is at least \$500,000. *Carolina Supplies & Cement Co.*, 122 NLRB 88 (1958). But the NLRB exercises plenary jurisdiction over any private employer in the District of Columbia if the employer falls within the board's statutory jurisdiction, without regard to the value of services provided, or goods sold or purchased.

Employers covered by the NLRA include:

- any person acting as an agent of an employer, 29 U.S.C. § 151(2);
- two entities that together constitute a single employer or joint employers, *South Prairie Construction Co. v. Operating Engineers Local 627*, 425 U.S. 800, 802 (1976) (single employer); *Sun Maid Growers of California*, 239 NLRB 346 (1979), *enfd*, 618 F.2d 56 (9th Cir. 1980) (joint employer). Under the NLRB's [2020 Rule](#), a joint employer must "possess and exercise substantial direct and immediate control over essential terms and conditions of employment of employees.";
- the United States Postal Service, 39 U.S.C. § 1209;
- private health care institutions, including nonprofit hospitals, 29 U.S.C. § 152(14);
- nonprofit organizations, including private schools and charitable organizations, *Rhode Island Catholic Orphan Asylum*, 224 NLRB 1344 (1976);
- private nonprofit colleges and universities that receive gross annual revenue from all sources totaling at least \$1,000,000, *Cornell University*, 183 NLRB 329 (1970);
- labor organizations, when acting as employers, *Garment Workers*, 131 NLRB 111 (1961);
- commercial enterprises operated in the United States by foreign governments, *German School of Washington*, 260 NLRB 1250 (1982); and
- Indian-operated commercial enterprises, *San Miguel Indian Bingo & Casino*, 341 NLRB 1055 (2004), *enfd*, 475 F.3d 1306 (D.C. Cir. 2007).

### **Policy Watch!**

In September 2022, the NLRB released a [notice of proposed rulemaking](#) to revise the joint employer standard under the 2020 Rule. Attorneys should refer to NLRB for current status of the joint employer rule.

Employers that the NLRA does not cover include:

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- the government of the United States or any wholly owned government corporation, 29 U.S.C. § 152(2);
- federal reserve banks, 29 U.S.C. § 152(2);
- state governments and their political subdivisions, 29 U.S.C. § 152(2);
- entities covered by the Railway Labor Act, such as airlines and railroads, 29 U.S.C. § 152(2);
- international organizations, such as the World Bank and the International Monetary Fund, *Herbert Harvey, Inc.*, 171 NLRB 238 (1968), enforced, 424 F.2d 770 (D.C. Cir. 1969);
- church-operated schools, *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979);
- horseracing and dog racing establishments, 29 C.F.R. § 103.3;
- foreign flag ships employing alien seamen, *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963); and
- Indian-operated enterprises that perform traditional tribal or governmental functions, *Yukon Kushokwin Health Corp.*, 341 NLRB 1075 (2004).

### **Covered Employees**

In general, anyone employed by a covered employer is an “employee” within the meaning of the NLRA and covered by that law, unless otherwise excluded.

Employees who are excluded from coverage include:

- agricultural employees, 29 U.S.C. § 152(3);
- domestic employees working for a family, rather than a business, 29 U.S.C. § 152(3); *Ankh Services, Inc.*, 243 NLRB 478 (1979);
- individuals employed by a parent or spouse, 29 U.S.C. § 152(3);
- independent contractors, 29 U.S.C. § 152(3);
- supervisors, 29 U.S.C. § 152(3), which are broadly defined as persons “having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,” 29 U.S.C. § 152(11); and
- managerial employees, *NLRB v. Yeshiva University*, 444 U.S. 672 (1980).

### **Protected Concerted Activity**

Under Section 8(a)(1) of the NLRA it is an unfair labor practice for an employer “to interfere with, restrain, or coerce employees” in the exercise of protected rights. 29 U.S.C. § 158(a)(1). Under Section 8(a)(3), it is an unfair labor practice for an employer to

discriminate against an employee who engages in protected activities or to discourage him or her, or other employees, from engaging in protected activities. 29 U.S.C. § 158(a)(3). Accordingly, an employee who has been discharged or disciplined, or threatened with either, by his or her employer may have a remedy under the NLRA if the employer's conduct was a response to the employee's protected activity.

Conduct protected by the NLRA is described in Section 7. That section states that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Activity protected by Section 7 is not confined to conduct related to organizing or collective bargaining. Concerted activity for mutual aid or protection is protected, even if the employee is not represented by a union and even if the conduct is unrelated to organizing or collective bargaining.

To be protected, employee conduct must be concerted. In general, concerted activity is activity taken by two or more employees or by one employee on behalf of others. There are circumstances in which the conduct of a single employee would be deemed concerted activity. The NLRB holds, for example, that an individual's efforts to enforce the provisions of an existing collective bargaining agreement constitute concerted activity. *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966), *enfd*, 388 F.2d 495 (2nd Cir. 1967). That activity is deemed concerted even if the employee is mistaken about the content or meaning of the collective bargaining agreement. The Supreme Court endorsed what became known as the Interboro doctrine, or constructive concerted activity, in *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), in which a truck driver refused to drive a truck that he considered unsafe, relying on the provision in his collective bargaining agreement stating that employees could not be compelled to drive vehicles that were not safe.

The NLRB also holds that the conduct of an individual employee constitutes concerted activity where it is a "logical outgrowth" of group activity. An employee who called the Department of Labor following a group protest over the employer's new lunch hour policy was, for example, engaged in concerted activity. *Salisbury Hotel, Inc.*, 283 NLRB 685 (1987). An employee who, after several coworkers expressed concern about their supply of water, threatened to stop working if water did not arrive by a certain time, also was engaged in concerted activity. *Golden Stevedoring Co.*, 335 NLRB 410 (2001). Each of four employees who separately refused to work overtime was engaged in concerted activity because their conduct followed expressions of concern by several employees about the employer's overtime policy. *Mike Yurosek & Son, Inc.*, 306 NLRB 1037 (1992). An individual employee who complained to his supervisor about working conditions and said that his complaints were based on conversations with co-workers was engaged in concerted activity. *Manimark Corp.*, 307 NLRB 1059 (1992).<sup>112</sup> Even more broadly, the NLRB has held that an employee who repeats a complaint previously expressed by a group

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<sup>112</sup> The 6<sup>th</sup> Circuit denied enforcement of the board's order, holding that "the evidence in this case is too thin to support a conclusion that ... Fields was acting on behalf of anyone other than himself." *Manimark v. NLRB*, 7 F.3d 547 (6th Cir. 1993).



of employees is engaged in concerted activity. *Alton H. Piester*, 353 NLRB No. 33 (2008), *enfd*, 591 F.3d 332 (4th Cir. 2010).

On the other hand, an employee who acts individually and solely for his or her own benefit is not engaged in concerted activity. In *Meyers Industries*, 281 NLRB 882 (1986), the NLRB held that a truck driver who had complained to his employer and to the state transportation agency about the unsafe condition of his truck and, as a result, was discharged, was not engaged in concerted activity because he was acting only on his own behalf. The employee in that case, unlike the employee in *City Disposal*, was unable to rely on a provision in a collective bargaining agreement. When an employee was discharged because he had expressed his intention to file a workers' compensation claim, the NLRB concluded that he was engaged in concerted activity, but the Fourth Circuit disagreed. *Krispy Kreme Doughnut Co.*, 245 NLRB 1053 (1979), *enforcement denied*, 635 F.2d 304 (4th Cir. 1980).

A conversation between two employees could constitute concerted activity, but, according to the Third Circuit, only if "engaged in with the object of initiating or inducing or preparing for group action or [if] it had some relation to group action." *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3rd Cir. 1964). The *Mushroom Transportation* standard has been widely adopted, including the D.C. and Fourth Circuits. See *Prill v. NLRB*, 755 F.2d 941, 954 (1985) ("courts have long followed the Board's view that individual efforts to enlist other employees in support of common goals is protected by section 7"); *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304, 307-08, 307 n.6 (4th Cir. 1980) (adopting the *Mushroom Transportation* standard). But, in *Ellison Media Co.*, 344 NLRB 1112 (2005), the NLRB held that a conversation between two employees about sexual harassment constituted protected concerted activity.

To be deemed protected, employee activity must be concerted and for "mutual aid or protection." In *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), the Supreme Court read that language broadly to include efforts by employees "to improve terms or conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Id.* at 565. Under this standard, employees who file administrative claims or lawsuits, or who write to legislators to protect or advance their interest as employees, are acting for their mutual aid or protection. See *Kaiser Engineers*, 213 NLRB 752 (1974) (A group of engineers wrote letters to legislators opposing any change in immigration laws that would allow foreign engineers to enter the United States.).

Some categories of employee conduct are unprotected. Violent conduct is unprotected. Conduct that is unlawful or that constitutes a breach of contract (for example, a strike in violation of an applicable no-strike clause) is also unprotected. Employee statements may be unprotected if they reveal confidential employer information, *Int'l Bus. Machines Corp.*, 265 NLRB 638 (1982); if they contain deliberately or maliciously false information about the employer, *Walls Mfg. Co.*, 137 NLRB 1317 (1962), *enfd*, 321 F.2d 753 (D.C. Cir. 1963); or if they unfairly disparage the employer's product or services in a

manner unrelated to employee interests or working conditions, *NLRB v. IBEW Local 1229*, 346 U.S. 464 (1953). Employee conduct that is flagrant or offensive may be unprotected, but an employee does not necessarily lose the protection of the NLRA by making statements that are loud, boisterous or even profane. *Media General Operations, Inc.*, 351 NLRB 1324 (2007).

## **Undocumented Employees**

Undocumented workers are “employees” within the meaning of the NLRA. They are therefore protected by that law and entitled to file unfair labor practice charges. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984). Notification of immigration authorities that an employee is undocumented constitutes a constructive discharge of that employee, and an employer would commit an unfair labor practice by reporting an undocumented employee in retaliation for his or her protected activity. *Id.* An undocumented employee who is discharged in violation of the NLRA, however, is not entitled to reinstatement or back pay. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

The NLRB general counsel has taken the position that an undocumented employee who is knowingly hired by an employer and then unlawfully discharged is entitled to a remedy of conditional reinstatement. To be reinstated, however, the employee would have to satisfy the verification procedures contained in the 1986 Immigration Reform and Control Act (IRCA), 8 U.S.C. § 1101, *et seq.*

An employee’s undocumented status has no relevance to the merits of an unfair labor practice case (if, for example, the employer discharges an undocumented employee because of his or her protected conduct). The NLRB will not consider the employee’s undocumented status, unless and until it is raised at the compliance stage, where the issue of what back pay the employer owes can be litigated. *Tuv Taam Corp.*, 340 NLRB 756 (2003).

## **Filing an Unfair Labor Practice Charge**

For individual employees with limited means, filing an unfair labor practice charge with the National Labor Relations Board offers significant advantages over other forms of litigation. After a charge is filed, it will be investigated by an NLRB field agent who will interview the charging party and, if the charge appears to have merit, will seek information from the charged employer. If the NLRB general counsel concludes that the charge is meritorious and the employer refuses to settle on the terms offered, the general counsel will issue a complaint and an NLRB field attorney will litigate the case against the charged employer. Thus, if a charge is meritorious, the NLRB will assume the burden of obtaining information and litigating the case.

An unfair labor practice case against an employer is initiated by filing an unfair labor practice charge. The charge is a one-page form that can be obtained from the NLRB's website, [www.nlr.gov/eservice/efileterm.aspx](http://www.nlr.gov/eservice/efileterm.aspx). The charge asks for certain information about the employer and requires the charging party to state what section of the NLRA the employer violated and to describe in general terms the employer conduct that constituted the violation.

The NLRB will not initiate a case on its own; a charge must be filed. The charge, however, does not have to be filed by the affected employee. Anyone can file an unfair labor practice charge with the NLRB.

The charge should be filed online with the e-filing system. An employee may also contact their regional office. In this area, the nearest regional office is Region 5 in Baltimore, MD. Its address is Bank of America Center, Tower II, 100 South Charles St., 6<sup>th</sup> Floor, Baltimore, MD 21201. The phone number is (410) 962-2822 and the fax number is (410) 962-2198. Region 5 also operates a resident (sub-regional) office at 1015 Half Street SE, Washington, D.C. 20570-0001. The telephone number is (202) 208-3000, and the fax number is (202) 208-3013. NLRB regional offices appoint field examiners to act as information officers and help those needing assistance in filing a charge. Employees who feel that they need such assistance may wish to speak, in person or by phone, to the NLRB employee acting as information officer. Both the regional office in Baltimore and the resident office in Washington, D.C. have employees proficient in Spanish and other languages.

Unfair labor practice charges must be filed with the NLRB within six months. 29 U.S.C. § 160(b). If more than six months has elapsed since the unfair labor practice took place, a charge is untimely and will be dismissed. The six-month period can be tolled if the charging party did not have actual knowledge of the conduct that constituted the violation, and in limited circumstances an unfair labor practice might be deemed a continuing violation. *Metromedia, Inc.*, 232 NLRB 486 (1977) (tolling).

After a charge is filed, it will be assigned for investigation to an NLRB field agent. The charging party should be prepared to present evidence in support of the charge, including witnesses (which may include or be limited to the charging party) with firsthand knowledge of the relevant facts. The NLRB field agent will interview the charging party, either in person or by telephone, and prepare an affidavit, based on the interview, for the charging party to sign. The interview and the preparation of the affidavit can take several hours in some cases. If the case appears to have merit, the field agent will then ask the employer to respond to the charge and offer witnesses to be interviewed.

After the evidence is collected, the regional office will evaluate the case. If the regional director concludes that the charge has no merit, the regional office will ask the charging party to withdraw the charge. If the charging party declines, the regional director will dismiss the charge. Dismissals can be either "short form" or "long form." A long form dismissal explains in detail why the charge is being dismissed. If the charging party wants

to appeal the dismissal, she should ask for a long form dismissal. A dismissal can be appealed to the NLRB General Counsel in Washington, D.C. at 1015 Half Street SE, Washington, D.C. 20570-0001. A charging party has 14 days to appeal a dismissal, but the general counsel has the authority to grant an extension of time for such appeals.

If the regional director concludes that the charge has merit, the regional office will attempt to settle the case. A settlement offer will be made to the charged employer, which the employer can accept or reject. The charging party will be invited to join in the settlement, but charges can be settled over the objection of a charging party.

If the case cannot be settled, the NLRB general counsel will issue a complaint against the charged employer. The general counsel has the authority to seek injunctive relief while the case is pending. 29 U.S.C. 160(j). Such relief, however, is rarely sought.

After the general counsel issues a complaint, a hearing will be scheduled before an NLRB administrative law judge (ALJ). Before the hearing takes place the NLRB may schedule a conference with a settlement judge who, as the title suggests, will try to settle the case. The charging party has the right to participate in any of those settlement discussions.

The charging party is a party to the unfair labor practice case and has the right to participate in all aspects of the case, including the hearing before the ALJ. If the charging party is not proficient in English, she should inform the ALJ that an interpreter is needed.

At the hearing before the ALJ, an attorney for the NLRB general counsel's office will prosecute the case against the charged employer. The charging party can participate in the hearing as a party and call, examine and cross-examine witnesses. One does not have to be a lawyer to participate in the hearing before the ALJ. After a witness testifies for the general counsel, the employer will ask to see any affidavits that the witness has signed. The employer will then use the affidavit in its cross-examination of that witness. A witness, including the charging party, should take care to ensure that his or her testimony is consistent with his or her affidavit.

In most cases, briefs are filed with the ALJ after the hearing. The charging party can file a brief, but is under no obligation to do so. Briefs are usually due in 35 days, but extensions of time are common. In cases that are not particularly complex, the ALJ can ask for closing arguments in lieu of briefs and issue a decision from the bench.

If she does not issue a decision from the bench, the ALJ will issue a written decision sometime after the hearing. The issuance of a decision can take several months. In discharge cases, the typical remedy is back pay, reinstatement and a cease and desist order.

Any party dissatisfied with the ALJ's decision, including the charging party, can appeal to the NLRB by filing "exceptions" to the decision. Unless exceptions are filed, the decision of the ALJ becomes final. If exceptions are filed, the NLRB will issue a decision

either adopting the ALJ's decision, modifying it or reversing it. In most cases, the NLRB issues a short-form decision adopting the decision of the ALJ.

The average time from the filing of a charge to the issuance of an NLRB decision is more than two years.

Final decisions of the NLRB can be appealed to the United States Courts of Appeals. 29 U.S.C. § 160(f). Cases may be appealed either to the D.C. Circuit, the court of appeals in the circuit where the unfair labor practice occurred, or the court of appeals in the circuit where the appellant resides or transacts business.

## **Collective Bargaining Agreements and the Grievance-Arbitration Procedure**

A collective bargaining agreement is a contract negotiated by a union and an employer establishing the terms and conditions of employment of workers represented by the union and covered by the agreement. An employee need not be a union member to be represented by a union or covered by a collective bargaining agreement. A collective bargaining agreement typically covers all employees in the bargaining unit represented by the union, regardless of whether they are union members.

A collective bargaining agreement establishes the wages and benefits to which covered employees are entitled. Benefits such as vacation, sick leave, health insurance and pension benefits, if they exist, are usually described in the collective bargaining agreement.

Most collective bargaining agreements include a provision stating that employees can be disciplined or discharged only for just cause. Most agreements also include a grievance and arbitration procedure to resolve disputes arising under the agreement, including disputes over discipline and discharge.

The grievance procedure is initiated by filing a grievance. Some collective bargaining agreements permit employees to file their own grievances and some permit only the union to file. Most collective bargaining agreements limit the time within which a grievance can be filed, although in several circumstances (where, for example, the parties have a practice of ignoring the time limits) those time limits may be deemed waived.

The grievance procedure usually consists of several steps, each consisting of a meeting between union and management representatives. If the grievance is not settled at one step it proceeds to the next. If the grievance is not settled at the last step it can be referred to arbitration. The decision to refer a grievance to arbitration is typically made by the union. Some agreements permit an employer to file a grievance and to refer it to arbitration. Individual employees, however, do not have the right to refer a grievance to arbitration over the objection of the union.

The union has the right to settle a grievance, even if the grievant—the individual employee who is the subject of the grievance—objects to the terms of the settlement.

Arbitration consists of a hearing before a neutral arbitrator chosen by the employer and the union. The parties at the arbitration hearing are the union and the employer. The grievant is represented by the union, but the grievant is not a separate party (as is, for example, the charging party in an unfair labor practice case). The grievant has no right to separate representation or to call her own witnesses. The party filing the grievance, generally the union, has the burden of proof and puts on its case first. In discipline and discharge cases, however, the employer has the burden of proof and puts on its case first.

Federal district courts have the authority to enforce or vacate arbitration decisions. In reviewing arbitration awards, courts apply a highly deferential standard. If the employer is bound by an agreement to arbitrate, the circumstances in which a court will vacate an arbitration award are extremely narrow. *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

A collective bargaining agreement is an enforceable contract. A suit alleging a violation of a collective bargaining agreement can be filed in either state or federal court. 29 U.S.C. § 185(a); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962). Regardless of where such suits are filed, they are governed by federal law. *Textile Workers v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957). Since federal courts have original jurisdiction over suits to enforce a collective bargaining agreement, such suits can be removed from state court to federal court.

Either a union or an individual employee can sue an employer for breach of an applicable collective bargaining agreement. *Smith v. Evening News Association*, 371 U.S. 195 (1962) (suit by individual employee). But, where the collective bargaining agreement includes a grievance procedure, an employee or union must attempt to exhaust that procedure before filing a suit for breach of contract. *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). An employee need not exhaust those procedures if exhaustion would be futile, *Glover v. St. Louis-San Francisco Railway Co.*, 393 U.S. 324 (1969); or if exhaustion is precluded either by the employer's repudiation of those procedures or by the union's wrongful refusal to use them, *Vaca v. Sipes*, 386 U.S. 171 (1967).

If the collective bargaining agreement contains a final and binding arbitration procedure, she can sue the employer for violating the collective bargaining agreement only if the employee can also show that the union breached its duty of fair representation in processing the grievance. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976).

Suits in which an employee alleges that the employer has breached the collective bargaining agreement and the union has breached the duty of fair representation are referred to as hybrid 301/DFR suits. In such suits, the fact that the arbitrator denied the

grievance does not preclude the employee from prevailing, if she can show both a breach of contract by the employer and the duty of fair representation by the union. The statute of limitations applicable to such suits is the six-month limitations period applied in unfair labor practices cases under the NLRA. *DelCostello v. Teamsters*, 462 U.S. 151 (1983). In suits in which a breach of the collective bargaining agreement, but not a breach of the duty of fair representation is alleged (where, for example, the agreement does not include a final and binding arbitration procedure), some courts have applied the six-month limitations period and others have applied the most analogous state statute of limitations.

## **The Duty of Fair Representation**

Under the National Labor Relations Act and the Railway Labor Act, a union that represents employees in a bargaining unit has the legal right to represent all of the employees in that unit. 29 U.S.C. § 159(a). Individual employees do not have the right to opt out of union representation or to choose a representative different from that chosen by a majority of the employees. In *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192 (1944), the Supreme Court held that, if federal labor law gives a union the right to represent all employees in a bargaining unit, it implicitly requires that union to represent all of those employees fairly. Unions thus owe a duty of fair representation to the employees that they represent. That duty is owed to all employees represented by the union, regardless of whether they are union members.

The duty of fair representation applies to anything that a union does as a representative of employees. It applies to the negotiation of collective bargaining agreements, *Air Line Pilots v. O'Neill*, 499 U.S. 65 (1991); to the processing of grievances and arbitration cases, *Vaca v. Sipes*, 386 U.S. 171 (1967); and to the operation of an exclusive hiring hall, *Breining v. Sheet Metal Workers Local 6*, 493 U.S. 67 (1989). It does not apply to internal union decisions, such as admission to union membership or the imposition of internal union discipline.

The duty of fair representation is violated only by union conduct that is arbitrary, discriminatory or taken in bad faith. *Vaca v. Sipes*, 386 U.S. 171 (1967). Mere negligence, poor judgment or ineptitude does not breach the duty of fair representation. *Steelworkers v. Rawson*, 495 U.S. 362 (1990).

The duty of fair representation does not require a union to process a grievance or to take a grievance to arbitration, as long as the decision not to proceed is not arbitrary, discriminatory or made in bad faith. *Vaca v. Sipes*, 386 U.S. 171 (1967). The failure to process a meritorious grievance is not necessarily a breach of the duty. *Stanley v. General Foods Corp.*, 508 F.2d 274 (5th Cir. 1975). Nevertheless, a union breaches the duty of fair representation by arbitrarily ignoring a meritorious grievance or by processing it in a perfunctory manner. Furthermore, a union's refusal to process an employee's grievance

because the grievant had supported a rival union candidate likely would be deemed a breach of the duty.

A claim for breach of the duty of fair representation may be litigated in either of two ways: Because a breach of the duty of fair representation is also an unfair labor practice, *Miranda Fuel Co.*, 140 NLRB 181 (1962), *enforcement denied*, 326 F.2d 172 (2nd Cir. 1963), an unfair labor practice charge can be filed with the NLRB alleging a breach of that duty. An employee who claims that the union has breached the duty of fair representation also can file a lawsuit, typically in federal district court. *Vaca v. Sipes*, 386 U.S. 171 (1967). In either case, a six-month limitations period will apply. 29 U.S.C. § 160(b); *DelCostello v. Teamsters*, 462 U.S. 151 (1983).

## **Replacement of One Employer by Another**

When one employer (the predecessor) is replaced by another (the successor), who performs essentially the same work as the predecessor in the same location, employees of the predecessor employer may ask whether the successor employer has any obligation to hire them and, if they are hired, whether the successor can change their terms of employment.

As a general matter, a successor employer has no obligation to hire the employees of the predecessor.

In the District of Columbia, however, there is a significant exception to that rule. The 1994 Displaced Workers Protection Act, D.C. Code §§ 32-101(a), protects three groups of employees: (1) employees hired by a contractor as food service workers; (2) employees hired by a contractor to perform janitorial or building maintenance services; and (3) nonprofessional employees hired by a contractor to perform healthcare or related services. Those employees are protected only if the predecessor employer employed at least 25 employees. D.C. Code § 32-101. The Displaced Workers Protection Act requires successor employers to retain for a 90-day transition period all covered employees who were employed by the predecessor at the site of the contract for at least 8 months. If at any time the new employer decides that fewer employees are needed than were employed by the predecessor, the new employer must retain employees by seniority within their job classifications. At the end of 90 days, the successor must prepare a written evaluation of each retained employee and offer continued employment to any employee whose job performance was deemed satisfactory. And, if a contractor's agreement is not renewed, but the contractor is awarded a new job in the District of Columbia within 30 days, the employer must retain at least 50 percent of the employees from each establishment (the old and the new) as needed to perform the job. D.C. Code § 32-102. An employee who has been wrongfully discharged in violation of the Displaced Workers Protection Act can bring an action in Superior Court and collect back pay for each day the violation continues, the cost of benefits that the new contractor would have incurred, and reasonable attorney's



fees. D.C. Code § 32-103. As of 2012, a similar law is in place in Montgomery County, Maryland.

Although a successor employer may have no obligation to hire the predecessor employer's employees, it would be an unfair labor practice to refuse to hire the predecessor's employees because of their protected activity, because they are union members or union-represented, or to avoid the obligation to bargain with their union. *Howard Johnson Co. v. Hotel and Restaurant Employees*, 417 U.S. 249 (1974).

Employees who are union-represented and covered by a collective bargaining agreement may have certain additional rights. Many collective bargaining agreements include "successor" clauses obligating the predecessor employer to obtain from any successor a commitment to hire the predecessor's employees or adopt the predecessor's collective bargaining agreement. Since the successor is not necessarily bound by that commitment, *NLRB v. Burns Security Services, Inc.*, 406 U.S. 272 (1972), an employee, or the union that represents the employees, would have to look to the predecessor for enforcement of those contractual rights or damages resulting from a breach.

There are, however, two circumstances in which a successor employer would be bound by the predecessor's collective bargaining agreement: (1) where the successor had, by explicit agreement or by its conduct, assumed the predecessor's agreement; or (2) where the successor employer is an alter ego of the predecessor. Alter ego status requires, at a minimum, common ownership and control *e.g.*, *Crawford Door Sales Co.*, 226 NLRB 1144 (1976).

As long as its hiring decisions are not based on unlawful considerations (e.g., union membership), a successor employer is generally free to hire whomever it chooses. And, unless it has acquired an obligation (discussed below) to bargain with the union that represented the predecessor's employees, the successor employer can establish the initial terms and conditions of employment for those employees who are hired.

A successor employer that hires a majority of its employees from among the predecessor's employees thereby acquires an obligation to bargain with the representative of the predecessor's employees, as long as the new employer continued to use the same facilities and perform the same work as did the predecessor. *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972). Once the duty to bargain attaches, the employer is prohibited from unilaterally changing terms or conditions of employment without first bargaining to impasse with the employees' bargaining representative. If an employer makes it perfectly clear that it plans to retain all or most of the predecessor's employees and those employees will constitute a majority of the successor's employees, the successor would acquire a duty to bargain even before the employees were hired and would therefore be required to provide them with the pay and benefits that they had received from the predecessor. *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972).

## **Dealing with Labor Unions**

Since union-represented employees who contend that their employer has violated the collective bargaining agreement (*e.g.* by discharging them without just cause) generally must use and exhaust the grievance arbitration procedure to resolve those disputes, the relationship between employees and the union that represents them is an important one.

Section 104 of the 1959 Labor Management Reporting and Disclosure Act obligates a union to provide a copy of the collective bargaining agreement to any employee whose rights are affected by that agreement. 29 U.S.C. § 414. Any employee who does not have a copy of the collective bargaining agreement under which she is working should ask for a copy.

Unions are governed by constitutions that constitute enforceable contracts between the union and its members. *Wooddell v. IBEW Local 71*, 502 U.S. 93 (1991). Union constitutions sometimes contain appeal procedures that permit union members to appeal decisions of an affiliated local union. The local union's decisions not to process a grievance may or may not be appealable, depending on the language of the constitution and the union's practice.

Most unions are hierarchical organizations. A union member who does not receive a satisfactory answer at one level may want to consider communicating with a higher union authority. A member dissatisfied with the conduct of a job steward, for example, could contact, in ascending order, the chief steward, the local union president or business manager, the international representative who services the local union, the international vice president with jurisdiction over that local, and finally the international president of the international union with which the local is affiliate.

# **INTERNATIONAL** **EMPLOYEES**

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## **Introduction**

Generally speaking, most embassies, international organizations, and many of their officials are not subject to employment-related administrative processes and cannot be sued in U.S. courts. However, their immunity from the jurisdiction of local courts can be waived; therefore, in some cases, it is possible that these entities are fully subject to local laws and local courts. With respect to individuals, visa status is not determinative of privileges and immunities, of rank, or of amenability to local jurisdiction; it merely determines the basis for entry into the United States.

**Note:** If the employer has “privileges and immunities,” he or she is immune from U.S. jurisdiction for claims arising out of ordinary living expenses, including household employees.

## **Definitions**

**Civil Servant:** An official who has the discretion to act on behalf of the employing entity. Determined by a fact-based analysis.

**Embassy:** The organization engaging in diplomatic representation of a foreign government to the Government of the United States. Includes consulates located in the Washington, D.C., area and usually special offices (trade offices, military liaisons, officially-sponsored tourist offices, etc.).

**FSIA:** (Foreign Sovereigns Immunities Act, 22 USC § 1601 et seq.) Law that incorporates the restrictive theory of sovereign immunity, essentially enabling U.S. citizens to sue foreign sovereigns for their commercial activities. Note specific service of process provisions at 28 U.S.C. § 1608.

**Household/Domestic Employees:** Individuals hired and paid by employees of embassies or international organizations (or their spouses) to work in the sponsoring individual's home. These can include nannies, tutors, nursing attendants, cooks, cleaners and other household staff.

**IO:** (International Organization) Public international organization. An entity whose membership is made up exclusively of national governments (private entities and individuals cannot be members) and whose activities are governed by international instruments, such as treaties, which give them privileges and immunities in specific contexts.

**Respected:** In the case of Embassy officials with privileges and immunities, the Vienna Convention on Diplomatic Relations provides in Article 41(1): “Without prejudice to their

## International Employees

privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State.” Generally individuals/entities who are immune from the jurisdiction of U.S. administrative and judicial authorities nonetheless have a duty and are expected to conform their conduct to the ordinary rules of the country in which they are stationed. A waiver of immunity can be granted by the appropriate authority of the sending state. However, the only real enforcement mechanism is for the host state to expel the individual as a “persona non grata.” This is a drastic remedy and can trigger, no matter what the merits of the individual’s conduct might be, retaliatory expulsions of U.S. personnel.

The following charts may be helpful in determining an international client’s possible avenues of recourse for employment-related issues:

### **Chart 1: Client is Employed by International Entity**

<b><u>The Client is employed by</u></b>	<b>Client’s Citizenship</b>	<b>Client’s Job Function</b>	<b>U.S. Laws Apply</b>	<b>US Ad-min Juris.</b>	<b>US Judicial Juris.</b>	<b>Other Avenues of Redress</b>
<b>Embassy</b>	Sending state	Not relevant	No	No	No	Embassy internal process or in sending state
	U.S. citizen	Civil servant (i.e., has discretion to act on behalf of sending state)	Respected	No	No	As above, however redress less likely in sending state
		Not civil servant	Contract law	No	Only under FSIA	As above
	Third country	Civil servant	Respected	No	No	Embassy internal process; potentially, in sending state or home state

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		Not civil servant	Contract law (but choice of law issue, i.e., where formed)	No	Only under FSIA	Embassy internal process or where law of contract permits
<b>International Organization</b>	Not relevant	Not relevant	No, unless waived	No	FSIA if waived	Internal International Organization Process

## **Chart 2: Client is a Household/Domestic Employee**

**Note:** For serious abuse or human trafficking, the worker can call the 24-hour National Human Trafficking Resource Center Hotline at **1-888-373-7888**. In case of an abusive situation, the domestic worker may qualify for a special visa to stay in the United States. Please see [Immigration and Employment](#) Chapter.

<b>The Client is Employed By</b>	<b>Written Contract</b>	<b>U.S. Laws Apply</b>	<b>U.S. Admin and Court Jurisdiction</b>	<b>Other U.S. Redress<sup>113</sup></b>
Embassy Official or Spouse	Yes (Contract required as part of visa process for worker to enter United States)	Respected; contract will usually incorporate U.S. laws	No	Contact embassy admin w/ documented written complaint
International Organization Official or Spouse	Yes	Contract will usually incorporate U.S. laws; some laws may apply if the employer is not a civil servant	If employer is civil servant, then no; if the employer is not civil servant, this depends upon the particular language of the immunity instruments	Check International Organization to see whether Employee Rules of Conduct encompass conduct at issue and/or process for redress. If not, contact the organization's personnel office to submit documented written complaint.
International Organization Official or Spouse	No <sup>114</sup>	If employer is civil servant, then no; if employer is not civil servant, depends upon the particular	If employer is civil servant, then no; if employer is not civil servant, depends upon the particular	See above.

<sup>113</sup> As a practical matter, exercising these options might endanger client's position and ability to stay in the United States.

<sup>114</sup> Contract should have been required, which could cause problems for employer in obtaining future U.S. visas.

		language of immunity instruments.	language of immunity instruments.	
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## **Employees of Embassies**

**If the client was hired in the sending state and sent to the United States with diplomatic status.** the client's employing embassy is immune from U.S. jurisdiction and U.S. laws do not apply to embassy personnel decisions. *See generally*, Vienna Convention on Diplomatic Relations, Articles 22-40 ("Vienna Convention"). Depending on the law of the sending state, the worker may have a remedy there.

**If the client was hired in the United States or a third country,** it is necessary to examine his or her duties to see if she is a "civil servant." Generally, the worker will be a civil servant if she has the discretion to act on behalf of the sending state. If the worker is a civil servant, the employment transaction is immune from U.S. laws. *See, e.g., El-Hadad v. United Arab Emirates*, 216 F.3d 29, 34 (D.C. Cir. 2000) ("Whether the employee shall be considered a civil servant of the foreign state—and thus noncommercial—requires consideration of several factors to make this determination, e.g., the foreign government's own laws defining civil servant and the employee's job title and duties in relation to that definition.").

**If the client is a civil servant,** although the employment relationship is immune from U.S. laws, there may be an internal embassy or Ministry of Foreign Affairs grievance process or internal dispute resolution mechanism available to the worker to resolve the dispute. If there is no known internal mechanism, the worker may draft a letter of complaint setting out the problem; what violations of the embassy's employment contract or procedures are alleged; and what remedy is sought. If the matter has already been discussed with the immediate supervisor, then the letter should be addressed to the next supervisory level or, if none, to the embassy's Secretary/Counselor/Minister for Administrative Affairs (which includes the embassy's personnel office).

**If the client is not a civil servant,** then his or her employment will be a commercial transaction and the sending state is not immune from the application of U.S. laws. However, enforcement of the law is difficult for several reasons. First, participation in the process of administrative agencies—EEOC or state/D.C. agencies—is completely voluntary, and embassies often will ignore or be irritated by attempts to involve them. *See, e.g., Ellenbogen v. Embassy*, Dist. Court, Dist. of Columbia CA No. 05-01553 (JDB) (2005). Secondly, while embassies can be sued for commercial activities, service of process requires compliance with the elaborate provisions of the Foreign Sovereign Immunities Act. *See* 28 U.S.C. § 1608.



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As a first step, a worker may write a letter of complaint; however, the letter should not include references to specific legal action or cite specific laws. Rather, broader language to the effect that the employee will “seek appropriate remedies under applicable law” should be used instead.

### **Employees of International Organizations**

A public international organization (“IO”) is one whose membership is made up exclusively of national governments (private entities and individuals cannot be members) and whose activities are governed by international instruments, such as treaties, which give them privileges and immunities in specific contexts, e.g. World Bank, the International Monetary Fund, the Pan-American Health Organization. Entities that operate internationally but have natural persons as members, such as the International Association of Chiefs of Police (IACP), are not IOs for this purpose. Some, such as the International Federation of Red Cross-Red Crescent Societies or various Olympic organizations, are not IOs but may have some privileges and immunities in particular countries or at particular times (e.g., during the Olympic Games).

Employees of international organizations that have privileges and immunities are without a U.S. remedy. U.S. courts will not generally intrude upon the internal workings of an international organization. *Broadbent v. Organization of Am. States*, 628 F. 2d 27 (D.C. Cir, 1980). However, IOs usually have “legal personality” and the ability to enter into ordinary contracts. Courts will probably not find employment contracts to have waivers of immunity without explicit language. *See, e.g., Mendaro v. World Bank*, 717 F. 2d 610 (D.C. Cir. 1983). Even U.S. citizen employees of IOs will not be able to take advantage of U.S. legal remedies. *See, e.g., Brzak v. United Nations*, 597 F. 3d 107 (2010) (*cert denied*) (alleging sexual harassment).

Again, the worker may draft a letter of complaint setting out the problem, what violations of the IOs employment contract or procedures are alleged, and what remedy is sought. If the matter has already been discussed with the immediate supervisor, then the letter should be addressed to the next supervisory level or, if none, to the part of the IO that most nearly resembles a personnel office. The letter should do no more than request assistance in resolving the problem in order to avoid a premature election of remedies.

### **Domestic Employees**

Workers employed as maids, nannies, housekeepers, personal drivers, personal nurses, caregivers or any other form of employment where the employer is not an embassy or an IO, but *the employee* of an embassy or IO, are distinct from officials who work directly

## International Employees

for an embassy or IO. While U.S. laws do apply to these workers, some or all of their employment relationships may not be covered.

Since at least 2008, domestic employees must have a contract in order to obtain a visa to enter the U.S. A-3 visas are provided for domestic employees of embassy households, while employees of IO households obtain G-5 visas. The contract:

- must be in English and also in a language understood by the employee to ensure the employee understands his or her duties and rights regarding salary and working conditions; and
- must guarantee the employee will be compensated at the state or federal minimum or prevailing wage, whichever is greater. Any money deducted for food or lodging is limited to that which is considered “reasonable.”

The willful failure by an employer to comply with this requirement could result in the employer's ineligibility to receive a visa under Section 212(a)(6)(B) of the Immigration and Nationality Act. See <http://travel.state.gov/>.

Under some circumstances, special visas may be available to aid the protection of domestic workers who are escaping abusive situations. Other than the potential visa relief, the rights and remedies available to the domestic employee depend upon the status of the employer.

## **Domestic Workers Employed in the Households of Embassy Officials**

When an embassy official holds a diplomatic rank—*e.g.*, under the Vienna Convention, either “a diplomatic agent” or a “member of the administrative and technical staff”—the official is immune from the jurisdiction of local laws and local courts with regard to his household employees. *See Sabbithi v. Al Saleh* 623 F. Supp. 2d 93 (D.C. Dist. Ct. 2009). If the rank is unclear, it may be necessary to check with the State Department Office of Protocol; in general, if the embassy official has a diplomatic title, such as Deputy Chief of Mission, Minister, Counselor, Secretary, or Attaché, that individual almost certainly has diplomatic status of some kind (although, the lack of a title is not dispositive). In the rare instance of an embassy official who is a U.S. citizen or who has no diplomatic rank, he or she would be fully subject to U.S. laws and procedures.

If the conditions under which the worker is living or working rise to the level of serious abuse or human trafficking, the worker can call the National Hotline Human Trafficking Resource Center Hotline at **1-888-373-7888**. This line is available 24 hours a day and serves as the central contact for locally available resources.

## International Employees

If the worker's situation does not rise to that level of seriousness and there is an employment contract, the contract should be reviewed. As a first step, a demand letter should be prepared describing the ways in which the employer is not meeting the contractual obligations and the remedy desired. The letter may be directed to the employing embassy official unless the worker feels that such communication will not lead to a resolution. In that case, the letter should be directed to the embassy official's supervisor, with a copy to the embassy official, and it should include a time limit for the response.

If there is no employment contract, then the demand letter should note that the employer has an obligation to offer a fair wage and reasonable working conditions, state the deficiencies, and include a time limit for the response.

If there is no response or an inadequate response, a follow-up letter may be prepared that suggests possible involvement by the U.S. Department of State in resolving the matter. This assertion should be made carefully, because resorting to the State Department to resolve the workplace problem is a serious step with potentially far-reaching consequences for the organization by whom the employer is employed and the domestic worker as well. A follow-up demand letter should state the history of the problem and request the assistance of the Deputy Chief of Mission, "to avoid having to involve appropriate authorities," which in turn might jeopardize the embassy's ability to assure that all its employees remain eligible for the appropriate State Department visa process for personal and domestic employees.

## **Domestic Workers Employed in the Households of Officials of International Organizations**

This is a complex area because the status of an official employed by an IO depends on what laws, treaties and executive orders govern the particular international organization and what privileges and immunities attach to the official's particular job in that organization.

In order to determine whether a U.S. remedy exists, it is necessary to determine what privileges and immunities the client's employer has. For example, an IO might have a bilateral treaty or agreement with the United States that gives specific and sometimes limited privileges and immunities to the IO and *some* of its employees (e.g., Headquarters Agreement with Organization of American States). Most IOs will be covered by designation under the International Organization Immunities Act, which generally states that covered IOs have the same status as foreign governments and incorporates most of the privileges and immunities accorded to diplomatic missions and diplomatic agents under U.S. law, the Vienna Convention, and customary international law. *See* 22 U.S.C. § 288 *et seq.* In the absence of immunity, U.S. law and jurisdiction will apply. If there is immunity, the only realistic recourse may be to attempt to pursue the claim or grievance through the IO's internal processes. Many IOs, including the large ones in Washington, have employee

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manuals and internal processes by which the IO employee may be disciplined. This can provide leverage for the domestic worker seeking redress if the employer's conduct (not having a written contract, failing to abide by that contract) violates a standard of conduct.

If the conditions under which the worker is living or working rise to the level of serious abuse or human trafficking, call the National Hotline Human Trafficking Resource Center Hotline at **1-888-373-7888**. This line is available 24 hours a day and serves as the central contact for locally available resources.

However, if the worker's safety is not threatened, an inquiry should be made as to the precise status of the employer and an appropriate strategy may be devised accordingly. If the worker's situation does not rise to that level of seriousness and there is an employment contract, the contract should be reviewed. As a first step, a demand letter should be prepared describing the ways in which the employer is not meeting the contractual obligations and the remedy desired. The letter may be directed to the employing IO official unless the worker feels that such communication will not lead to a resolution. In that case, the letter may be directed to the IO employee's supervisor, if known, or to the Administrative or personnel office of the IO.

If there is no employment contract, then the demand letter should note that the employer has an obligation to offer a fair wage and reasonable working conditions, state the deficiencies, and include a time limit for the response.

If there is no response or an inadequate response, a follow-up letter may be prepared that suggests a possible involvement by the U.S. Department of State in resolving the matter. This assertion should be made carefully, because resorting to the State Department to resolve the workplace problem is a serious step with potentially far-reaching consequences for the organization by whom the employer is employed and the domestic worker as well. The follow-up demand letter should state the history of the problem and request the assistance of the Deputy Chief of Mission "to avoid having to involve appropriate authorities," which in turn might jeopardize the embassy's ability to assure that all its employees remain eligible for the appropriate State Department visa process for personal and domestic employees.

# **FEDERAL** **GOVERNMENT** **WORKERS**

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## **Introduction**

This chapter provides a very basic overview of the workplace rights of federal government employees and the administrative processes available to them to seek recourse for violations of these rights. In drafting this chapter we relied heavily on *The Federal Employees' Legal Survival Guide: How to Protect and Enforce Your Job Rights*, by Passman & Kaplan, PC (2<sup>nd</sup> Ed. 2004).

## **Wage & Hour Issues for Federal Employees**

Federal employees **in a union bargaining unit** covered by the provisions of a collective bargaining agreement (CBA) pursue wage and overtime claims as union

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grievances, unless the CBA specifically excludes the Fair Labor Standards Act (FLSA) or overtime claims. *See* 5 C.F.R. § 551.703.

For those employees not in a bargaining unit or whose CBA excludes such claims, workers can file claims with their agencies or with the Office of Personnel Management (OPM), or file a lawsuit in U.S. District Court or the Court of Federal Claims. *See* 5 C.F.R. §§ 551.703(c); 551.705. Employees may not simultaneously file claims with both their agencies and OPM.

If the worker decides to file a complaint with his or her agency and receives an unfavorable decision from the agency, she may then go to the Office of Personnel Management (OPM). If she chooses to first file a complaint with OPM and receives an unfavorable decision, however, she may not then seek a favorable determination from the agency. *See* 5 C.F.R. § 551.705. OPM encourages workers to use their agencies' grievance procedures, if available, but does not require it. OPM claims must be sent, in writing, to the following address:

Classification and Pay Programs Manager  
Center for Merit System Accountability  
Office of Personnel Management  
1900 E St. NW, Room 6484  
Washington, D.C. 20415

For information regarding the contents of the claim, please visit the OPM website, [www.opm.gov](http://www.opm.gov). Alternatively, workers may contact OPM at 202-606-7948. Claims may not be filed electronically. If the worker's total claim, including liquidated damages, is for more than \$10,000, the case may **only** be filed in the Court of Federal Claims.

If a federal employee alleges a violation of the equal pay requirement (not minimum wage, overtime, or child labor laws), the employee should file a complaint with the Equal Employment Opportunity Commission. *See* 5 C.F.R. § 551.701(b).<sup>115</sup>

## **Unemployment Compensation for Federal Employees**

Under a 1966 Act of Congress, federal employees whose services have been terminated by the federal government are eligible for payments under state unemployment compensation laws in the state where they last worked for the federal government – the federal employee's last station. To remedy the unfair burden imposed on state funds as a result of the federal government's exemption from state taxation, Congress included in the Act a provision assigning credit for a claimant's federal service and wages to the state of claimant's last official federal work station, and reimbursing that state for the cost of

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<sup>115</sup> *See* Passman & Kaplan, P.C., *Federal Employees' Legal Survival Guide: How to Protect and Enforce Your Rights*, 211-212 (1998).

satisfying the claim. *See* 5 U.S.C. § 8504 *et. seq.*

## **Family and Medical Leave Laws for Federal Employees**

Federal employees are covered by provisions nearly identical to the federal FMLA (they also receive 12 weeks of unpaid leave in a 12-month period, for example). *See* 5 U.S.C. §§ 6381-6387; 5 C.F.R. §§ 630.1201 – 630.1211. There are, however, some minor differences. For instance:

- Federal employees may not be required to substitute their paid leave for any part of their FMLA leave. *See* 5 C.F.R. § 630.1205(d).
- The avenues of redress are more limited. Workers can file administrative grievances with their agencies or grievances under a collective bargaining agreement. Workers may also raise an FMLA violation as a defense to a disciplinary or adverse action (e.g., separation). Employees, however, probably cannot bring lawsuits against the federal government for FMLA violations, as courts have not found that Congress ever explicitly waived the federal government’s immunity from suit with regard to the FMLA. *See Mann v. Haigh*, 120 F.3d 34, 36 (4th Cir. 1997) (noting that while Title I of the FMLA, which covers the private sector and employees of state and local governments, creates a private right of action, Title II, which governs federal employees, “omits a similar provision creating a private right of action”); *Keen v. Brown*, 958 F. Supp. 70 (D. Conn. 1998).

**Note:** Federal employees are not covered by the D.C. FMLA.

## **Federal Employees Paid Parental Leave Act of 2019**

Under the Federal Employees Paid Parental Leave Act (FEPLA)<sup>116</sup>, federal employees who have completed at least 12 months of federal services are eligible to take up to 12 weeks of paid parental leave in connection with the birth or placement (adoption or foster care) of a child. 5 U.S.C. § 6382.

Paid parental leave may only be used during the 12-month period immediately following the birth or placement of a federal employee’s child. Federal employees must agree in writing to subsequently work for the applicable employing agency for at least 12 weeks, beginning on the first scheduled workday after paid parental leave concludes.

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<sup>116</sup> This law came into effect on October 1, 2020.



Leave granted under FEPLA is provided as a replacement for unpaid leave provided under FMLA. Federal agencies cannot require employees to exhaust other forms of leave prior to using FEPLA leave.

## **Discrimination Protections for Federal Government Employees**

The process for filing discrimination complaints against the federal government is governed by the Equal Employment Opportunity Commission's (EEOC) regulations found at 29 C.F.R. § 1614. Discrimination based upon race, sex, national origin, religion, handicap, or age is prohibited in employment with the federal government.

### **EEO Claim Procedure: Federal Employees**

The process for an employee of, or applicant for employment with, the federal government to file a complaint of discrimination against her agency is substantially different from an employee or applicant alleging discrimination against a private-sector employer.

#### **EEO Counseling – 1<sup>st</sup> stage**

The first step of the federal-sector complaint process is EEO counseling. An employee of, or applicant for employment with, the federal government who believes she has been discriminated against must contact an EEO counselor in the agency's EEO office within **45** calendar days of the date of the alleged discriminatory event. 29 C.F.R. § 1614.105(a)(1). This time frame can be extended in limited circumstances. *Id.* at § 1614.105(a)(2). Examples of situations where the time frame can be extended are: (1) if a continuing violation occurs, (2) if the worker has severe health problems that make her completely incapacitated and unable to file a complaint, or (3) if the worker is misled by the agency official of the filing deadline. Union grievance proceedings do **not** toll the statute of limitations.

The EEO counselor must advise the complainant that she has the choice between traditional EEO counseling or participation in alternative dispute resolution (ADR). *Id.* at § 1614.105(b)(2). Traditional EEO counseling involves the EEO counselor meeting with the complainant and the agency officials involved to gather basic facts regarding the claim and to determine whether the case can be settled. EEO counseling is only supposed to last 30 calendar days from the date of the complainant's first contact with the agency's EEO office. *Id.* at § 1614.105(d). If the complainant chooses ADR, then the pre-complaint processing will terminate after 90 calendar days. *Id.* at § 1614.105(f).

**Note:** The complaint must include *all* the relief the worker is seeking and must include *all* the claims. If these are not included, the worker may be barred from including

them in court or at a later stage of the administrative process.

### **Filing the formal complaint – 2<sup>nd</sup> stage**

After the EEO counseling stage is completed, the EEO counselor will send a letter to the complainant notifying the complainant of the right to file a formal discrimination complaint. *Id.* at § 1614.105(d). This letter is typically referred to as the “notice of final interview.” Significantly, the complainant has only **15 calendar days** from the date she receives the notice of final interview to file the formal complaint. *Id.* at § 1614.106(b). If the formal complaint is not filed within those 15 calendar days, then the complainant will be barred from raising that complaint in the future. The formal complaint must contain the following information: identity of the complainant and the agency; general description of the action(s) that form the basis of the complaint; address and telephone number of the complainant or the complainant’s representative; and signature of the complainant or the complainant’s attorney. *Id.* at § 1614.106(c). The complaint also should include a request for compensatory damages and all other relief being sought.

The complaint can be amended to include issues or claims “like or related to” those raised in the original complaint at any time prior to the conclusion of the investigation of the original complaint. *Id.* at § 1614.106(d). In general, a complaint may be amended to include additional bases of discrimination at any time prior to an EEOC hearing.

### **The investigation – 3<sup>rd</sup> stage**

In what seems like an odd conflict-of-interest, the agency that is accused of discrimination is responsible for investigating the complaint. A formal discrimination complaint must be investigated within 180 calendar days of the date the complaint was filed. *Id.* at § 1614.108(e). If the original complaint was amended, the investigation must be completed within either 180 calendar days after the date of the last amendment or 360 calendar days from the date of the filing of the original complaint, **whichever is earlier**. *Id.* at § 1614.108(f). The agency EEO office can request a 90-day extension to continue and complete its investigation.

### **Agency decision/EEOC hearing/Filing suit in court – 4<sup>th</sup> stage**

At the completion of the investigation, the agency must notify the complainant of her rights for continued processing of the complaint. *Id.* at § 1614.108(f). In short, after the investigation is complete, the complainant may: (1) request that the agency issue a decision regarding the merits of the complaint; (2) request a hearing by an EEOC administrative judge; or (3) file suit in U.S. District Court. *Id.* at § 1614.108(f). Importantly, at any time after 180 calendar days has expired from filing a formal discrimination complaint, the complainant may file suit in an appropriate U.S. District Court or request that an administrative judge of the EEOC conduct a hearing. *Id.* at § 1614.108(g). Once that initial 180 calendar days has expired, **the complainant does not have to wait for the agency to complete its investigation to request an EEOC hearing or file suit in court**, nor does

the complainant need a “right to sue” letter. If the investigation has been completed prior to the 180 calendar days, the agency will provide the complainant with notice of his/her rights. If the complainant wishes to request an EEOC hearing, the complainant must send the hearing request to the appropriate office of the EEOC and a copy of the hearing request must be sent to the agency’s (i.e., employing/discriminating agency’s) EEO office.

The maximum amount of compensatory damages allowed, other than back pay and possibly front pay, is \$300,000. *See Fogg v. Ashcroft*, 349 U.S. App. D.C. 26; 254 F.3d 103 (D.C. Cir. 2001) (holding Civil Rights Act limits on damage awards apply to each lawsuit, not each claim within each suit).

## **Disability Discrimination Claims for Federal Employees**

The Rehabilitation Act essentially mirrors the language of the ADA;<sup>117</sup> however, it protects employees of the federal government and federal government contractors. Federal employees must file their claims under Section 501 of the Rehabilitation Act, which provides that:

Each department, agency, and instrumentality ... in the executive branch and the Smithsonian Institution shall ... submit ... an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities in such department, agency, instrumentality, or Institution.

*See* 29 U.S.C. § 791(b).<sup>118</sup> Federal employees must file their claims with an EEO counselor within 45 days and follow the same process as for other types of discrimination claims, discussed in the previous section.

## **Workers’ Compensation for Federal Employees**

### **Federal Workers’ Compensation Procedures**

Injured workers should file Form CA-1, Notice and Claim, within 30 days of the injury in order to receive continuation of pay. To make a claim for occupational illness or disease, workers should file Form CA-2, Notice and Claim.

Notice of injury should generally be given within 30 days, and the claim must be

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<sup>117</sup> Federal employees cannot sue their employer under the ADA – their only recourse in cases of disability discrimination is the Rehabilitation Act.

<sup>118</sup> Employees who are covered by the Aviation and Transportation Security Act (ATSA) cannot sue their employer under the Rehabilitation Act because the ATSA pre-empts the Rehabilitation Act. *See Joren v. Napolitano*, 633 F.3d 1144 (7th Cir. 2011) (holding that an airport security screener could not sue the TSA under the Rehabilitation Act).

filed within three years from the time the worker realized the injury, disease, or illness was caused or aggravated by employment. *See* 5 U.S.C. §§ 8119-8121. The burden is on the claimant to prove that the injury is work-related. If the claim is denied by the district office, workers can ask for a short oral hearing or written review conducted by a hearing officer. The hearing office will issue a recommendation. *Id.* at §§ 8124-8128. The worker can request reconsideration by the OWCP within one year of the initial decision, and submit additional evidence. Adverse decisions can be appealed within 90 days to the Employee Compensation Appeals Board, U.S. Department of Labor. For good cause, this time limit can be extended to one year. Review is limited to evidence on the record. The decision of the ECAB is not subject to judicial review. *See* 5 U.S.C. § 8128.

## **Attorneys for Federal Workers' Compensation Claims**

Very few attorneys handle federal workers' compensation cases. Attorneys' fees are available by statute; however, before awarded, the fees must be approved by OWCP. *See* 5 U.S.C. § 8127. Attorneys have to wait a long period before collecting fees, and this limits the number of attorneys who engage in this work.

## **Coverage Issues Specific to the Federal Government System**

### **Emotional distress**

To make a claim for emotional distress, the disability must result from a worker's "emotional reaction to his regular or specially-assigned work duties or to a requirement imposed by the employment." *Lillian Cutler*, 28 EACB 125.

### **Restoration Rights**

If the worker recovers from disability within one year, he/she should be returned to his/her former or an equivalent position. If the disability lasts for more than one year, workers receive priority placement for two years, including "all reasonable efforts" from the agency. *See* 5 U.S.C. § 8151; 5 C.F.R. § 353

## **Miscellaneous Issues Specific to the Federal Government System**

### **Problems with Health Insurance Companies**

Health insurance companies are supposed to pay for work-related injuries and be reimbursed later if the claim is approved. If they fail to do so, the worker can file a complaint with the U.S. Office of Personnel Management, the federal agency charged with

managing federal employee health insurance programs.

### **Disability Retirement vs. Workers' Compensation**

In most cases, the coverage under workers' compensation will be better than disability retirement. Under workers' compensation the benefits are more generous, benefits are not taxable, and employees are entitled to reemployment rights.

## **Exceptions to Employment At Will for Federal Employees**

Most federal employees are not at-will employees. *See* 5 U.S.C. § 1201-1222. As public employees, federal workers have constitutional rights that may prevent their termination, including procedural due process rights to notice and a hearing before the deprivation of the employee's property interest in employment, and the protection of free speech rights.

### **Removal for Misconduct or Poor Performance**

Federal employees may be removed for misconduct<sup>119</sup> or poor performance.<sup>120</sup> The major difference between a removal for poor performance and a removal for misconduct is the necessity of creating a performance improvement plan for the effected worker. An employee whose performance is unacceptable may be removed, demoted, or reassigned.

### **Performance Improvement Plans**

A performance improvement plan (PIP) is designed to spell out in writing what a worker must do in order to effectively perform his or her job, and it must be approved by the Office of Personnel Management. *See* 5 U.S.C. § 4303; 5 C.F.R. § 432.104. The discharge must then be related to the criteria outlined in the plan, and at least one of the plan components must be "crucial" to the worker's position.

Prior to issuing a PIP, the agency/employer must determine that the employee's performance is unacceptable. Once the PIP is issued, the employee has at least 30 calendar days to improve his or her performance to an acceptable level, but employees are generally given 90 days. If the employee does not demonstrate acceptable performance during the PIP, the agency will either demote or remove the employee.

Prior to demoting or removing the employee, the agency must follow the same

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<sup>119</sup> These are sometimes referred to as Chapter 75 removals.

<sup>120</sup> These are sometimes referred to as Chapter 43 removals or performance-based removals. They are less common than those under Chapter 75.

procedures as it would to remove an employee for misconduct.

### **Notice of Proposed Removal**

Prior to terminating a federal employee for misconduct or poor performance, (or taking an adverse action against a federal employee), the agency/employer must first send the employee a “notice of proposed removal/demotion/suspension” containing specific reasons for the action, and provide the worker a chance to review the material relied on by the agency for the removal. The worker will have at least seven (7) days after the receipt of the notice to respond in writing and/or orally.

An adverse action is defined as a termination, demotion, or suspension of more than 15 days.

After the employee presents her reply to the notice of proposed adverse action, the agency must issue a written decision explaining whether or not it is going to terminate, suspend, or demote the employee. The agency has the burden to establish by a preponderance of the evidence that the adverse action “promotes the efficiency of the federal service,” and it can choose to mitigate the penalty to a lesser one.

In any event, no official agency action can be taken for 30 days. *See* 5 U.S.C. § 7512; 5 C.F.R. § 752.404. If, after 30 days, the agency decides to move forward with its decision to terminate (or demote or suspend for 15 or more calendar days), the worker then has **30 days from the effective date of the removal to appeal** in writing to the Merit Systems Protection Board **or 45 days to file a discrimination complaint** with the agency’s EEO office.

If the worker is a **union member**, however, she must check her union contract because it will specify the **maximum number of days within which to file an appeal**. THIS TIME PERIOD COULD BE AS SHORT AS FIVE DAYS!

**Practice Tip:** Some unions are inactive and workers are unaware they are members. Read the Notice of Proposed Removal carefully to see whether it references a union. If it does, immediately request a copy of the collective bargaining agreement from the union AND the agency, and ask the union for assistance with preparing the appeal.

### **Appeals to the MSPB<sup>121</sup>**

Federal employees who are (1) not on probation (e.g., competitive service federal workers who have been employed for more than a year), or (2) excepted service workers

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<sup>121</sup> Although many federal employees have the right to file an appeal to the MSPB from an adverse action, some do not, due to the nature of their appointment or the agency for which she works. For example, employees of the FBI generally do not have MSPB appeal rights.

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who have been employed in the same or similar position for two years have due process rights that allow them to appeal a termination or other “adverse action” to the Merit Systems Protection Board (MSPB).<sup>122</sup>

Other “adverse actions” include suspensions of *more than* 15 calendar days, a demotion, a loss in pay, or a reduction-in-force (RIF). A suspension for less than 15 days is not appealable to the MSPB unless the worker claims retaliation and has raised that claim with the Office of Special Counsel.<sup>123</sup>

Workers have **thirty (30) calendar days** (or the next business day after the thirtieth day) from the effective date of the adverse action to appeal the action to the MSPB.

The MSPB provides an optional form (a letter is also fine) for filing an appeal, available online at [www.mspb.gov](http://www.mspb.gov). The worker should provide two copies of the appeal, filed with the regional office. If the worker was terminated prior to filing an appeal, she will no longer be on payroll. However, if the MSPB orders him or her reinstated, she will receive back pay and interest for the time of the appeal, so long as she was “ready, willing and able to work.” If the worker was suspended, she will remain on payroll pending the appeal; however, she will not receive income for the time she was suspended, unless the MSPB orders otherwise.

**Federal employees who are covered by union contracts** must choose to use either the union grievance procedures as negotiated in the collective bargaining agreement OR the above outlined procedure.

The MSPB, in the *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981), established a number of factors it uses to determine whether a removal was proper. The factors include the following:

- (1) The nature and seriousness of the offense, and its relation to the employee’s duties, position, and responsibilities, including whether the offense was intentional or technical, or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
- (2) The employee’s job level and type of employment, including supervisory or fiduciary role, contacts with the public, and the prominence of the position;
- (3) The employee’s past disciplinary record;
- (4) The employee’s past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;

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<sup>122</sup> Federal workers are hired and employed under one of two categories of service: “competitive service,” which requires a preliminary civil service examination and a probationary employment period, are the presumptive category, while “excepted service,” which requires no examination and has at least a two-year probationary period, must be approved by the Office of Personnel Management. There are further sub-categories, such as temporary, term, career-conditional, and career.

<sup>123</sup> Much of this section is culled from James M. Eisenmann, Esq., *Overview of Rights of Federal Government and District of Columbia Employees* (September 23, 1999) (unpublished paper included in D.C. Bar PSAC Pro Bono Program – Employment Law Training).

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- (5) The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
- (6) Consistency of the penalty with those imposed upon other employees for the same or similar offenses;
- (7) Consistency of the penalty with any applicable agency table of penalties;
- (8) The notoriety of the offense or its impact upon the reputation of the agency;
- (9) The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
- (10) Potential for the employee's rehabilitation;
- (11) Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice, or provocation on the part of others involved in the matter; and
- (12) The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

One can use these factors to argue that the adverse action was not proper. To review post 1994 MSPB case law, go to [www.mspb.gov](http://www.mspb.gov).

Federal workers who work in D.C. file MSPB cases with the Washington Regional Office, 1901 S. Bell Street, Suite 950, Arlington, VA 22202. The telephone number is 703-756-6250. At the MSPB, the case is assigned to an administrative law judge. It is common practice for the administrative judges to actively try to get the parties to settle the case.

## **Whistleblower and Anti-Retaliation Protections for Federal Employees**

The Civil Service Reform Act, 5 U.S.C. § 2302, protects many categories of federal government employees (and applicants for employment) from retaliation for whistleblowing. Under the law, it is unlawful to retaliate against such employees or applicants who have (1) complained that a law, rule, or regulation has been violated; (2) complained of gross mismanagement, gross waste of funds, abuse of authority, or a "substantial and specific danger to public health or safety;" or (3) disclosed to the Special Counsel or Inspector General that there has been such a legal violation, gross mismanagement, gross waste, abuse of authority, or substantial danger to health or safety. § 2302(b)(8).

The Act also makes it unlawful to do the following:

- Retaliate (or threaten to retaliate) against federal government employees (or applicants for employment) because of "the exercise of any appeal, complaint, or grievance right granted by any law, rule or regulation." 5 U.S.C. § 2302(b)(9)(A).



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- Retaliate against a federal government employee or applicant on the basis of the employee's testifying or assisting another individual in the exercise of any right referred to in subsection (b)(9)(A). § 2302(b)(9)(B).
- Retaliate (or threaten to retaliate) against federal government employees (or applicants for employment) because the employee is "cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law." § 2302(b)(9)(C).
- Retaliate (or threaten to retaliate) against federal government employees (or applicants for employment) because of their refusal to obey an order that "would require the individual to violate a law." § 2302(b)(9)(D).

The Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1465 (WPEA), strengthened protections under 5 U.S.C. § 2302. Disclosures can no longer be excluded from protections because (1) the disclosure was made to a supervisor or to a person participating in the legal violation, gross mismanagement, gross waste, abuse of authority, or substantial danger to health or safety; (2) the disclosure revealed information that had been previously disclosed; (3) of the employee's motive for making the disclosure; (3) the disclosure was not made in writing; (4) the disclosure was made while the employee was off duty; or (5) of the amount of time which has passed since the occurrence of the events described in the disclosure. § 2302(f)(1). The WPEA expressly protects employees who make disclosures in the normal course of their duties and up the chain of command. *See* § 2302(f). TSA security officers are no longer excluded from whistleblower protections. *See* § 2304(a).

Additionally, the Inspector General for each agency must now designate a Whistleblower Protection Ombudsman tasked with explaining to employees the process for submitting retaliation claims with the Office of Special Counsel as well as the process for filing whistleblower disclosures. *See* 5 U.S.C.A. App. 3 § 3(d).

The WPEA expands the remedies available in whistleblower claims. Employees may now pursue compensatory damages in addition to reversal of adverse personnel actions. 5 U.S.C. § 1221(g)(1)(A)(ii), (g)(2).

**Note:** Under the WPEA, whistleblower protections supersede agency non-disclosure agreements, and all such agreements signed after the WPEA went into effect must advise employees of this exception. *See* 5 U.S.C. § 2302(a)(2)(A)(xi), (b)(13)

### **False Claims Act Claims**

Please see the [Wage & Hour](#) Chapter of this manual for a detailed discussion about bringing and enforcing whistleblower claims under the False Claims Act.

## **Substance Abuse Testing for Federal Employees**

Drug testing is required by law for many federal and state government employees. For example, about half of all federal government employees are tested at some point, ranging from once during the application/hiring process to random ongoing testing for certain positions.

### **When is Testing Required**

Executive Order 12,564, signed by Ronald Reagan in 1986, mandates drug testing for federal government employees in “sensitive positions.” *See* 51 FR 32,889, § 3(a) (1986). This includes the handling of classified information; positions charged with law enforcement, national security, and protecting life, property, and public health and safety; and jobs requiring a high degree of trust and confidence. *Id.* at § 7(d). In total, about half of all federal government employees are covered by this law.

The tests are permitted under five circumstances: (1) initial job application; (2) reasonable suspicion of illegal drug use; (3) in conjunction with the investigation of an accident; (4) as part of an Employee Assistance Program (EAP); and (5) pursuant to a drug testing program established by the agency head in accordance with section 3(a) of the Executive Order. *See id.* at § 3.

### **Manner of Testing**

The Department of Health and Human Services (HHS) has promulgated regulations for the manner of testing of federal employees. *See* 53 FR 11970-01 (1988).

Urine testing is generally the method used. Thus, the guidelines exclusively and extensively cover urine collection techniques (as opposed to hair, which is sometimes tested by private employers). *See id.* at subpart B, § 2.2. The guidelines require testing for marijuana and cocaine, allow testing for amphetamines, opiates and PCP, and allow testing for other Schedule I and II controlled substances during reasonable suspicion or accident-related testing, but do not allow testing for alcohol and other legal drugs. *See id.* at subpart B, § 2.1(a).

Some worker protections include:

- (1) Employees must sign a statement that it is their specimen. *Id.* at subpart B, §2.2(f)(22).
- (2) Specimen collectors must ensure workers’ privacy unless there is reason to believe the worker may adulterate the sample. *Id.* at subpart B, § 2.2(e).
- (3) Any tested employee must, upon written request, have access to documents relating to his or her test and to the certification of the lab performing the test. *Id.* at subpart B, § 2.9.

### **What to Do About a Positive Test**

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The Executive Order mandates a confirmatory test or the employee's admission that s/he used illegal drugs before action may be taken on any positive test. 51 FR 32,889, § 5(e) (1986). Both the first and confirmatory tests are generally done before the employee is informed of a positive result. *See* 53 FR 11970-01, subpart C, § 3.5 (1988).

Once the worker is informed of a positive test result, she should make a written request for documents pertaining to the test. Prior to verifying a positive test result, a Medical Review Officer must give the employee a chance to explain the result. *Id.* at subpart B, § 2.7(c).

Section 5 of the Executive Order specifies disciplinary action once an employee's drug use is established. *See* 51 FR 32,889, § 5 (1986). Generally, the employee will be referred to an Employee Assistance Program (EAP) for rehabilitation, and refusal to take part will result in dismissal, as will any recurrence of drug use. *Id.* at § 5(a-d). Employees in sensitive positions will be temporarily removed pending successful completion of the EAP. *Id.* at § 5(c).

An employee who uses drugs can only avoid discipline if she admits to drug use or volunteers for testing before being identified by other means. *Id.* at § 5(b)(1). She must also: (1) seek EAP rehabilitation; and (2) refrain from future drug use. *Id.* § 5(b)(2-3).

### **Federal Government Contract Workers**

The *Drug Free Workplaces Act of 1988* requires federal **government contractors** and grant recipients to certify that they provide drug-free workplaces, but this act does not require testing. *See* 41 U.S.C. §§ 8101 to 8106.

## **Employees of Congress**

In the past, many labor and employment laws did not apply to employees of the U.S. House or Senate. The Congressional Accountability Act of 1995 (PL 104-1) extended labor protections to most employees on Capitol Hill, including workers at the House of Representatives and the Senate, the Capitol Guide Service, the Capitol Police, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Compliance, and the Office of Technology Assessment. This includes those currently working, job applicants, and former employees who may file claims in certain cases. 2 U.S.C. § 1301 *et seq.* 2018 amendments to the CAA expanded workplace protections to unpaid employees, including interns and fellows. *See* Congressional Accountability Act of 1995 Reform Act, Pub. L. 115-397.

The following laws are now enforceable under the Congressional Accountability Act:

- **Title VII of the Civil Rights Act of 1964**, as amended by the Civil Rights Act of

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1991, prohibits discrimination in employment because of race, color, religion, sex, or national origin.

- **Age Discrimination in Employment Act of 1967** prohibits employment discrimination against individuals 40 years of age and older.
- **Title I of the Americans with Disabilities Act of 1990** and the Rehabilitation Act of 1973 prohibit employment discrimination against qualified individuals with disabilities.
- **Fair Labor Standards Act of 1938** governs overtime pay, minimum wage, and child labor protection, and prohibits pay discrimination on the basis of sex.
- **Family and Medical Leave Act of 1993** entitles eligible employees to take leave for certain family and medical reasons.
- **Employee Polygraph Protection Act** restricts use of lie detector tests by employers.
- **Worker Adjustment and Retraining Notification Act** assures employees of notice before shut-downs and mass lay-offs.
- **Section 2 of the Uniformed Services Employment and Reemployment Rights Act** of 1994 protects job rights of individuals who serve in the military and other uniformed services.
- **Federal Service Labor-Management Relations Act** establishes the rights of individuals to form, join, or assist a labor organization, or to refrain from such activity; and to collectively bargain over conditions of employment through their representatives. It does not establish the right to strike.
- **Occupational Safety and Health Act** protects the safety and health of employees from physical, chemical, and other hazards in their places of employment.
- **Titles II and III of the Americans with Disabilities Act of 1990** prohibit discrimination against qualified individuals with disabilities with respect to public services and public accommodations.

The Office of Congressional Workplace Rights (OCWR) is a resource for legislative branch employees. Legislative employees can connect with Confidential Advisors, experienced employment law attorneys who provide cost-free advice and guidance to covered employees on their rights under the Congressional Accountability Act (CAA) and the administrative dispute resolution process. To connect with a Confidential Advisor, call OCWR at (202) 724-9250 or e-mail [ConfidentialAdvisor@ocwr.gov](mailto:ConfidentialAdvisor@ocwr.gov).

The Office of Employee Advocacy provides free legal advice and representation to U.S. House of Representatives employees for CAA-related matters. To seek advice and representation, eligible employees can contact the Office of Employee Advocacy by telephone: (202) 225-8800; email: [EmployeeAdvocacy@mail.house.gov](mailto:EmployeeAdvocacy@mail.house.gov) (to maintain confidentiality, employees should send matters using their personal, non-House email accounts); or by fax: (202) 225-8802.

## Dispute Resolution Process

A worker who believes his or her rights have been violated pursuant to any of the above-mentioned statutes must lodge a complaint with the Office of Congressional Workplace Rights (OCWR) or the worker will lose his/her right to pursue a claim.

This complaint *must* be made **within 180 days**. See [Procedural Rules of the OCWR as Amended June 2019](#), § 4.04(b). Complaints must be made in writing and can be submitted through OCWR's online portal ([File a Claim - OCWR](#)), in person, via email ([ocwrefile@ocwr.gov](mailto:ocwrefile@ocwr.gov)), via fax ((202) 426-1913), or by mail. OCWR is located at Room LA 200, John Adams Building, 110 Second St. S.E., Washington, D.C. 20540-1999, Telephone: 202-724-9250 Fax: 202-426-1913 TTY: 202-426-1912 Email: [OCWRinfo@ocwr.gov](mailto:OCWRinfo@ocwr.gov).

### Note!

Not all CAA rights are enforced through the dispute resolution process, e.g. violations of safety and health, access to public services or accommodations rights for the disabled, unfair labor practices. Workers should contact an OCWR Confidential Advisor for specific guidance.

**Note:** Employees of the Capitol Police or the Office of the Architect of the Capital may be required to go through the internal grievance procedures of their respective employers. *Id.* at § 4.06(d).

The claimant or employing agency may request voluntary OCWR mediation at any point up until the time that a decision is issued on the merits or the claimant files a complaint in federal court. Both parties must consent to the mediation for it to proceed. *Id.* at § 4.07.

After receipt of the complaint, a Preliminary Hearing Officer (PHO) will conduct a preliminary review to determine if the claim may proceed to an OCWR administrative hearing. The PHO will usually issue a preliminary review report **within 30 days** of filing. If the PHO determines that an administrative hearing is not available to the worker, e.g. if they are not a covered employee, then the worker's only option is to file a civil action in federal district court. *Id.* at § 4.08.

If the PHO determines that the complaint can proceed to an administrative hearing, the claimant has **10 days** from the issuance of the preliminary report to request a hearing. *Id.* at § 4.09. Upon request, a Merits Hearing Officer (MHO) is assigned and must commence a hearing **within 90 days** of the request. *Id.* at § 7.05. The MHO will issue a final decision which may include relief such as monetary awards, reinstatement, promotion, back pay, attorney fees, and other costs or appropriate remedies.

The worker may appeal a final decision to the OCWR Board of Directors for review no later than **30 days** after the order. *Id.* at § 8.01. Upon the decision of the board, the worker may appeal to the U.S. Court of Appeals for the federal circuit that has jurisdiction. *Id.* at § 8.04.

## Federal Government Workers

The Office of Congressional Workplace Rights provides information about the applicability of these laws. OCWR is located at Room LA 200, John Adams Building, 110 Second St. S.E., Washington, D.C. 20540-1999, Telephone: 202-724-9250 Fax: 202-426-1913 TTY: 202-426-1912 Email: [OCWRinfo@ocwr.gov](mailto:OCWRinfo@ocwr.gov). Go to [www.ocwr.gov](http://www.ocwr.gov) for further details.

### **Civil Actions**

Legislative employees must first file a timely claim with the OCWR's dispute resolution process before they can proceed with a civil action. A worker has 70 days from the date of filing their claim to file a civil action. This will terminate any preliminary review of their claim. However, if the claimant requests an OCWR administrative hearing, they may not file a civil action and must proceed through the appeal process outlined above. *Id.* at § 4.05.

### **Retirement for Federal Employment**

The information for this section was taken from Federal Employees' Legal Survival Guide, by the Attorneys of Passman & Kaplan, P.C., published by the National Employee Rights Institute. Please see this guide for additional treatment of these systems.

### **CSRS & FERS**

The Civil Service Retirement System (CSRS) covers all appointed and elected officers and employees in or under the executive, judicial, and legislative branches of the federal government and certain employees of the District of Columbia, except those excluded by law or OPM regulations. For federal employees hired after Jan. 1, 1984, who are covered by Social Security, a new retirement system was developed, the Federal Employees Retirement System (FERS).

There are some notable differences between CSRS and FERS. CSRS is a straight retirement plan with the benefits dependent on years of service and "high-three" salary years. High-three average pay is the highest average pay produced by an employee's basic pay during any three consecutive years of service, including within-grade increases, but not overtime or other allowances, with several exceptions.

FERS is a three-tiered retirement system containing three benefits: (1) Social Security, (2) a basic annuity plan that is less generous than CSRS, and (3) an option thrift savings plan.

FERS employees may contribute up to 10 percent of their pay to the thrift plan with full matching by the agency on the first three percent and half matching on the next two

percent. These contributions are credited to the employee's own account. If an employee is in the thrift savings plan, there are a number of investment vehicles to which he or she can direct funds.

### **Eligibility for Retirement**

Optional voluntary retirement under the CSRS is available when employees reach: (1) age 55 with at least 30 years of service, (2) age 60 with at least 20 years of service, or (3) age 62 with at least five years of service. An employee must have been employed under CSRS for at least five years, including one year out of the two last years immediately preceding his or her separation. In addition, the employee must have been employed in a position covered by CSRS where retirement deposits were or should have been made, except for disability retirement benefits.

Under FERS, an employee may retire at age: (1) 60 with at least 20 years' service with reduced benefits, or (2) 55 with a minimum of 10 years' service with greatly reduced benefits. Early retirement will cause benefits to be reduced by five percent for each year the employee is younger than 62 when he or she retires. There is also a gradual extension of the minimum age of 55 for retirement under FERS for employees born in 1948 and thereafter.

### **Other Retirement Options**

"Discontinued service retirement" is available if an employee is involuntarily separated without cause, or on account of poor performance, before becoming eligible for optional retirement. There is also early optional retirement due to major reorganizations, major RIFs, or major transfers of function as determined by OPM.

If the employee is younger than 55 at the date of retirement, under CSRS, an annuity is reduced by: (1) one-sixth of 1% for each full month, and (2) 2% per year. There is no similar penalty or reduction under FERS based on age. If an employee is separated for cause or resigns from federal employment with a minimum of five years of service and does not obtain a refund of his or her retirement contributions, the employee may wait until age 62 for deferred retirement.

### **Federal Law Enforcement Officials and Firefighters**

Federal law enforcement officials and firefighters already contribute 7.5% of their salaries to their retirement systems. They are entitled to greater benefits while retiring at an earlier age. Retirement is optional at age 50 and is mandatory at age 55 with at least 20 years of law enforcement or service, although it may be extended to age 60 by the agency

head.<sup>124</sup> Military service as a firefighter or law enforcement officer may not be credited toward the minimum 20-year civilian service requirement.<sup>125</sup>

## **Federal Disability Retirement**

If a federal worker is unable to render **useful and efficient service**, she may apply for disability retirement, through which she can collect a portion of her salary from the contributions made to her or his retirement fund. If a worker cannot perform **any single critical element** of her current job on account of illness or injury, then she is unable to render useful and efficient service, and is deemed disabled. *See* 5 U.S.C. § 8451 *et seq.* (FERS); 5 C.F.R. § 844.103 *et seq.* (FERS); 5 U.S.C. § 8337 (CSRS).

A worker need not be totally disabled in order to collect federal disability retirement benefits. If the disabling **medical condition is likely to last more than one year**, then a worker is eligible to collect disability retirement benefits. The disability need not be because of an on-the-job injury, and can be the result of the exacerbation or flare-up of a pre-existing condition.

## **Enrollment Requirement**

As discussed above, there are two federal employment systems: Federal Employee Retirement System (FERS) and Civil Service Retirement System (CSRS). Make sure you know which system an employee is in before you advise them about disability retirement.

FERS employees must be enrolled in their retirement system for 18 months in order to be eligible for disability retirement. CSRS employees must be enrolled for a minimum of five years in order to be eligible.

**Note:** A federal employee injured on the job cannot collect both workers' compensation and disability retirement. Although an employee can apply for both, the employee must elect one or the other.

## **Accommodation and Reassignment**

Because disability retirement is supposed to be a last resort, federal agencies are required to make reasonable attempts to reassign and accommodate disabled workers. Accommodations must allow the worker to perform all the critical aspects of his or her job in order to be valid. Reassignments must be to another position in the agency with the same grade, pay, and tenure, and within the same commuting area. Only after attempts to accommodate and reassign have been exhausted can a federal employee apply for disability retirement.

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<sup>124</sup> *See* 5 CFR 831.901-911.

<sup>125</sup> *See* 5 USC 8336(c)(1).



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Federal workers **must** cooperate with these attempts at reassignment and accommodation; if they fail to do so, or turn down reasonable accommodations or reassignments, they can be denied disability retirement.

### Checklist

Make sure your client meets all these qualifications in order to successfully apply for disability retirement:

- \_\_\_\_\_ Enrolled in FERS for at least 18 months, or enrolled in CSRS for at least five years
- \_\_\_\_\_ Suffers from a disease or injury
- \_\_\_\_\_ This disease or injury became disabling only **after** the employee entered federal service
- \_\_\_\_\_ Unable to perform any **one** of the critical elements of the job in a satisfactory manner
- \_\_\_\_\_ Likely to be unable to perform that critical element for at least one year
- \_\_\_\_\_ Currently in government service, or have been separated from service for less than one year
- \_\_\_\_\_ Agency cannot accommodate the disability or find a suitable reassignment to a comparable position

### Application Procedure

Employees may submit an application for disability retirement **within one year** after the date of their separation. If the application is submitted before separation or within 31 days of separation, it may be sent to the personnel department of the worker's agency, but it is generally better to send it directly to OPM. After 31 days, the application should be sent directly to U.S. Office of Personnel Management, Retirement Operations Center, P.O. Box 45, Boyers, PA 16017. For information, request Standard Forms 3105 (A through E) and 3107 from the agency or OPM.

**Note:** Termination from a job does not preclude a federal employee from applying for disability retirement. In fact, termination because a person cannot perform the functions of a job due to a medical condition may help bolster a claim for disability retirement.

If a worker is denied disability retirement by OPM, the worker can usually request reconsideration and file a letter brief in support, as a part of which new evidence (e.g., new medical records) can be submitted. The right to request reconsideration is stated in the CSRS regulations at 5 C.F.R. § 831.109. The FERS regulations do not contain this provision.

If the reconsideration is denied, the worker can appeal to the Merit Systems

Protection Board (MSPB) and request a hearing before an administrative law judge (ALJ). Appeals from the ALJ are taken to the MSPB (an actual board that is like an appellate court). Appeals from the MSPB are taken to the Federal Circuit court.

## Benefits Received

If a worker successfully applies for disability retirement under FERS, she will receive 60% of his or her average pay during the first year of disability and 40% of the average pay during all other years. Average pay is the average amount earned during each year of the three highest consecutive paid years of federal civil service. **FERS employees on disability are also required to apply for Social Security**, even if they believe they are not eligible to receive it. If a person is eligible for Social Security, during the first year, for every dollar the worker receives from Social Security, the same amount will be deducted from his or her disability payment. This will most likely reduce the worker's entitlement to his or her disability payment to nothing, or almost nothing. During subsequent years, for each dollar a person receives from Social Security, FERS will deduct 60 cents from the disability payment.

CSRS employees do not have to apply for Social Security, and if they do apply and receive it, their disability payment will not be reduced. Like FERS, CSRS disability is also predicated on the same average pay definition as FERS, but the formula for computing benefits is a bit more complex:

- If a worker has 22 or more years of "creditable service,"<sup>126</sup> but less than 22 years of actual service, she will collect 40% of average pay.
- If a worker has 22 or more years of actual service, the annuity will be computed under the general formula for regular retirement and will be higher than 40% of average pay.
- If a worker has less than 22 years of creditable service, she will receive less than 40% of average pay, ranging from 7.5% for 5 years of service to 38.25% for 21 years of service. (The percentage increases by 1.75% through year 10, and then increases by 2% each year.)

The benefits are taxable income, but recipients are eligible for the Earned Income Tax Credit. *See Policy Basics: The Earned Income Tax Credit*, Center on Budget and Policy Priorities, available at <https://www.cbpp.org/research/federal-tax/the-earned-income-tax-credit>.

Disability retirement benefits continue until the worker (1) dies; (2) returns to work for the federal government; (3) voluntarily gives up the benefits; (4) recovers from

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<sup>126</sup> To compute creditable service, add the number of years until a worker reaches 60 to the number of years he or she worked in the federal civil service.

the disability; or (5) is “restored to earning capacity.”<sup>127</sup> For more detail, *see* 5 C.F.R. § 831.1209. Workers who successfully received disability are eligible to maintain government health insurance, but they must pay the same monthly premiums as they did when they were employed.

A person can work in another non-government job while on disability retirement. However, if in doing so, she is “restored to earning capacity,” disability retirement benefits will cease, including group health insurance coverage.

## **Federal Employees’ Right to Personnel Files**

Under the Privacy Act, federal government employees have a right to view their own personnel file. *See* 5 U.S.C. § 552a. The act also contains a process for correcting errors found in the file.

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<sup>127</sup> A person is restored to earning capacity when income from wages or self-employment or both equals at least 80% of the current rate of pay of the position occupied immediately before retirement. *See* 5 U.S.C. § 8337(d).

# **EMPLOYEE**

# **BENEFITS**

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## **ERISA**

The Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, is the federal law that governs employer-provided health and retirement benefits. Generally, ERISA pre-empts state law on retirement benefits, deferred compensation plans, group health, life and disability insurance, and other employer-provided benefits.

A full discussion of ERISA is beyond the scope of this manual.

### **Types of Plans Covered by ERISA**

The following types of plans are subject to ERISA:

- “Employee Pension Benefit Plans,” including retirement or pension plans (“defined benefit plans”), profit-sharing plans (*i.e.*, 401(k) plans), thrift and savings plans, money-purchase plans, employee stock-ownership plans, and qualified stock bonus plans. Employers are not required to offer retirement or pension benefit plans to their employees.
- “Employee Welfare Benefit Plans,” including life insurance, hospital/surgical insurance, medical insurance, accident insurance, dental insurance, disability income insurance, supplemental unemployment payments, and prepaid legal services.

Plans sponsored by governmental entities and religious organizations are NOT covered by ERISA (though generally plans provided by non-profits are covered). Also excluded are: plans maintained solely for complying with workers’ compensation, unemployment compensation, or disability insurance laws; plans maintained outside the U.S. primarily for the benefit of non-resident aliens; and, certain other plans that exist solely to provide benefits in excess of the limitations imposed by ERISA. This last exclusion is not likely to apply to low-wage workers. *See* 29 U.S.C. § 1003. Many plans excluded from ERISA’s coverage are regulated by applicable state law or other areas of federal law.

Generally, defined contribution plans, in which contributions are withheld from an employee’s paycheck and deposited, sometimes with additional employer contributions, into an account for the employee (*i.e.*, a 401(k) plan), will be the most commonly encountered type of plan. Less common today are defined benefit plans (traditional pension plans), in which an employee “accrues” pension credits through years of service, which are used to calculate benefits in the form of set periodic payments after retirement.

## Requirement of Trustee to Furnish Plan Documents

Employee benefit plans are typically governed by several plan documents that set out the rules and entitlements under the plan. Employers have broad leeway in designing how benefits are earned (or “accrued”) and distributed under the plan, subject to satisfying certain minimum requirements and regulations. Accordingly, specific questions regarding whether an employee is eligible to participate in the plan, how much benefit an employee has accrued (under a defined benefit plan), how and when an employee may receive benefits from the plan, and additional features that may be available will need to be resolved through examination of the plan documents.

In most cases, the most readable plan document will be the Summary Plan Description (“SPD”), sometimes labeled a pamphlet or booklet. Employees who are or may become eligible for benefits (“Participants”) under a plan covered by ERISA must be furnished with an SPD, which is intended to be an understandable and reasonably comprehensive summary of the plan benefits, plus updates when significant changes are made. *See* 29 U.S.C. § 1024(b); 29 CFR § 2520.104b-2 (DOL regulations on disclosure of documents).

The administrator of the plan must respond to a participant’s written request for the latest version of the SPD (or any other plan document). 29 U.S.C. § 1024(b)(4). If the plan fails to provide documents within 30 days of the request, a court may assess a statutory penalty of as much as \$110 per day (a court would consider the length of delay, prejudice to the beneficiary, etc.). 29 U.S.C. §§ 1021-25. Upon written request, employees must also be given a report on the status of their vesting and accrued pension benefits, unless the employer has already provided, for a defined contribution plan, quarterly (or annual in some cases) statements required under the law. 29 U.S.C. § 1025(a). Failure to provide requested plan documents can be redressed through a § 502 claim. *See Pursuing a Case, supra*.

## Vesting in a Pension Plan

Retirement benefits become non-forfeitable through “vesting,” gradual securing of ownership through continuous employment with the employer sponsoring the benefit plan. Once benefits become vested, the employee has an unconditional right to those benefits and cannot lose them through, for example, termination of employment or amendment of the benefit plan.

1. Employee Contributions: An employee is immediately and fully vested in his or her own contributions to any retirement plan (typically contributed through amounts withheld from the employee’s paycheck). 29 U.S.C. § 1053(a)(1).
2. Employer Contributions: Employer contributions must satisfy the following

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vesting requirements, depending on the type of retirement plan. Plan documents will include information on the vesting requirements for the particular plan. Plans may provide for vesting schedules that are more generous than the following minimum standards.

a) Defined Contribution Plans (401(k) plans): 29 U.S.C. § 1053(a)(2)(B). If an employer makes employer contributions or provides matching contributions to a defined contribution plan on a worker's behalf, the employee must become vested in those contributions either:

- i. Entirely after three years of employment, or
- ii. Six-Year Vesting, according to years of service with the employer:
  - 20% after two years
  - 40% after three years
  - 60% after four years
  - 80% after five years
  - 100% after six years

b) Defined Benefit Plans (Pension Plans): 29 U.S.C. § 1053(a)(2)(A). If an employer makes contributions to a defined benefit plan on a worker's behalf, the employee must become fully vested in benefits derived from those contributions either:

- i. Entirely after five years of employment, or
- ii. Seven-Year Vesting, according to years of service with the employer:
  - 20% after three years
  - 40% after four years
  - 60% after five years
  - 80% after six years
  - 100% after seven years

In addition, retirement plans provide that benefits become fully vested upon the employee's attainment of the plan's "normal retirement age." Consult the plan documents for a description of the plan's normal retirement age. Finally, the Uniform Services Employment and Reemployment Rights Act provides that employees out on military service cannot be treated as having incurred a "break in service" (a break in the vesting period) on account of such military service, once the employee returns to employment. 38 U.S.C. § 4318; 20 C.F.R. § 1002.259.



## **Potential Enforcement Issues**

### **Employee Contributions**

Employers that sponsor plans where employees make their own contributions (e.g., 401(k) plans) must withhold the elected contributions from the employee's paycheck and place them in the employee's plan account no later than the 15th day of the month following the payday. 29 C.F.R. § 2510.3-102(b). Plan participants will have a cause of action for breach of fiduciary duty under ERISA § 502 if an employer withholds but never deposits money into the participant's account. 29 U.S.C. § 1132(a); *see Pursuing a Case, infra*. Furthermore, an officer of such an employer can be held personally liable for the breach if he or she exercised discretionary control over the contributions. A participant affected by an employer's failure to deposit contributions may wish to contact the EBSA at the Department of Labor, which also has standing to sue for breaches of duty. *See "Administrative Complaint Options" below*. If the plan is a collectively bargained plan, the participant should notify the union and the plan administrator (the Board of Trustees or its representative). Under some circumstances, failure to remit benefit contributions can result in criminal liability. 18 U.S.C. § 664. Account statements will be helpful in determining whether elected withholdings have been deposited into a client's account. Paycheck stubs will be helpful in determining what amounts have been withheld.

### **Discrimination and Retaliation Prohibited**

It is illegal for an employer to terminate or otherwise discriminate or take adverse action against a plan participant or plan beneficiary for exercising his or her rights under ERISA (e.g., the employer cannot take adverse action against an employee because the employee has high-cost medical claims). *See* ERISA § 510. It also is illegal to retaliate against an individual who has given information or testified in any inquiry or proceeding under ERISA. *Id.* Unlawful discrimination under § 510 is enforced through § 502 claims. *See Pursuing a Case, supra*. To determine whether discriminatory intent exists in § 510 cases, courts have adopted a burden-shifting analysis similar to the approach in Title VII cases.

### **Interference with Vesting Prohibited**

Section 510 of ERISA also prohibits the employer from interfering with the participant's attainment of rights under an ERISA plan (e.g., firing the worker so that the worker's pension rights do not vest). *Id.*

### **Breach of Fiduciary Duty**

There may be a cause of action for breach of fiduciary duty for mismanagement of a plan, such as negligent investment of plan funds. *See* ERISA § 404; *see also*, ERISA § 502. Whether an individual or entity will be found to be a fiduciary is based on that individual's

## Employee Benefits

duties and conduct. A person is a fiduciary if she holds or exercises discretionary authority over the management or administration of a plan or over plan assets. *See* 29 U.S.C. § 1002. Employers and boards of trustees also often hire professionals (such as investment managers and plan administrators) to manage a plan. In carrying out their fiduciary duties, the employer or trustees must show prudence in selecting these professionals; the professionals, in turn, also may be found to be fiduciaries to the plan.

The Department of Labor has extensive responsibility with regard to fiduciary duties. The DOL publishes pamphlets regarding fiduciary responsibility, which can be found on its website. The DOL regulations regarding fiduciary duties are at 29 C.F.R. § 2550.

### **Benefit Claims and Appeals**

Unlike some other claims, beneficiaries seeking benefits due under a plan should file a claim for those benefits with the person designated by the plan to receive claims (consult the SPD to determine how and where to submit claims). Any notice of benefit denial must be provided within 90 days of the plan's receipt of the claim, although the plan may claim an extension of time upon notice to the participant. However, shorter deadlines are applicable for certain health plan claims, such as urgent care claims (72 hours) and non-urgent, pre-service claims (15 days). If a plan renders an adverse decision, the beneficiary will have an opportunity for review as set forth in the plan documents and federal regulations. *See generally* 29 C.F.R. § 2560.503-1(a)-(j) (benefit claims procedures).

Any notice of benefit denial (in part or in whole) must include (a) the reason for the denial; (b) reference to the particular plan section or provision upon which the denial was based; (c) a description of any additional information necessary to perfect the claim, if applicable; (d) a description of the plan's appeal procedures, including any applicable deadlines and including a statement of the participant's rights to bring a civil action under § 502. 29 C.F.R. § 2560.503-1(g). Additional items may be required for certain health claim denials. *Id.*

Participants in plans have the right to sue to recover benefits, enforce or clarify benefits, enjoin any act violating ERISA or the terms of a plan, and obtain other appropriate relief for violations of ERISA. Successful plaintiffs can recover lost benefits, prejudgment interest, injunctive relief, and attorneys' fees for the court proceedings (but not administrative review). However, plaintiffs cannot obtain additional compensatory or punitive damages beyond the lost benefits. Beneficiaries must exhaust their administrative remedies before going to court to pursue a claim for wrongful denial of benefits. One important exception to the exhaustion requirement, however, is where the plan fails to establish or follow claims procedures consistent with the requirements of the regulations. *See* 29 C.F.R. 2560.503-1(l).

### **Pursuing a Case**

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Enforcement of claims falls under Section 502 of ERISA. *See* 29 U.S.C. § 1132. Generally the statute provides for recovery of actual damages and reasonable attorneys' fees and costs at the judge's discretion. *See* 29 U.S.C. § 1132(g). As noted above, a claim for benefits must go through the administrative process set forth under the plan before it may be appealed to federal court. Consult the SPD to determine the plan's claims procedures.

### ***Statute of Limitations***

Except for claims for a fiduciary breach, ERISA's civil enforcement provisions do not contain a statute of limitations, and federal courts often adopt the most analogous state statute of limitations.

Many cases have found the state breach of contract statute of limitations to apply to ERISA non-fiduciary breach claims, but this is not always the case. For example, in *Watts v. Parking Management Inc.*, No. 02-2132, 2006 U.S. Dist. LEXIS 12873, 2006 WL 627153 (D.D.C Mar. 12, 2006), the judge held that a former employee was time-barred from suing his employer alleging it illegally interfered with his right to retirement benefits when it fired him four years before he would have become eligible for such benefits under section 510, the non-discrimination section of ERISA. The judge reasoned that the one-year statute of limitations found in the District of Columbia Human Rights Act (DCHRA) was the most analogous to section 510.

Claims for relief against fiduciaries for breach of their duties have a six-year statute of limitations. No such action may commence after the earlier of: (1) six years after (a) the date of the last action that constituted a part of the breach or violation, or (b) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation; or (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation, except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation. ERISA § 413, 29 U.S.C. § 1113.

### ***Where to File***

ERISA grants exclusive jurisdiction over claims to the federal district courts, with the exception of actions to enforce the terms of the plan itself, for which state courts have concurrent jurisdiction. *See* 29 U.S.C. § 1132. Claims relating to employee benefits are often improperly brought in state courts and are subject to federal pre-emption and removal.

### ***Whom to File Against***

Potential defendants in an ERISA case include employers, fiduciaries, trustees, administrators, third-party service providers, and the plan itself. A person is a fiduciary if he or she holds or exercises discretionary control over the management or administration of a plan or plan assets. *See* 20 U.S.C. § 1002.

### ***Administrative Complaint Options***

If there are problems with a worker's benefit plan, contact the nearest field office for DOL's Employee Benefits Security Administration, or call 1-866-444-3272. For D.C., Maryland, and Virginia, that office is located at 1335 East-West Highway, Suite 200, Silver Spring, MD 20910. The regional telephone number is (202) 693-8700. Participants also have the right to sue in federal district court, as noted above. 29 U.S.C. § 1132.

DOL has authority to investigate complaints of fund mismanagement (*i.e.*, breach of fiduciary duty). If an investigation reveals wrongdoing, it can take action to correct the violation, including asking a court to compel plan trustees and others to put money back in the plan. Courts can also impose penalties of up to 20% of the recovered amount and bar individuals from serving as trustees and plan money managers.

## **Employer Requirements under the Affordable Care Act**

Under the Affordable Care Act, employers with 50 or more full time equivalent (or FTE) (working 30 hours or more per week) employees are required to offer health insurance coverage to FTE employees which meets minimum value and affordability standards.<sup>128</sup> If eligible employers do not provide this coverage, they may be subject to a tax penalty.<sup>129</sup>

### **Complaint Process**

Employees seeking to gain access to employer health insurance coverage through the Affordable Care Act should first consult with the employer's HR department, if possible, to determine whether they are eligible. If eligible, the HR department will provide the requisite forms needed to gain coverage. If the employee doubts the veracity of the employer's answer, the employee may be able to report possible tax fraud to the local IRS office (77 K St. NE, 202-803-9000). The IRS is the agency ultimately responsible for assessing penalties for non-compliance with the Affordable Care Act's employer coverage provisions.

If the employee is terminated, suspended, or subject to other adverse action in retaliation for complaining about an employer's non-compliance, the employee can contact the Occupational Safety and Health Administration office, at 1099 Winterson Road, Suite 140, Linthicum, MD 21090, or (410) 865-2055. There is no special form for this complaint.

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<sup>128</sup> The insurance must pay for "at least 60% of the covered health care expenses for a standard population." In terms of affordability, employees cannot pay more than 9.66% of their household income for the insurance. A full discussion of these requirements is complicated and outside of the scope of this manual. For more information on these minimum standards, visit <http://www.healthcare.gov/>.

<sup>129</sup> At the time of publication in late 2016, the IRS is not enforcing the tax penalties for employers with 50-100 employees.

A complaint can also be filed online at:

<https://www.osha.gov/ords/osha7/eComplaintForm.html>.

## **COBRA Health Care Continuation**

The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) requires employers to provide health insurance to employees, their spouses, and dependent children, at group rates for a minimum of 18 months when that insurance is lost because of events such as the termination of the worker's employment (a "qualifying event" – see below for a definition). *See* 29 U.S.C. § 1161. Workers must pay the premiums, which generally will be higher than what the employee paid while employed, because they must pay the full premium, and the employer is permitted to add a 2% administrative cost. For a single person, those premiums are often more than \$400 a month.

### **Coverage**

#### **Employers with 20 or More Workers Must Comply**

COBRA covers all private employers, including a successor to an original employer, with 20 or more employees, foreign and domestic, that maintain a group health plan. *Id.* When determining the number of employees working for the employer, all full- and part-time common-law employees are taken into account. *See* 64 Fed. Reg. at 5163. Be sure to include related business entities when counting employees; all entities under common control are considered a single employer for purposes of COBRA.<sup>130</sup>

**Important exception:** Although employers with fewer than 20 employees are not covered by COBRA, if a small employer mistakenly represents to an employee that he or she is covered by COBRA, that employer may have a contractual obligation to provide such benefits. *See Haley v. Trees of Brookwood, Inc.*, 838 F. Supp. 1553 (N.D. Ala. 1993).

#### **Plans Subject to COBRA**

Generally all group health plans are subject to COBRA. The exceptions to this rule include plans maintained by small employers; churches; and federal, state, and local governments. Similar health continuation rules covering the federal civil service can be found at 5 U.S.C. § 8905.

#### **Definition of a Group Health Plan**

A group health plan is one maintained by an employer or employee organization

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<sup>130</sup> "Common control" is a complicated analysis under the tax regulations, relating to stock ownership and control over a business, among other factors. Workers with claims under COBRA who are endeavoring to engage in this inquiry should consult a professional.

## Employee Benefits

(e.g., a union) to provide health care to individuals who have an employment-related connection to the employer or employee organization. A group health plan can include health coverage provided through “cafeteria plans” and, in certain circumstances, flexible spending accounts. *See* 29 U.S.C. § 1167.

### **Worker & Other Eligibility**

#### ***Individuals Eligible for COBRA Coverage***

COBRA coverage extends to the worker, the worker’s spouse, and any dependent child of the covered employee (including a child who is born to or adopted by a covered employee during the period of COBRA continuation). It also extends to any “individual who is (or was) provided coverage under a group health plan by virtue of the performance of services by the individual for one or more persons maintaining the plan.” *See* 29 U.S.C. § 1167.

If a qualified beneficiary does not choose COBRA continuation coverage by the time the election period ends, the individual ceases to be a qualified beneficiary. § 1165.

**Note:** Non-resident aliens with no source of income from sources within the United States are not qualified beneficiaries.

#### ***Individuals Not Eligible for COBRA Coverage***

Federal, state, and local government employees are not covered by COBRA. *See* instead 5 U.S.C. § 8905(a), D.C. Code §§ 1-621.01 & 1-621.14 for continuation of coverage rules for governmental employees.

### **Qualifying Events**

Generally, qualifying events are those that result in the loss of employer-provided group health coverage for employees, their spouses, and dependents. Specifically, those events include:

- the worker’s termination of employment, voluntarily or involuntarily, for reasons other than gross misconduct;
- a reduction in the worker’s work hours that causes the loss of group health coverage (not including employees who are presently out on FMLA leave for whom health insurance coverage must continue at employer’s expense);
- death of a covered employee;
- divorce or legal separation from the covered employee;
- loss of dependent status by the child of the covered employee under the provisions of the group health plan;
- the worker’s entitlement to Medicare benefits (for this qualifying event, the

## Employee Benefits

qualified beneficiaries are the spouse and dependent children of the covered employee, not the covered employee); or

- the employer's bankruptcy proceeding under Title 11 of the U.S. Code that results in the substantial elimination of coverage for a retiree with employer-provided health insurance.

See 29 U.S.C. §1163. The qualifying event must cause loss of coverage. Such loss of coverage is not just termination of coverage; it includes any change in the terms and conditions of such coverage, such as an increase in premiums or a reduction of benefits. *Id.*

### **Notice to Employees and Election of Coverage**

Upon the occurrence of a **qualifying event**, the employer is required to notify the employee of his or her rights to elect and pay for health insurance coverage. The *employer* has a duty to notify the *plan administrator* of the qualifying event within **30 days** of that event. 29 U.S.C. § 1166. If the qualifying event is either (1) divorce or legal separation; or (2) a child's ceasing to be a dependent, then the covered employee must notify the plan administrator of such event within 60 days after the later of (1) the qualifying event; (2) the date on which the beneficiary loses (or would lose) coverage as a result of the qualifying event; or (3) the date on which the beneficiary received notification of the responsibility to notify the plan and the procedures for doing so. *Id.* at § 1166(a)(3).

After receiving notice of the qualifying event, the *plan administrator* has **14 days** to notify the *employee* of their continuation rights. 29 U.S.C. § 1166; 29 C.F.R. § 2590.606-4(b).

**Note:** If the employer is the plan administrator, there is no clear rule as to the amount of time the employer has to notify the employee. Some courts have held that the employer has 14 days, and some have held that the employer has 44 days. The DOL's 2003 proposed regulations set the time at 44 days. The proposed regulations also require that the plan administrator notify the employee if the employee is not entitled to COBRA continuing coverage.

### **Time for Worker to Claim COBRA Coverage**

The period of time a qualified beneficiary has to elect COBRA health-care continuation is **60 days** after the later of:

- The date the qualified beneficiary would lose coverage on account of the qualifying event; OR
- The date notice is provided to the qualified beneficiary of the right to elect COBRA continuation coverage.

Each qualified beneficiary must be offered the opportunity to make an independent election to receive COBRA. Thus, if a covered employee with a spouse and children leaves a job, the worker, spouse, and each of the children must be provided the opportunity to elect

COBRA coverage independently. Parents and legal guardians can make elections on behalf of their minor children. A legal representative or the estate of a qualified beneficiary who is incapacitated can make a COBRA election for that beneficiary. § 1165.

When a qualified beneficiary elects the coverage, the coverage is retroactive to the date of the loss of coverage. The beneficiary will therefore have to pay the premiums retroactively.

If a qualified beneficiary waives COBRA health-care continuation coverage during the election period, that choice to opt out of benefits does not end the right to elect COBRA coverage. The qualified beneficiary can revoke the waiver any time before the end of the election period.

### **What Health Insurance Coverage Must Be Offered & Cost of Insurance**

The kind of health continuation coverage that is available to qualified beneficiaries is ordinarily the same coverage they had the day before the qualifying event, including the same deductibles and plan limits. The coverage must be the same coverage that is provided to similarly situated individuals under the employer's plan. If the coverage is not the same coverage that other employees and their families have, then the group health plan is not in compliance with COBRA. An exception to this last rule is if there is other coverage offered to the qualified beneficiaries that does constitute COBRA coverage. *See* 29 U.S.C. § 1162.

**Note:** If an employer has eliminated or reduced health coverage in anticipation of a qualifying event, that elimination or reduction of that coverage is disregarded when looking at the coverage in effect before the qualifying event occurs.

In general, an employer only has to provide the coverage the qualified beneficiary was receiving immediately before the qualifying event. However, if an employer provides an open-enrollment period for selection of another plan or benefit package, or to add/eliminate family members to similarly situated active employees, then that employer must make the open-enrollment period available to the qualified beneficiaries receiving COBRA continuation coverage.

In some cases, a qualified beneficiary will be covered by a health plan that is specific to the region where she works and does not extend to the area to which the qualified beneficiary is relocating. The employer is not required to provide health coverage if the only plan the employer has is the one that is specific only to the region the qualified beneficiary is leaving. If the employer provides different health coverage to employees that can be extended to the area where the qualified beneficiary is moving, then that health coverage must be made available to the qualified beneficiary in his or her new location.



### **Cost**

Under COBRA, a qualified beneficiary may be required to pay a premium or cost for continuation of coverage. *See* 29 U.S.C. § 1164. The cost of coverage cannot exceed 102% of the cost paid for active beneficiaries. The extra 2% is allowed to try to compensate the employer for the added costs of administering COBRA. As a practical matter, this means that qualified beneficiaries will often have to pay in excess of \$400 per month for health insurance, and more if there are additional beneficiaries. The reality is that COBRA is not a viable option or solution for low-wage earners. In the event that a worker becomes entitled to an additional 11 months of COBRA due to disability (see Duration of Coverage), the health plan can charge 150% of the cost instead of 102% for the additional 11 months. 29 U.S.C. § 1162(3).

### **Duration of Coverage**

When the qualifying event is the termination of employment or the reduction in hours, qualified beneficiaries can purchase up to **18 months** of coverage beginning at the date of the termination or reduction of hours. This period can be extended to **29 months** if the worker whose employment was terminated or whose hours were reduced is determined to be disabled under Title II or XVI of the Social Security Act within the first 60 days of COBRA continuation coverage. The extension also applies to a spouse and any children of the worker who are qualified beneficiaries.

The qualified beneficiaries can purchase up to **36 months** of coverage if the qualifying event is:

- the death of the covered employee;
- a spouse's divorce or separation from the covered employee;
- a dependent child ceasing to be considered as such under the terms of the group health plan; or
- the covered employee's becoming entitled to Medicare.

If the applicable period is 18 months, that period can be extended to 36 months if, during the 18-month period, any of the following occur:

- the covered employee dies;
- the covered employee becomes eligible for Medicare;
- the covered employee divorces or legally separates; or
- the covered employee's child ceases to be a dependent.

*See* 29 U.S.C. § 1162.

### **Early Termination of Coverage by Employer**

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Employers can terminate COBRA coverage before the statutory period expires in the following circumstances:

- on the date the employer stops providing any group health plan to its employees;
- the first day that timely payment of the COBRA premium is not made to the health plan as determined under its provisions;
- after electing COBRA coverage, the date when the qualified beneficiary becomes covered under another group health plan;
- in the case of coverage for a former spouse, when the spouse remarries and becomes covered under another group health plan as the new spouse's dependent;
- for cause (such as submitting fraudulent medical claims) as long as it is on the same basis as similarly situated non-COBRA beneficiaries; or
- after COBRA continuation is elected, the date when the qualified beneficiary becomes entitled to Medicare benefits.

If an individual is receiving coverage under a group health plan because of his/her relationship to a qualified beneficiary and the obligation to provide COBRA coverage to the qualified beneficiary ends, then the obligation to provide group health coverage to the individual ends as well.

## Remedies for Violations of COBRA

There are several remedies available depending on the nature of the COBRA violation:

- The IRS can impose excise tax penalties of up to \$200/day for failure to comply with the Act;
- Beneficiaries can recover a penalty of up to \$110/day for failure to provide election notice;
- Qualified beneficiaries can sue to recover health insurance coverage;
- Failure to provide election notice can be the grounds for a suit for other damages, such as worsening of a medical condition; and
- Attorneys' fees can be awarded to the prevailing party.

See 29 C.F.R. Pt. 5 § 1131-1136.

## Continuation Benefits for Employees in the Military

The Uniform Services Employment and Reemployment Rights Act (USERRA) requires health plans to offer COBRA-like continuation benefits for up to 24 months for employees called to serve in military service. 38 U.S.C. § 4317(a); 20 C.F.R. §§ 1002.1 *et seq.* USERRA applies to employer-sponsored health plans regardless of the size of the employer.

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The employer and health plan may provide that USERRA and COBRA continuation coverage periods run concurrently, so long as the requirements of both laws are satisfied. 26 C.F.R. § 54.4980B-7, Q&A 7. Consult the plan's SPD or other plan documents to determine procedures for electing USERRA coverage. Violations of USERRA should be reported to the Department of Labor's Veterans' Employment and Training Services (VETS).

### Basic Questions to Ask a Client

- Where do/did you work? (If the answer indicates federal civil service or a religious organization, then COBRA likely does not apply. Check for similar rules under those systems.)
- How many people does your company have working for it? (If the answer is fewer than 20, check to see whether this includes part-time employees, whether there were more employees during the year, or whether this is a branch of a larger employer. If the answer is no, then it is unlikely that COBRA applies.)
- Were you covered by health insurance by your employer? (If not, COBRA health-care continuation probably does not apply.)
- Who else in your family is under the employer's health plan? (Spouse? Dependents?)
- When you left work, did your employer inform you about the right to continue your health insurance coverage? (If the worker left employment and has not received notice that she had a right to COBRA coverage, the former employee still has 60 days to elect COBRA coverage, even though she may have lost health coverage.)

### D.C. Government Employees' COBRA Rights

If a claimant loses his or her job, the D.C. Code provides that the D.C. government is required to offer the employee the opportunity to purchase health insurance. *See* D.C. Code § 1-621.14. Federal COBRA rights are not applicable to D.C. government employees.

## HIPAA

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) amended COBRA to add protections for individuals with pre-existing medical conditions. Specifically, HIPAA seeks to (1) limit the exclusion of employees from health plans due to pre-existing conditions; (2) prohibit discrimination against employees and their dependents based on their health status; (3) require employers to make coverage available or renewable to certain employees; and (4) provide workers who lose coverage with better access to individual insurance coverage. *See* 29 U.S.C. § 1181 *et seq.* However, effective Jan. 1, 2014, all group health plans will be prohibited from imposing pre-existing condition exclusions.

## Employee Benefits

HIPAA also provides protections against the unauthorized disclosure of personal health information by certain covered entities, including entities that provide services for employer-sponsored health plans. The privacy provisions of HIPAA apply to health information created or maintained by **health-care providers** who engage in certain electronic transactions, health plans, and health-care clearinghouses. However, employers are *not* covered entities directly regulated by the privacy rules of HIPAA. The Department of Health and Human Services (HHS) has issued the regulation “Standards for Privacy of Individually Identifiable Health Information,” applicable to entities covered by HIPAA. The Office for Civil Rights (OCR) is the Departmental component responsible for implementing and enforcing the privacy regulation. See 45 C.F.R. § 164.500 *et seq.*

To file a complaint for a privacy violation under HIPAA, the worker must do so in writing and within 180 days of when the violation became known to the worker. In D.C., Maryland, or Virginia, the complaint must be filed online at <https://ocrportal.hhs.gov/ocr/smartscreen/main.jsf>, via email at [OCRMail@hhs.gov](mailto:OCRMail@hhs.gov), or by mailing the complaint form to:

Centralized Case Management  
U.S. Department of Health & Human Services  
200 Independence Avenue, S.W., Room 509F, HHH Building  
Washington, D.C.

The complaint form, as well as general instructions for filing a complaint can be located at <https://www.hhs.gov/hipaa/filing-a-complaint/index.html>.

## **Prompt Pay Act of 2002**

D.C. Code § 31-3132(a) requires health benefits plans to compensate any person entitled to reimbursement for a covered service within 30 days after receipt of a claim that is accompanied by all reasonable and necessary documentation. If a health insurer fails to comply with this requirement, the health insurer shall pay interest beginning on the 31<sup>st</sup> day after the receipt of the claim if the claim remains unpaid after 30 days. A formal claim by the person filing the original claim is not required. § 31-3132(b). The statute states the interest payable if the health insurer fails to compensate the person within 30 days. § 31-3132(c)(1)-(3).

The statute stipulates that there shall be a rebuttable presumption that a claim has been received by a health insurer:

- within five business days from the date the provider or person entitled to reimbursement placed the claim in the U.S. mail;
- within 24 hours if the claim was submitted by the provider or provider’s agent electronically and was not returned to the provider by a claims clearinghouse or returned to the provider by the insurer if submitted directly to the health insurer; or

## Employee Benefits

- on the date recorded by the courier if the claim was delivered by courier.

§ 31-3132(h)(1)-(3).

A health insurer shall provide a manual or other document that sets forth the claim submission procedures to all contracting providers at the time of contracting and 30 days prior to any changes in the procedure. § 31-3132(i). Furthermore, a health insurer shall maintain a written or electronic record of the date of receipt of a claim. The person submitting the claim shall be entitled to inspect the record on request and to rely on that record or on any other admissible evidence as proof of the fact of receipt of the claim, including electronic or facsimile confirmation of receipt of a claim. § 31-3132(j).

## Exceptions

“Prompt payment” is not required under this law if the payer:

- notifies the person submitting the claim within 30 days after the receipt of the claim that the legitimacy of the claim or the appropriate amount of reimbursement is in dispute;
- states, in writing, to the person the specific reasons why the legitimacy of the claim, a portion of the claim, or the appropriate amount of reimbursement is in dispute; and
- pays any undisputed portion of the claim within 30 days of the receipt of the claim.

§ 31-3132(d)(1)-(3).

Additionally, the health insurer will not be held in violation of the statute if its failure to pay a claim is caused:

- in material part by the person submitting the claim; or
- by impossibility due to matters beyond the health insurer’s reasonable control, such as an act of God, insurrection, strike, fire, or power outages.

§ 31-3132(k)(1)-(2).

If any portion of the claim is disputed, the health insurer must process the undisputed portion within 30 days after receipt of all reasonable and necessary documentation. § 31-3132(e). If the insurer fails to comply with this requirement, it must pay interest at the statutory rates.

## **Federal Disability Retirement**

## Employee Benefits

For federal workers unable to render **useful and efficient service**, they may apply for disability retirement, through which they can collect a portion of their salary from the contributions made to their retirement fund. If a worker cannot perform **any single critical element** of his or her current job on account of illness or injury, then s/he is unable to render useful and efficient service, and is deemed disabled. *See* 5 U.S.C. § 8451 *et seq.* (FERS); 5 C.F.R. § 844.103 *et seq.* (FERS); 5 U.S.C. § 8337 (CSRS); 5 C.F.R. §§ 831.101, .1201 *et seq.* (CSRS).

A worker need not be totally disabled in order to collect federal disability retirement benefits. If the disabling **medical condition is likely to last more than one year**, then a worker is eligible to collect disability retirement benefits. The disability need not be because of an on-the-job injury, and can be the result of the exacerbation or flare-up of a pre-existing condition.

### Enrollment Requirement

There are two federal employment systems: Federal Employee Retirement System (FERS) and Civil Service Retirement System (CSRS). Make sure you know which system an employee is in before you advise them about disability retirement.

FERS employees must be enrolled in their retirement system for 18 months in order to be eligible for disability retirement. CSRS employees must be enrolled for a minimum of five years in order to be eligible.

**Note:** A federal employee who is injured on the job cannot collect both workers' compensation and disability retirement. Although an employee can apply for both workers' compensation and disability retirement, the employee must elect one or the other.

### Accommodation and Reassignment

Because disability retirement is supposed to be a last resort, federal agencies are required to make reasonable attempts to reassign and accommodate disabled workers. Accommodations must allow the worker to perform all the critical aspects of her job in order to be valid. Reassignments must be to another position in the agency with the same grade, pay, and tenure, and within the same commuting area. Only after attempts to accommodate and reassign have been exhausted can a federal employee apply for disability retirement.

Federal workers **must** cooperate with these attempts at reassignment and accommodation; if they fail to do so, or turn down reasonable accommodations or reassignments, they can be denied disability retirement.

## Checklist

Make sure your client meets all these qualifications in order to successfully apply for disability retirement:

- \_\_\_\_\_ Enrolled in FERS for at least 18 months, or enrolled in CSRS for at least 5 years
- \_\_\_\_\_ Suffer from a disease or injury
- \_\_\_\_\_ This disease or injury became disabling only **after** you entered federal service
- \_\_\_\_\_ Unable to perform any **one** of the critical elements of your job in a satisfactory manner
- \_\_\_\_\_ Likely to be unable to perform that critical element for at least one year
- \_\_\_\_\_ Currently in government service, or have been separated from service for less than one year
- \_\_\_\_\_ Agency cannot accommodate the disability or find a suitable reassignment to a comparable position

## Application Procedure

Employees may submit an application for disability retirement **within one year** after the date of their separation. If the application is submitted before separation or within 31 days of separation, it may be sent to the personnel department of the worker's agency, but it is generally better to send it directly to the Office of Personnel Management (OPM). After 31 days, the application should be sent directly to FERS at Office of Personnel Management, Federal Employees' Retirement System, Employee Records and Service Center, P.O. Box 200, Boyers, PA 16020. For information, request Standard Forms 3105 (A through E) and 3107 from the agency or OPM.

**Note:** Termination from a job does not preclude a federal employee from applying for disability retirement. In fact, termination because a person cannot perform the functions of a job due to a medical condition may help bolster a claim for disability retirement.

If a worker is denied disability retirement by OPM, the worker can usually request reconsideration and file a letter brief in support, as a part of which new evidence (e.g., new medical records) can be submitted. The right to request reconsideration is stated in the CSRS regulations at 5 C.F.R. § 831.109. The FERS regulations do not contain this provision.

If the reconsideration is denied, the worker can appeal to the Merit Systems Protection Board (MSPB) and request a hearing before an administrative law judge (ALJ). Appeals from the ALJ are taken to the MSPB (an actual board that is like an appellate court). Appeals from the MSPB are taken to the Federal Circuit court.

## Benefits Received

If a worker successfully applies for disability retirement under FERS, he will receive 60% of his average pay during the first year of disability and 40% of the average pay during all other years. Average pay is the average amount earned during each year of the three highest consecutive paid years of federal civil service. **FERS employees on disability are also required to apply for Social Security**, even if they believe they are not eligible to receive it. If a person is eligible for Social Security, during the first year, for every dollar the worker receives from Social Security, the same amount will be deducted from his disability payment. This will most likely reduce the worker's entitlement to his disability payment to nothing, or almost nothing. During subsequent years, for each dollar a person receives from Social Security, FERS will deduct 60 cents from the disability payment.

CSRS employees do not have to apply for Social Security, and if they do apply and receive it, their disability payment will not be reduced. Like FERS, CSRS disability is also predicated on the same average pay definition as FERS, but the formula for computing benefits is a bit more complex:

- If a worker has 22 or more years of “creditable service,”<sup>131</sup> but less than 22 years of actual service, she will collect 40% of average pay.
- If a worker has 22 or more years of actual service, the annuity will be computed under the general formula for regular retirement and will be higher than 40% of average pay.
- If a worker has fewer than 22 years of creditable service, she will receive less than 40% of average pay, ranging from 7.5% for 5 years of service to 38.25% for 21 years of service (the percentage increases by 1.75% through year 10, and then increases by 2% each year).

The benefits are taxable income, but recipients are eligible for the Earned Income Tax Credit. *See Policy Basics: The Earned Income Tax Credit*, Center on Budget and Policy Priorities, available at <https://www.cbpp.org/research/federal-tax/the-earned-income-tax-credit>.

Disability retirement benefits continue until the worker (1) dies; (2) returns to work for the federal government; (3) voluntarily gives up the benefits; (4) recovers from the disability; or (5) is “restored to earning capacity.”<sup>132</sup> For more detail, *see* 5 C.F.R. § 831.1209. Workers who successfully received disability are eligible to maintain government health insurance, but they must pay the same monthly premiums as they did

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<sup>131</sup> To compute creditable service, add the number of years until a worker reaches 60 to the number of years she worked in the federal civil service.

<sup>132</sup> A person is restored to earning capacity when his or her income from wages or self-employment or both equals at least 80% of the current rate of pay of the position occupied immediately before retirement. *See* 5 U.S.C. § 8337(d).



when they were employed.

A person can work in another non-government job while on disability retirement. However, if in doing so, she is “restored to earning capacity,” disability retirement benefits will cease, including group health insurance coverage.

## **Retirement for D.C. Public School Teachers**

### **Disability Retirement**

The worker must meet the following conditions to be eligible for disability retirement in D.C.:

- be physically or mentally disabled (“not due to vicious habits, intemperance or willful misconduct”);
- be incapable of satisfactorily performing the duties of the teacher’s position;<sup>133</sup>
- have completed five years of eligible service; and
- apply for disability or be ordered to apply for disability before leaving D.C.PS or within six months of leaving.

See D.C. Code § 38-2021.04(a)

The teacher must be examined under the direction of a health officer of D.C. and be found disabled by the health officer. Alternatively, a two-thirds majority of the members of the Board of Education can qualify a teacher for disability retirement. *Id.* Every worker who retires because of a disability must be examined every year under the direction of the Director of the Department of Human Services to assess the disability. If the worker recovers before reaching retirement age, she shall be reinstated in accord with the rules applicable (similar or equal position). Payment shall continue until the worker is reinstated. The Board of Education may direct or order medical or other examinations to assess the level of disability of the worker. § 38-2021.04(b).

If, before reaching the age of retirement but after retiring due to a disability, the worker earns income of not less than 80% of the current rate of pay for the position that the worker occupied before retirement, the retirement income shall be terminated. § 38-2021.04(c). The retired worker can have his or her payments reinstated if she shows that she is earning less than the 80%; however, the worker must show that this reduction in wage is not due to normal income fluctuations. § 38-2021.04(c).

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<sup>133</sup> This is exact language from the statute, so advocates can resist an attempt by the D.C.P.S. to suggest other suitable employment or arguments that the person is not disabled from all employment.

## **Regular Retirement for D.C. Public School Teachers**

D.C. Public School teachers hired before Oct. 29, 1996, are entitled to an annuity if they have five years of eligible service, retire, and either:

- (1) reach 55 years of age and have completed 30 years of service;
- (2) reach 60 years of age and have completed 20 years of service; or
- (3) reach 62 years of age.

D.C. Code § 38-2021.03(a).

If the worker was employed on or after Oct. 29, 1996, she must complete 30 years of service and five years of eligible service to acquire her annuity. *Id.*

A worker involuntarily separated from service is entitled to an annuity reduced by one-sixth of 1% for each full month the teacher is younger than 55 on the date of separation *if* the worker completed 25 years of service or completed 20 years of service and is older than 50. However, if the worker was removed for “cause on charges of misconduct or delinquency,” she is not eligible for an annuity. § 38-2021.03(b).

If there is a major reorganization, reduction in force, or transfer of functions where a large percentage of workers are separated or placed on furlough or receive a reduction in pay, the Board of Education can offer voluntary retirement as follows:

- (1) workers who have completed 25 years of service; or
- (2) workers who are 50 years or older and completed 20 years of service.

Those who opt for early retirement shall receive an annuity reduced by one-sixth of 1% for each full month the worker is younger than 55 at the date of her separation and be eligible for the early-out retirement incentive program established under D.C. Code § 38-2021.03, § 38-2021.03(f).

# **OTHER**

# **EMPLOYMENT**

# **RIGHTS**

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## **Substance Abuse Testing**

### **Marijuana Testing on Prospective Employees Prohibited in D.C.**

D.C. employers are now prohibited from requiring prospective employees to submit to a drug test for marijuana usage until after they extend a conditional offer of employment. D.C. Code § 32-931(a). There is also no enforcement provision in this law, so it is unclear what remedy an job applicant would have if forced to submit to a drug test for marijuana. This law also did not change the ability of the employers to prohibit *current* employees from using, possessing and consuming marijuana. *See* D.C. Code § 32-931(b).

### **Government Workers**

Drug testing is required by law for many federal and state government employees. For example, about half of all federal government employees are tested at some point, ranging from once during the application/hiring process to random ongoing testing for certain positions.

#### **Federal Government Employees**

##### ***When is Testing Required?***

Executive Order 12,564, signed by Ronald Reagan in 1986, mandates drug testing for federal government employees in “sensitive positions.” *See* 51 FR 32,889, § 3(a) (1986). This includes the handling of classified information; positions charged with law enforcement, national security, and protecting life, property, and public health and safety; and jobs requiring a high degree of trust and confidence. *Id.* at § 7(d). In total, about half of all federal government employees are covered by this law.

The tests are permitted under five circumstances: (1) initial job application; (2) reasonable suspicion of illegal drug use; (3) in conjunction with the investigation of an accident; (4) as part of an Employee Assistance Program (EAP); and (5) pursuant to a drug-testing program established by the agency head in accordance with section 3(a) of the Executive Order. *See id.* at § 3.

##### ***Manner of Testing***

The Department of Health and Human Services (HHS) has promulgated regulations for the manner of testing of federal employees. *See* 53 FR 11970-01 (1988).

Urine testing is generally the method used. Thus, the guidelines exclusively and

## Other Employment Rights

extensively cover urine collection techniques (as opposed to hair, which is sometimes tested by private employers). *See id.* at subpart B, § 2.2. The guidelines require testing for marijuana and cocaine; allow testing for amphetamines, opiates, and PCP; and allow testing for other Schedule I and II controlled substances during reasonable suspicion or accident-related testing, but do not allow testing for alcohol and other legal drugs. *See id.* at subpart B, § 2.1(a).

Some worker protections include:

- (4) Employees must sign a statement that it is their specimen. *Id.* at subpart B, §2.2(f)(22).
- (5) Specimen collectors must ensure workers' privacy unless there is reason to believe the worker may adulterate the sample. *Id.* at subpart B, § 2.2(e).
- (6) Any tested employee must, upon written request, have access to documents relating to his or her test and to the certification of the lab performing the test. *Id.* at subpart B, § 2.9.

### ***What to Do About a Positive Test***

The Executive Order mandates a confirmatory test or the employee's admission that she used illegal drugs before action may be taken on any positive test. 51 FR 32,889, § 5(e) (1986). Both the first and confirmatory test are generally done before the employee is informed of a positive result. *See* 53 FR 11970-01, subpart C, § 3.5 (1988).

Once the worker is informed of a positive test result, she should make a written request for documents pertaining to his or her test. Prior to verifying a positive test result, a Medical Review Officer must give the employee a chance to explain the result. *Id.* at subpart B, § 2.7(c).

Section 5 of the Executive Order specifies disciplinary action once an employee's drug use is established. *See* 51 FR 32,889, § 5 (1986). Generally, the employee will be referred to an Employee Assistance Program (EAP) for rehabilitation, and refusal to take part will result in dismissal, as will any recurrence of drug use. *Id.* at § 5(a-d). Employees in sensitive positions will be temporarily removed pending successful completion of the EAP. *Id.* at § 5(c).

An employee who uses drugs can only avoid discipline if she admits to drug use or volunteers for testing before being identified by other means. *Id.* at § 5(b)(1). S/he must also: (1) seek EAP rehabilitation; and (2) refrain from future drug use. *Id.* § 5(b)(2-3).

### **D.C. Government Employees**

Pursuant to D.C. law, certain employees of the D.C. Department of Corrections, Department of Human Services, and Department of Mental Health are subject to drug and alcohol testing.

## Other Employment Rights

The Department of Corrections Employee Mandatory Drug & Alcohol Testing Act of 1996, D.C. Code §§ 24-211.21 *et seq.*, requires drug and alcohol testing of department employees in the following cases: (1) pre-hire for all applicants; (2) reasonable suspicion based on supervisor's belief; (3) post-accident; and (4) random testing for "high potential risk" employees. D.C. Code § 24-211.22(a). This latter term means "any Department employee who has inmate care and custody responsibilities or who works within a correctional institution, including any employees and managers who are carried in a law enforcement retirement status." § 24-211.21(5).

In addition, supervisors must be trained in substance abuse recognition and get a second opinion from another supervisor before determining reasonable suspicion to test an employee. § 24-211.21(9). If an employee tests positive, s/he may request a confirmatory test of the previous untested half of the same sample at his or her own expense. § 24-211.23(c). A confirmed positive test, or the refusal to submit to a test, may be grounds for dismissal. § 24-211.24.

A very similar law exists for the Department of Mental Health and the Department of Human Services; however, a few significant differences should be noted. *See* D.C. Code §§ 1-620.21 *et seq.* For example, pre-hire testing is only done for applicants to positions in a residential facility or with resident care or custody responsibilities in a secured facility. §§ 1-620.21(4), .22(a)(1). Instead of "reasonable suspicion," the statute refers to "probable cause" testing, and notes that "conditions giving rise to probable cause must be observed and documented." §§ 1-620.22(a)(2), (e). An employee testing positive has one opportunity to seek treatment before being fired. § 1-620.22(f).

### **Maryland Government Employees**

There is no law requiring the testing of state government employees. If the worker is employed in Maryland and is being tested, see "Protections Against Unreasonable Testing/Maryland Regulation of All Employers" below.

### **Virginia Government Employees**

No Virginia law requires the testing of any state government employee, but Virginia permits local governments to require pre-employment testing of law enforcement employees. A law officer who refuses to submit or has unexplained positive result shall be decertified. Va. Code Ann. § 15.2-1707.

## **Federal Government Contract Workers**

The Drug Free Workplaces Act of 1988 requires federal **government contractors** and grant recipients to certify that they provide drug-free workplaces, but this act does not require testing. *See* 41 U.S.C. §§ 8101 to 8106.

## Workers in the Transportation Industry

Millions of transportation workers in the private sector are subject to federally-mandated drug testing through the Omnibus Transportation Employee Testing Act of 1991, Pub. L. No. 102-143, Tit. V, 105 Stat. 917, which requires random drug and alcohol testing of employees in the private transportation sector. It is promulgated through Department of Transportation regulations at 49 C.F.R. §40, along with the following industry-specific regulations:

- Trucking (7.3 million employees): Federal Motor Carrier Safety Admin., 49 CFR § 382
- Aviation (364,000 employees): Federal Aviation Admin., 14 CFR § 120.
- Mass Transit (214,000 employees): Federal Transit Administration, 49 CFR § 655
- Energy Pipeline (190,000 employees): Research & Special Programs Admin., 49 CFR § 199
- Coast Guard and Merchant Marine (132,000 employees): 46 CFR §§ 4, 16
- Railroad (97,000 employees): Federal Railroad Administration, 49 CFR §219

The above rules were written with the same language to the extent possible, for ease of compliance by companies under two or more regulations.

The Omnibus Transportation Act generally regulates private collection techniques and mandates use of the same HHS testing procedures applicable to federal government employees who are tested. *See* 53 FR 11970. The act requires random, post-accident, and reasonable-suspicion alcohol and drug testing, as well as pre-employment testing for drugs only. *See American Trucking Associations, Inc. v. Federal Highway Admin.*, 51 F.3d 405, 407 (4th Cir. 1995) (citing the act). Periodic testing is discretionary. *Id.*

If a safety-sensitive employee tests positive for drugs, she must be removed from safety-sensitive duty if she had a positive drug test result. *See* 49 CFR § 382.501 (trucking employees). An employee may not be returned to safety-sensitive duties until she has been evaluated by a substance abuse professional or Medical Review Officer ("MRO"), complied with recommended rehabilitation, and had a negative result on a return-to-duty drug test. 49 CFR §§ 40.285(a), .305. Follow-up testing to monitor the employee's continued abstinence from drug use may be required. § 40.307.

Testing records are confidential, and may not be released to third parties without the employee's specific written consent. § 40.321. Test results and other confidential information may only be released to the employer and the substance abuse professional/MRO. *Id.* Any other release of this information is only with the employee's written consent. *Id.*



## Workers of Private Employers

Unfortunately, **there are few statutory protections for private-sector workers whose employers choose to test.** If the worker is in a union and the employer tests, the subject is likely covered by the collective bargaining agreement as a mandatory subject of bargaining. *See* NLRA Sec. 8; *Schlacter-Jones v. General Telephone of California*, 936 F.2d 435, 442 (9<sup>th</sup> Cir. 1991) (stating that drug-testing as condition of employment is a proper subject of a collective bargaining agreement).

In the D.C. metro area, only Maryland regulates the manner in which employees may be tested. The Maryland statute applies to all private employers who test their employees for substance abuse. *See* Md. Code Ann., Health - General § 17-214.<sup>134</sup> The employer must use a certified or licensed lab, and must comply with federal standards for cut-off levels for positive tests. *Id.* at § 17-214(f). The employer may use a “single-test device” at the place of work as a pre-employment screen, if the procedure is conducted by a trained operator and if positive tests are confirmed at a lab. *Id.* at § 17-214(j), (k). An employee must, at his or her request, be informed of the name and address of the lab doing the testing at the time the testing is conducted. *Id.* at § 17-214(b)(1)(ii). Hair samples may be used only for pre-employment testing. Specimens may not include hair more than 1½ inches from body. *Id.* at § 17-214(b)(3). Blood, urine and saliva may also be collected. *Id.* at 17-214(a)(11).

If there is a confirmed positive test, then within 30 days from the time the test was performed, the employee must be provided in person or by certified mail with: 1) a copy of test results; 2) a copy of the employer’s written policy on use of drugs and alcohol; 3) a statement of the employee’s right to request independent testing of the same sample at the employee’s expense; and 4) if applicable, written notice of employer’s intent to take disciplinary action. *Id.* at § 17-214(c), (e). Disclosure may not be made to the employer of any legal or medically prescribed drugs (excluding alcohol) found in the sample, except as necessary to comply with the Commercial Motor Vehicle Safety Act of 1986. *Id.* at § 17-214(i).

In addition, Maryland statute requires that persons who lease space at a marine facility from the Maryland Port Administration implement drug and alcohol testing, including random, reasonable cause, post-accident, return-to-work, and post-treatment testing of certain safety-sensitive positions and pre-employment testing of all employees. *See* Md. Code Ann., Transportation § 6-102.1.

In Virginia, the only reference to substance abuse testing is in the state’s Unemployment Compensation Act, which provides that a positive drug test is “misconduct” disqualifying an employee from benefits, if the test was conducted in conformity with the

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<sup>134</sup> This law does not apply to workers who are subject to federally-mandated testing, such as federal government employees in safety-sensitive position and private-sector transportation employees. *See French v. Pan Am Express, Inc.*, 869 F.2d 1, 1 (1st Cir. 1989) (holding state law pre-empted by federal law when it seeks to regulate federally-mandated testing).

HHS guidelines described under “Federal Government Employees/Manner of Testing” above. *See* Va. Code Ann. § 60.2-618(2)(b)(1).

## **Non-Statutory Protections against Unreasonable Testing**

### **Constitutional Challenges**

Federal- and state-mandated testing is analyzed under the Fourth Amendment. Drug testing by the government is a type of “special needs” search under the Fourth Amendment, subject to a **reasonableness balancing test**.<sup>135</sup>

Overall, courts have given the government broad discretion to test employees under safety and security rationales, but they have placed limits on who may be tested and how. The two major Supreme Court cases to address the issue are *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), and *Skinner v. Railway Labor Executives’ Assn.*, 489 U.S. 602 (1989). Unfortunately, these cases are very fact-specific and thus have little precedential value. *Skinner* upheld Federal Railroad Administration regulations requiring automatic testing of employees involved in accidents or who violate certain safety procedures. *Skinner*, 489 U.S. at 634. In a 7-2 decision, the Court held that warrants and individualized suspicion were not necessary in these situations, due to the government’s compelling interest in public safety. *Id.*

*Von Raab* was a closer decision, upholding tests on certain U.S. Customs Service employees 5-4, and unanimously rejecting the testing of a third group of employees. *Von Raab*, 489 U.S. at 679. The government’s stated interest in the testing was the security-related activities of some Customs employees, especially their work in stopping the drug trade. *Id.* The Court found the testing of *anyone* who handles classified materials to be too broad, encompassing mail clerks and attorneys not in the front line of the drug war. *Id.* Both *Skinner* and *Von Raab* employed the reasonableness balancing test.

More informative are the many lower federal courts cases addressing workplace testing. Validity tends to depend on degree to which testing is essential to ensure public safety. *See Nat’l Treasury Employees Union v. Yeutter*, 918 F.2d 968 (D.C. Cir. 1990) (upholding random testing of Department of Agriculture motor vehicle operators while striking down suspicionless testing of employees not in safety- or security-sensitive jobs); *Nat’l Fed’n of Fed. Employees v. Cheney*, 884 F.2d 603 (D.C. Cir. 1989) (upholding random testing of Army air-traffic controllers, aviation mechanics, guards, and drug counselors, but striking down testing of lab workers and those in chain of custody of drug specimens). Pre-

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<sup>135</sup> Constitutional claims may only arise with government action, so if the client works for a private-sector employer not required by law to test, there is likely no constitutional ground for a complaint. *See, e.g., Parker v. Atlanta Gas Light Co.*, 818 F. Supp. 345, 346-47 (S.D. Ga. 1993) (holding that because Drug-Free Workplace Act does not mandate testing, an employer’s decision to test in order to meet the act’s requirements is not governmental action subject to the Constitution).

## Other Employment Rights

employment testing has been accepted for almost any employer. *Cf. Willner v. Thornburgh*, 928 F.2d 1185 (D.C. Cir. 1991) (upholding pre-employment testing for attorney at DOJ, because in order to avoid the intrusion, a person may simply not apply for the job). *But see Georgia Assn. of Educators v. Harris*, 749 F. Supp. 1110 (N.D.Ga.1990) (striking down law requiring testing of all applicants for state employment).

For non-safety sensitive employees, **individualized suspicion** of some type has been required. *See Benavidez v. City of Albuquerque*, 101 F.3d 620 (10th Cir. 1996). The broadest interpretation of “safety-sensitive” includes school teachers, aides, and secretaries, due to their interactions with children. *See Knox County Educ. Assoc. v. Knox County Board of Educ.*, 158 F.3d 361 (6th Cir. 1998).

Direct observation of urine collection, without reasonable, individualized, and articulable suspicion of intent to tamper with sample, is unconstitutional. *See Yeutter; Hansen v. California Dep’t of Corrections*, 920 F.Supp. 1480 (N.D. Cal. 1996). *But see Wilcher v. City of Wilmington*, 139 F.3d 366 (3d Cir. 1998) (upholding direct observation of firefighters due to the nature of their employment and because observation of genitalia was only “incidental”).

### **Common Law Challenges**

In some extreme cases, a worker may be awarded damages for his or her employer’s drug-testing policies. Such claims have usually involved tort claims such as invasion of privacy, negligence, defamation, and wrongful discharge. They have met with mixed success.

In Massachusetts, workers have successfully challenged testing under other statutes not directly relating to drugs or drug testing. *See, e.g., Webster v. Motorola, Inc.*, 418 Mass. 425 (1994) (testing of technical editor struck down under state privacy law). The First Circuit upheld an award for negligent infliction of emotional distress for direct observation of urination in drug testing. *See Kelly v. Schlumberger Technology Corp.*, 849 F.2d 41 (1st Cir. 1988). Successful lawsuits have been brought for excessive or malicious publication of testing results. *See O’Brien v. Papa Gino’s of Am., Inc.*, 780 F.2d 1067 (1st Cir. 1986); *Welch v. Chicago Tribune Co.*, 34 Ill.App.3d 1046 (1975). At least one court has held that the worker’s discharge violated public policy when he was tested without reasonable suspicion but tested positive and was fired as a result. *See Twigg v. Hercules Corp.*, 185 W.Va. 155 (1990).

## **Americans with Disabilities Act & Family Medical Leave Act Issues**

The Americans with Disabilities Act (ADA) and the Family Medical Leave Act (FMLA) provide some limited protection to workers who are being treated for substance abuse problems and for disabled workers subject to drug testing.

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Under FMLA, an eligible worker can take 12 (federal) or 16 (D.C.) weeks of leave for medical care for the worker's own serious health condition. 29 U.S.C. § 2612(a)(1)(D). Substance abuse is considered a **serious health condition** under the law, and a worker can take leave for treatment by a health-care provider, which would include in-patient care. *See Gilmore v. University of Rochester*, 654 F.Supp.2d 141, 149 (W.D.N.Y. 2009). His or her employer, however, is allowed to inquire into the reason needed for the leave and to request medical certification to document the need for and duration of the leave. 29 U.S.C.A. § 2613.

Please review this manual's [Family Medical Leave Act chapter](#) for additional information.

Under ADA, individuals who are currently engaging in drug or alcohol abuse are not protected under the law. 42 U.S.C. § 12114(a). "Current use" is defined as use recent enough to justify the employer's belief that usage is an ongoing problem. 29 C.F.R. Appx. to § 1630.3(a). These employees may be terminated without violating the statute. 42 U.S.C. § 12114. Employers may not, however, discriminate against employees who are addicts but who are not currently using drugs or alcohol, and employers may be required to reasonably accommodate such employees by allowing time off for treatment. *See Buckley v. Consol. Edison Co. of New York, Inc.*, 155 F.3d 150, 154, 156 (2d Cir. 1998); *see also* 1 Empl. Privacy Law § 3:30. With respect to testing, a disabled employee who is required to take certain medications because of his or her disability may need reasonable accommodations when it comes to taking the employer's usual and routine drug tests. 42 U.S.C. § 12114(b).

Please review this manual's [Discrimination chapter](#) for additional information.

## **Worker Adjustment and Retraining Notification Act** **(WARN)**

### **Notice of Layoffs Required**

The Worker Adjustment and Retraining Notification Act (WARN), 29 U.S.C. § 2101 *et seq.*, requires employers to provide **60-day notice of shutdowns and layoffs of a certain size to affected employees**. The Act also requires employers to notify the workers' union, the workers themselves, and the local government office. Employers with 100 or more full-time employees or more than 100 employees who work in the aggregate more than 4,000 hours of regular time each week are required to comply with the statute. Part-time employees are not covered by the act.

**Employment loss** means an employment termination, other than a discharge for cause, voluntary departure, or retirement, a layoff exceeding six months, or a reduction in hours of work of more than 50 percent during each month of any six-month period. Notice must be given when a single site of employment is shut down and 50 or more employees are laid off within 30 days. Notice must also be given when there is a layoff at a single site

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of 500 or more employees, or of 50 or more employees if this equals more than one-third of the workforce at the site. Enforcement is by a civil action in federal or D.C. Superior Court.

An exception to this requirement stipulates that an employee has not experienced an employment loss if the closing or layoff is the result of the relocation or consolidation of part or all of the employer's business. For the exception to apply, the employer must offer to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a six-month break in employment prior to the closing or layoff, or the employer must offer to transfer the employee to any other site of employment regardless of distance with no more than a six-month break in employment, and the employee accepts within 30 days of the offer or of the closing or layoff, whichever is later.

## Remedies for Violations

If the employer fails to adhere to the requirements of WARN, the act provides for damages. Remedies include back pay and ERISA benefits for each worker for each day the notice was late, up to a maximum of 60 days, a penalty paid to the local government, and attorneys' fees. *See* 29 U.S.C. § 2104. The remedy may also include insurance and disability benefits, but will not include punitive damages. The WARN Act states that the rights for which it provides are in addition to any other rights employees may have, and are not intended to alter or affect such rights or remedies. § 2105; *see also Assn. of American Railroads v. Surface Transp. Bd.*, 161 F.3d 58, 65 (D.C. Cir. 1998).

An employer may be exempted from paying all or part of the damages under WARN if the court finds that the employer acted in good faith in failing to adhere to the requirements of the act. If the business closing was not reasonably foreseeable as determined by the court, the employer may be required to pay a reduced amount of damages to the affected employees. Additionally, WARN does not apply if federal authorities shut down the place of employment. *See Office and Professional Employees Int'l Union Local 2 AFL-CIO v. FDIC*, 138 F.R.D. 325, 327 (D.D.C. 1991); *see also Deveraturda v. Globe Aviation Sec. Services*, 454 F. 3d 1043, 1049.

## **Employment Agencies**

Employment agencies are regulated by D.C. Code §§ 32-401 to 416. The statute covers services aimed at providing employers with individual employees or advice concerning individual employees. *See A-L Associates v. Jorden*, 963 F.2d 1529, 1529 (D.C. Cir. 1992).

The statute protects workers' rights in several ways. Prior to performing any service, the employment agency must enter into a written contract with the job-seeker. *See* D.C. Code § 32-404(f)(1). The contract must be written in simple, easily understandable language. § 32-404(f)(2). After signing the contract with the agency, the job-seeker is

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entitled to cancel the contract within three days, which is considered a cooling-off period. § 32-404(f)(5). Agencies cannot, among other things:

- charge registration fees or fees in advance of services;
- charge a fee unless they make an appointment for a job interview;
- refer applicants to jobs where conditions violate federal or D.C. law;
- refer applicants to sites where labor disputes are under way without informing the applicant;
- refer applicants to employers without openings;
- refer applicants without making an appointment with the employer;
- refer applicants for jobs for which they are not qualified; or
- solicit, persuade, or induce any employer to discharge any job-seeker.

§ 32-404(g)-(o).

Employment counseling agencies must provide notice stating that the service is not an employment agency, does not arrange job interviews, and does not provide job placement services. § 32-405(a). Employment counseling agencies are generally held to the same standards as employment agencies.

The statute also prohibits any employment agency, employment counseling service, employer-paid personnel service, job listing service, or employment counselor to fail or refuse to provide service to any person for any reason based on race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, physical handicap, matriculation, or political affiliation. § 32-408.

The statute does not apply to résumé preparation companies; educational, religious, and charitable organizations that do not charge fees; labor organizations that secure employment for their members; or the United States or District of Columbia government. §32-416. The Department of Licensing and Consumer Protection is responsible for enforcing the statute and can be reached at (202) 671-4500.

In cases where an employment agency provides workers for clients (e.g. for maintenance, custodial, or construction work), the agencies are subject to the wage-hour provisions of D.C. law. They must provide a notice-of-hire form when a candidate is working for a client. The form must include the pay rate (or an approximate pay range), the overtime rate if applicable, the date of payday, the location of the work, whether training or safety equipment is required, and who will be responsible for workers' compensation if the employee is injured on the job. D.C. Code § 32-1008. The form must be in English and the employee's primary language (assuming the employer knows or has reason to know that the employee speaks a different language). Failure to provide this form can impact the staffing agency's credibility in a subsequent hearing or court case, and will toll the 3-year statute of limitations for the period when the agency fails to provide the form. D.C. Code § 32-1308.

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In the case of a temporary staffing agency, violations of D.C. wage laws can also subject its client to liability, without the need to prove that the client exercised sufficient control over the employee so as to be his “employer.” The aggrieved employee, his representative, or the District, must first notify the temporary staffing agency and the client of the possible violations, and provide 30 days to cure before filing a lawsuit. The staffing agency must indemnify the client should any claim emerge. D.C. Code § 32-1303(6).

## **Polygraph Testing**

### **Federal Law**

Polygraph testing was effectively made illegal by the Employment Polygraph Protection Act. *See* 29 U.S.C. §§ 2001-2009. Direct complaints may be made to the Department of Labor; civil penalties up to \$10,000 are available and attorney’s fees are awarded to prevailing parties.

However, under the following circumstances, an employer can legally require a worker to submit to a polygraph examination: (1) the employer is engaged in an ongoing investigation involving economic loss or injury to its business; (2) the worker to be tested had access to the property in question; and (3) the employer has a reasonable suspicion that the worker was involved in the incident. *See Long v. Mango’s Tropical Café, Inc.*, 972 F. Supp. 655 (S.D. Fla. 1997). It is important to note that neither polygraph test results nor a refusal to submit to a polygraph test can form the sole basis for discharge, discipline, refusal to promote, or any other adverse employment action, even in the case of an ongoing investigation involving economic loss. Instead, an employer must have additional evidence to support such an action. *See Mennen v. Easter Stores*, 951 F. Supp. 838 (N.D. Iowa 1997).

### **D.C. Law**

The Prevention of the Administration of Lie Detection Procedures Act of 1978 makes it a tortious act for employers in the District of Columbia to administer a lie detector test to an employee or prospective employee. *See* D.C. Code § 32-902(a) (prohibition); § 32-903(a) (tortious act). The act excludes employees of the federal government, employees of foreign governments, and employees of international organizations defined in 22 U.S.C. § 288. § 32-901(1). There is an exception to the prohibition in cases of “any criminal or internal disciplinary investigation, or pre-employment investigation conducted by the Metropolitan Police, the Fire Department, and the Department of Corrections; provided that any information received from a lie detector test which renders an applicant ineligible for employment shall be verified through other information and no person may be denied employment based solely on the results of a pre-employment lie detector test.” D.C. Code § 32-902(b). The act further provides that its protections cannot be abrogated through contract or an arbitration decision. *Id.*

Employers who violate this act can be punishable criminally and civilly. There is a

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private right of action through which an employee can recover an amount to be determined by the court, including attorneys' fees. § 32-903(d). The language of subsection (a) indicates that it is a claim in tort and that tort damages are recoverable.

## **D.C. Government Employees' Right to Personnel File**

Under D.C.'s Whistleblower Protection Act, a D.C. government employee also has the right to view his or her "own personnel file, medical report file, or any other file or document concerning his or her status or performance within his or her agency." See D.C. Code § 1-631.01 *et seq.*

## **Tax Issues**

### **Withholding Requirement**

At the beginning of employment, the employer needs to determine how much money to withhold. This amount depends on how much the worker makes, whether the worker is married or has dependents, and the number of exemptions the worker chooses to claim on his or her hiring tax forms.

Workers can determine the proper amount of withholding by using a Withholding Calculator available on many websites. One of the best such calculators can be found at <https://members.homeworksolutions.com/login> (registration for free calculator required). This site, designed for those who employ household workers, will calculate withholding for federal, D.C., Maryland, Virginia, and several other states.

The failure to withhold taxes from wages can make the employer liable for the amount not withheld. See 26 U.S.C. § 6672(a); D.C. Code § 47-1812.08(f). It is the employer's responsibility to ask for a withholding exemption certificate (a W-4 form, D-4 form for D.C. taxes). If the worker fails to furnish one, then the employer must consider the person as single with no withholding. See 26 C.F.R. § 31.3402(f)(2)-1(a).

### **Definitions**

**Employer** is defined as "the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person, except that (1) if the person for whom the individual performs or performed the services does not have control of the payment of the wages for such services, the term 'employer' means the person having control of the payment of such wages, and (2) in the case of a person paying wages on behalf of a nonresident alien individual, foreign partnership, or foreign corporation, not engaged in trade or business within the U.S., the term 'employer' means 'such person.'" See



26 U.S.C. § 3401(d).

**Wages** are defined as “all remuneration for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash.” 26 U.S.C. § 3401(a); *see also* D.C. Code § 47-1801.04 (adopting federal definitions of “employer” and “wages”).

### **Exceptions to Withholding Requirement**

Taxes do not need to be withheld on numerous types of wages. The following exceptions are relevant to low-income workers:

- live-in domestic workers in a private home;
- service not in the course of the employer’s trade or business of less than \$50, or if paid in a medium other than cash;
- children under 18 delivering newspapers;
- other newspaper sellers (see subsection (10)(A));
- tips paid in a medium other than cash; and
- tips below \$20 a month.

*See* 26 U.S.C. § 3401(a).

### **Failure to Withhold Taxes**

When an employer improperly fails to withhold taxes from a worker’s paycheck, the worker can file a complaint with the D.C. Tax and Revenue Office, Audit Division. The telephone number for the office is (202) 442-6854. The worker can also report the employer to the IRS Criminal Investigation Hotline at 1-800-829-0433 (be prepared to wait 15-20 minutes for your call to be answered). A report requires the name of the business, the address (preferably the corporation headquarters), the employer tax identification number (this can be found on a W-2 form or check stubs), and name of the individual in charge of the company.

### **Misclassification of Worker as Independent Contractor**

Employers sometimes misclassify workers as independent contractors and do not withhold taxes. If the worker completed a W-4 at the time of hiring, the worker can contact the IRS to complain at (800) 829-1040. If the worker did not complete a W-4, the worker must pay the taxes on his or her own. In D.C. and Maryland, the worker must go through the IRS as described above. In Virginia, call the state tax office at (804) 367-8031. From there, the worker will be referred to the district office to file a complaint.

Misclassified workers can also follow this procedure when filing their taxes in order to remedy the misclassification:

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- complete a 1040 form (the usual tax form);
- attach a completed 4852 form, a W-2 form substitute (can be obtained from [www.irs.gov](http://www.irs.gov));
- complete an employee's affidavit, spelling out the working relationship between the worker and employer, and showing why the worker is an employee, not an independent contractor;
- attach a completed 4137 form (Social Security and Medicare Tax on Unreported Tip Income form; also available on [www.irs.gov](http://www.irs.gov)).

## Issuance of W-2s

Under D.C. law, each employer must issue a year-end statement on or before January 31 of the following year. The statement must show the name and address of the employer; the name, address, and Social Security number of the worker; the total amount of wages; and the total amount deducted and withheld as tax. *See* D.C. Code § 47-1812.08(g)(1)(A). In practice, this requirement is fulfilled by the issuance of a W-2 form. If a worker does not receive a W-2, he or she should write the employer and request it, giving the current address. If it is still not received, a worker can complete IRS Form 4852, W-2 Substitute. To get a form or to file a complaint, the worker may contact the IRS at 800-829-1040. In Maryland, the worker may also call the state tax office at 800-638-2937 and they will file a complaint.

## Earned Income Tax Credit

Most low-income workers who are older than 25 qualify for the federal and D.C. earned income tax credits. However, undocumented workers who file taxes using an ITIN rather than a valid Social Security number or who file with spouses who have only an ITIN are not eligible. The Earned Income Tax Credit (EITC) is a refundable federal tax credit for eligible individuals and families who work and have earned income under a certain threshold. (This threshold amount of income varies by tax year; for more information, visit the IRS website at [www.irs.gov](http://www.irs.gov).) The EITC reduces the amount of tax owed by the worker, potentially resulting in a refund. Workers can also file for **advance** EITC payments using a form available from the IRS. The advance EITC allows those taxpayers who expect to qualify for the EITC and have at least one qualifying child to receive part of the credit in each paycheck during the year the taxpayer qualifies for the credit.

The IRS has information on its website that describes the EITC and how to apply for it, which can be found at <https://www.irs.gov/credits-deductions/individuals/earned-income-tax-credit-eitc> by calling 1-800-829-3676.

Free help is available for preparing tax returns through VITA, the Volunteer Income

## Other Employment Rights

Tax Assistance program operated by the IRS. To find the site nearest to you, call 1-800-TAX-1040. You may also visit D.C. EITC Campaign's website at <https://communitytaxaiddc.org/locations-other/>.

**Note:** D.C. also has an EITC, which may be of benefit to D.C. residents.

## **The Civil Rights Tax Fairness Act**

The Civil Rights Tax Fairness Act amends Title 47 of the District of Columbia Official Code to exclude from gross income certain amounts received on account of unlawful discrimination and to allow income averaging for back pay and front pay awards received on account of claims arising from unlawful employment discrimination. The statute enables employees who have been discriminated in the workforce to bring forth their claims without concern of severe tax penalty if their claim succeeds. If an employee succeeds on a claim of unlawful employment discrimination, D.C. Code § 47-1806.10 governs the amount of tax imposed on the back pay or front pay received by the employee for the taxable year in D.C.

The statute stipulates that if employment discrimination back pay or front pay is received during a taxable year, the tax imposed shall not exceed the tax that would be imposed if: (a) no amount of back pay or front pay were included in gross income for the year; and (b) no deductions were allowed for the year for expenses in connection with making or prosecuting any claim of unlawful employment discrimination by or on behalf of the taxpayer. § 47-1806.10(b)(1).

The statute further mandates that the tax imposed shall not exceed the sum of the product of:

- (a) the number of years in the back pay period and front pay period; and
- (b) the amount by which the tax determined under section § 47-1806.10(b)(1) would increase if the amount on which such tax is determined were increased by the average annual net back pay and front pay amount.

§ 47-1806.10(b)(2).

The award or settlement, however, is still subject to federal taxes, with the general exception of attorneys' fees and prejudgment interest.

## **D.C. Transportation Subsidy Law**

Employers with 20 or more employees must offer at least one transportation benefit to its employees. Employers must provide one of three commuter benefit options: (1)

employee-paid pre-tax benefit; (2) employer-paid direct benefit; or (3) employer-provided transportation. Most eligible employers will likely provide the first option, taking the form of a separate withholding from the employee's pay, one that is tax-deductible. The employer must provide funds directly or indirectly through a SmarTrip Card or Vanpool or Shuttle services through one of these benefit options. *See* D.C. Code § 32-152. Employers who fail to offer at least one transportation benefit program, is subject to civil fines and penalties. *Id.*

## **Non-Compete Clauses in Employment Contracts**

### **D.C. Law**

Recent 2022 legislation imposes a general ban on non-compete agreements for employees who spend more than 50% of their time working in D.C.<sup>136</sup> The law excludes highly compensated employees (those earning over \$150,000 or more per year) and medical workers (those earning over \$250,000 per year). While non-compete agreements are valid for highly compensated individuals, they must include geographical limitations and are temporally limited to one year for highly compensated employees and two years for medical workers. Employers are also permitted to bar employees from the disclosure of confidential and proprietary information. D.C. Code §§ 32-581.01-32-581.05. The validity of non-compete clauses is determined by a rule of reason, which requires a fact-intensive inquiry that depends on the totality of the circumstances. *See Deutsch v. Barsky*, 795 A.2d 669 (D.C. 2002).

As a general rule, any restraint of trade or commerce within the District of Columbia is illegal. *See* D.C. Code § 28-4502. A promise to refrain from competition that imposes a restraint that is ancillary to an otherwise valid transaction or relationship is unreasonably in restraint of trade if 1) the restraint is greater than is needed to protect the promisee's legitimate interest in terms of time, geographic area, or type of activity, or 2) the promisee's need is outweighed by the hardship to the promisor and the likely injury to the public. *See Venture Holdings Ltd. v. Carr*, 673 A.2d 686, 689 (D.C. 1996).

### **Maryland Law**

Maryland prohibits the use of non-compete agreements for low wage employees, specifically those earning less than \$31,200 per year or \$15 an hour.<sup>137</sup> *See* Md. Code. Ann. § 3-716. In Maryland, a permissible non-compete clause will be enforced if proven reasonably necessary to protect the employer's business, but such a clause cannot be used simply as a tool to defeat competition. *See Holloway v. Faw, Casson & Co.*, 319 Md. 324 (1990) (enforcing non-compete clause containing a 40-mile restriction, but reducing time restriction from five years to three years). *See also Deutsche Post Glob. Mail, Ltd. v. Conrad*,

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<sup>136</sup> The Non-Compete Clarification Amendment Act of 2022 went into effect on October 1, 2022.

<sup>137</sup> The Non-Compete and Conflict of Interest Clause Act went into effect on October 1, 2019.

116 F. App'x 435 (4th Cir. 2004) (holding that a covenant not to compete was broader than reasonably necessary to protect the company, and therefore unenforceable). Restrictive covenants that perpetuate a monopoly, unreasonably restrict a worker's ability to support him or herself, or are part of an employment contract breached by the employer are not likely to be enforced. *See Ruhl v. F.A. Barlett Tree Expert Co.*, 245 Md. 118 (1967) (enforcing non-compete preventing competition for two years in surrounding six Maryland counties).

The two main factors that will determine whether a covenant not to compete will be deemed reasonable are the temporal and geographic restrictions placed on the worker. These restrictions cannot be greater than are reasonably necessary to protect the employer and may not impose an undue hardship on the worker. *See Tuttle v. Riggs-Warfield Roloson*, 251 Md. 45 (1968) (holding agreement barring employee from soliciting employer's customers for two years reasonable). Factors weighed in determining the reasonability of the covenant's restrictions include the nature of the occupation, the skill level of the worker, the opportunity for the solicitation of the employer's customers, the public interest in enforcing the covenant, and the impact on the worker and employer. *See Budget Rent A Car of Washington v. Raab*, 268 Md. 478 (1973) (refusing to enforce non-compete against unskilled worker with little access to employer's customer data).<sup>138</sup>

## Virginia Law

In Virginia, covenants not to compete are enforceable if the employer shows that (1) the restraint is "no greater than is necessary to protect the employer's legitimate business interest;" (2) the restraint is not excessively severe and oppressive in restricting the employee's ability to market him or herself and procure income; and (3) the covenant does not violate public policy. *See Paramount Termite Control v. Rector*, 238 Va. 171, 174 (1989).<sup>139, 140</sup>

However, covenants not to compete are prohibited for low-wage employees. *See* VA Code § 40.1-28.7:8. "Low-wage employee" means an employee whose average weekly earnings are less than the average weekly wage in the Commonwealth as determined pursuant to subsection B of VA Code § 65.2-500. Current rates can be found [here](#). The definition also includes independent contractors compensated at an average rate less than the median hourly wage for the Commonwealth for all occupations as reported by the

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<sup>138</sup> The most common reason for the enforcement of a covenant is to prevent the misuse of trade secrets and other confidential material essential to the employer's business. *See Becker v. Bailey*, 268 Md. 93 (1973). Low-wage workers rarely have access to this kind of data.

<sup>139</sup> The outcome as to the exact non-compete clause in *Paramount Termite Control*, but not the test applied, was recently overruled in *Home Paramount Pest Control Companies, Inc. v. Shaffer*, 282 Va. 412, 419-20 (2011), citing subsequent refinements to the law most recently in *Omniplex World Services Corp. v. U.S. Investigation Services, Inc.*, 270 Va. 246 (2005).

<sup>140</sup> Critical information concerning consumer lists, exact market share, technological projects, and plans for market expansion are even more so protected and are generally also covered by nondisclosure agreements. *See Blue Ride Anesthesia & Critical Care v. Gidick*, 239 Va. 369 (1990); *Roto-Die, Inc. v. Lesser*, 899 F.Supp 1515 (W.D. Va. 1995).

## Other Employment Rights

Bureau of Labor Statistics of the U.S. Department of Labor. Virginia law creates a private cause of action for low-wage employees, and provides as remedies injunctive relief, liquidated damages, lost compensation, and reasonable attorney's fees and costs. It also authorizes VDOLI to assess a civil penalty against the employer of \$10,000. The statute of limitations for the newly created action is two (2) years.

The employer has the burden of proving that a non-compete covenant is valid. See *Foti v. Cook*, 220 Va. 800 (1980). In determining the legality of the restraint, the court looks to whether the time or geographic restrictions placed on the worker are reasonable or "greater than is necessary to protect the employer's legitimate business interests." *Paramount Termite Control v. Rector*, 238 Va. 171, 174 (1989). Time restrictions are likely to be upheld if the time limit is identical or closely related to an important element in the business. See e.g., *Roanoke Eng'g Sales Co. v. Rosenbaum*, 223 Va. 548 (1982) (validating a five-year limit dealing with insurance business competition on the ground that many policies came up for renewal in either three or five years). Likewise, geographic restrictions coterminous with the territory in which the employer does business have been found to be reasonable. See *Meissel v. Finley*, 198 Va. 577 (1956), but see *Blue Ride Anesthesia & Critical Care v. Gidick*, 239 Va. 369 (1990) (holding invalid geographic restriction where area was limited to territory serviced by employees.)

### **Establishing proof of harm**

It is necessary for the employer to show actual damage by referring to occurrences of "successful competition; it is sufficient if such competition, in violation of the covenant, may result in injury." *Worrie v. Boze*, 191 Va. 916 (1951). If the employer has proven a breach of a valid non-compete covenant, and has shown actual injury, damages are usually determined according to provisions in the covenant, which often include liquidated damage provisions. See *Foti v. Cook*, 220 Va. 800 (1980).

### **Preliminary injunctions**

Prior to a court judgment on the validity of the non-compete clause, the employer can obtain a preliminary injunction enforcing the non-compete covenant if she meets the requirements set forth in *Worrie v. Boze*, 191 Va. 916 (1951):

Generally, covenants by employees not to engage in a similar or competing business for a definite period of time following the termination of the contract of employment in which the covenant is incorporated will be enforced in equity unless found to be contrary to public policy, unnecessary for the employer's protection, or unnecessarily restrictive of the rights of the employees, due regard being had to the subject-matter of the contract and the circumstances and conditions under which it is to be performed.

*Id.* at 926.

### **Judicial modification**

Virginia courts have generally been less inclined to adopt the **blue pencil approach** (deleting or adding words to a particular clause to make it reasonable) or the severing rule of modification (construing independent clauses independently) in circumstances where the restrictions in the covenant not to compete are unenforceable because they are overbroad. *See Roto-Die, Inc. v. Lesser*, 899 F. Supp. 1515 (W.D. Va. 1995) (declining to adopt the blue pencil approach).

## **Organ Donation Leave**

### **D.C. Law**

The D.C. Organ & Bone Marrow Donor Leave Amendment Act of 2022 amends the District of Columbia Government Comprehensive Merit Personnel Act of 1978 to provide government employees leave with pay to serve as an organ or a bone marrow donor. A government employee is entitled to up to 30 days of leave to serve as an organ donor, and up to seven days of leave to serve as a bone marrow donor. *See* D.C. Code § 1-612.03b(a). Additionally, the organ or bone marrow donor may utilize this leave without loss or reduction in pay, leave, or credit for time of service. However, the law only applies if the employee is a volunteer donor, and any compensation received by the employee is limited to the costs and expenses associated with organ or bone marrow donations. § 1-612.03b(b).

### **Maryland Law**

Under the Maryland Organ & Bone Marrow Donation Leave Act, employers with at least 15 employees working in Maryland must provide eligible employees with sixty (60) business days of unpaid leave to serve as an organ donor, and thirty (30) business days of unpaid leave to serve as a bone marrow donor, in any 12-month period. The law borrows the FMLA's definition of eligible employee, requiring an employee to have worked for at least 12 months and at least 1250 hours in the preceding 12 months. Employees must provide a written physician verification confirming the employee is an organ or bone marrow donor *and* there is medical necessity for the donation. Most notably, organ donation leave *may not be taken concurrently* with FMLA leave. Organ donation leave affords the employee job restoration rights, maintenance of health insurance, and not considering the leave as a break in service for purposes of seniority, leave entitlement, or salary adjustment. This law went into effect on January 1, 2020.

## **The D.C. Language Access Act of 2004**

## Other Employment Rights

The D.C. Language Act of 2004, D.C. Code § 2-1931 et seq., requires that all covered D.C. agencies, including the **Office of Human Rights (D.C.OHR)** and all divisions of the **Department of Employment Services (DOES)**, provide “translations of **vital documents** into any non-English language spoken by a limited or no-English proficient population” as well as oral language services to individuals seeking to “access or participate in the services, programs, or activities offered by the covered entity.” §§ 2-1932(a) and 2-1933(a). “Vital documents” means applications, notices, complaint forms, legal contracts, and outreach materials published by a covered entity in a tangible format that inform individuals about their rights or eligibility requirements for benefits and participation. § 2-1931(7). The languages covered under the act are Spanish, Vietnamese, Chinese, Korean, French, and Amharic.

Workers who are trying to access services or file claims with D.C.OHR or the Department of Employment Services, and who speak any one of the languages covered by the act, are entitled to and should request interpretation services and/or that they receive all correspondence from D.C.OHR or the DOES in their native languages. Any worker who speaks a language other than English, even if not specifically covered by the act, should request oral interpretation services through language line.

## Complaint Process

The D.C. Office of Human Rights is charged with enforcing this act and encourages individuals to file an informal complaint with the agency where the issue occurred prior to submitting a formal complaint. This informal complaint entails contacting the Language Access Coordinator at the agency where the incident occurred with the following information:

Agency name;  
Date of incident;  
Time of incident;  
Location where incident occurred (*i.e.*, address); and  
Name of the staff person encountered at the agency.

A list of all Language Access Coordinators and their contact information can be found on the Office of Human Rights website.

Although filing an informal complaint is an option, individuals have the right to file a formal complaint with the D.C. Office of Human Rights by completing the complaint form found on the Office of Human Rights website ([www.ohr.DC.gov](http://www.ohr.DC.gov)). Complaints can be filed online, in person, or mailed to the Office of Human Rights, 441 4th St. NW, Suite 570 North, Washington, D.C. 20001. If the worker does not wish to file a complaint, organizations and/or advocates may file a complaint to report the violation.



## Other Employment Rights

Discrimination claims may be filed with the Office of Human Rights if the individual feels he or she has been directly harmed by the agency based race, color, or national origin as a result of the denial of language access. To file a discrimination complaint, please refer to the Discrimination section of this manual.

### **Social Security No-Match Letters**

A “no match” letter is a letter sent out from the Social Security Administration (SSA) to an employer and/or an employee who has submitted documents that the SSA has determined contain names and Social Security numbers that do not match SSA records. Common errors resulting in a no-match letter include: incorrect name or SSN, misspelled names, using nicknames or shortened names, using titles before or after the name, hyphenated names, and name changes. If a worker receives a no-match letter, or if a worker becomes aware of a mismatch by being notified by his employer, the worker should first ask his or her employer for a copy of the letter received by the employer.

If the employee wants to correct the mismatch, the employee should go in person to his local SSA office with identification and Social Security card if possible, to submit any corrections to the SSA. If the employee works in a unionized workplace, she should talk to his or her union steward for assistance on no-match issues. The collective bargaining agreement between the union and the employer often will provide the best protection for the employee who is the subject of the no-match letter.

**The employer is not required by the SSA to take any action** regarding the no-match letter, even if the worker does not provide corrected information. SSA asks employers to respond to no-match letters ONLY if they or their employees have corrected information.

An employer may not lay off, fire, suspend, intimidate, discriminate, or threaten an employee just because his or her name appears on a no-match letter. A no-match letter, by itself, does not constitute notice that a worker is not authorized to work. Further, an employer cannot request that an employee provide additional documentation just because it has received a letter from the SSA about a mismatch. Employers may not require employees to re-verify their work authorization based only on receiving a no-match letter. See [www.nelp.org](http://www.nelp.org); see also, [www.ssa.gov](http://www.ssa.gov).

# **DOMESTIC VIOLENCE as an EMPLOYMENT ISSUE**

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## Domestic Violence as an Employment Issue

## **Introduction**

The epidemic of domestic violence in American society is well-documented. Nearly one in every three adult women experiences at least one physical assault by an intimate partner during adulthood. Domestic violence is a pattern of behaviors directed at intimate partners that includes physical, sexual, and psychological attacks, as well as economic coercion. It occurs in same-gender and heterosexual relationships, teen relationships, and among all socio-economic levels. It also occurs in all cultures, races, ethnic, and religious groups. No one is immune.

Domestic violence, sexual assault, and stalking can have a significant impact on an individual's ability to work and on the workplace in general. An employer or co-worker may harass, assault, or stalk a fellow employee, affecting her productivity and jeopardizing her employment rights. A non-employee may also stalk, assault, or harass an employee at work, endangering her and her co-workers. Not surprisingly, one-quarter to one-half of domestic violence victims report losing a job due at least in part to domestic violence. One study has shown that 96 percent of employed domestic violence victims experience problems at work related to domestic violence. In some cases, employers fire employees who are victims of domestic violence just because they are victims. Moreover, domestic violence may result in job loss because a victim missed days of work due to injuries caused by battering and was unaware of her rights to sick leave or family and medical leave.

As employees, domestic violence victims are entitled to the same protections as any other employee, but there are unique aspects of their experiences that raise specific issues, some of which are addressed in this chapter.

## **Family and Medical Leave**

A domestic violence victim who needs time off from work to seek medical attention and/or to heal from a serious health condition resulting from domestic violence may be entitled to **job-protected leave** under the federal Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601, *et seq.*, or the D.C. Family and Medical Leave Act (D.C.FMLA), D.C. Code § 32-501, *et seq.* Neither of these acts, however, makes explicit reference to domestic violence.

### **Federal FMLA**

In order to be covered by the FMLA, the employee must have a **serious health condition** as defined under the act. *See* 29 U.S.C. § 2611(11). Domestic violence victims may experience physical and/or emotional abuse that results in injuries and/or conditions that qualify as serious health conditions under the FMLA, such as post-traumatic stress disorder, neck or back injuries, or head injuries.

## Domestic Violence as an Employment Issue

To be an **eligible employee** under FMLA, the employee must have worked for a covered employer for at least a year, and she must have worked for at least 1,250 hours for that employer during the last year preceding the date she needs FMLA-qualifying leave. *See* 29 U.S.C. § 2611(2)(A). A **covered employer** is one that employs 50 or more persons within a 75-mile radius. *See* 29 U.S.C. § 2611(4)(A)(i).

If an employee is eligible for FMLA leave, a covered employer is prohibited from discharging her for taking up to **12 weeks of unpaid leave** to care for her own serious health condition.

### **D.C. Family & Medical Leave**

Under D.C. law, an employee is eligible for up to **16 weeks of unpaid family and medical leave every 24 months** to care for her own “serious health condition” if she has been employed by the same employer for a year without a break in service and worked more than 1,000 hours in the 12-month period preceding her request for family and medical leave. D.C. Code § 32-503(a).

Under the D.C. law, a **covered employer** is one that employs 20 or more employees. *See* D.C. Code. § 32-516(2). The definition of **serious health condition** differs under federal and D.C. law and the purposes for taking the leave are slightly different.

### **D.C. Accrued Paid Sick and Safe Leave Act of 2008**

In D.C., employers must provide a certain amount of paid safe and sick leave to employees for illnesses and to address issues arising from stalking, domestic violence, or sexual abuse. D.C. Code § 32-531.02, *et seq.* The leave may be used for the illness or safety of the employee or a qualified family member. D.C. Code § 32-531.02(b)(4). The definition of “family member” is identical to the definition under the D.C. FMLA, and an “employee”<sup>141</sup> must work the same requisite hours within a 12-month period to qualify. D.C. Code §§ 32.531.01(2)(A), (4).

The amount of leave an employee is eligible for depends on the size of the employer:

- “100 or more employees: at least 1 hour of paid leave for each thirty-seven (37) hours worked, not to exceed 7 days of paid leave per calendar year.” D.C. Code § 32-531.02(a)(1);
- “25-99 employees: at least 1 hour of paid leave for every 43 hours worked, not to exceed 5 days of paid leave per calendar year.” D.C. Code § 32-531.02(a)(2);

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<sup>141</sup> Independent contractors, students, and health-care workers who choose to participate in a premium pay program, and restaurant wait staff and bartenders who work for a combination of wages and tips do not qualify as “employees” under the act. D.C. Code § 32-131.01(2)(B).

## Domestic Violence as an Employment Issue

- “1-24 employees: at least 1 hour paid leave for every 87 hours worked, not to exceed 3 days of paid leave per calendar year.” D.C. Code § 32-531.02(a)(3).

Paid leave may be used for an “absence resulting from employee or employee’s family member being a victim of stalking, domestic violence, or sexual abuse,” if the absence is directly related to seeking medical attention to treat or recover from physical or psychological injury or disability caused by the stalking, domestic violence, or sexual abuse; obtaining services from a victim services organization; obtaining psychological or other counseling services; temporary or permanent relocation; taking legal action, including preparation; or taking other action that could reasonably be determined to enhance physical, psychological, or economic health or safety of employee, employee’s family member, or the safety of those who work or associate with employee. *See* D.C. Code § 32-531.02(b)(4).

Paid leave guaranteed by the Accrued Sick and Safe Leave Act does carry over from year to year, but an employee is not entitled to cash out such leave at the termination of employment. D.C. Code § 32-531.02(c)(2).

Claims asserted pursuant to this act may be filed with the D.C. Office of Wage-Hour.

## **Maryland Healthy Working Families Act**

Under the Maryland Healthy Working Families Act (MHWFA), Maryland private employers with 15 or more employees must provide paid sick and safe leave. Employers with 14 or fewer employees must provide unpaid leave. In addition to providing paid sick leave, eligible employers must provide paid leave to allow employees to obtain relief in response to domestic or sexual assault for themselves or a family member. Covered employees accrue one leave hour for every 30 hours worked. Claims asserted pursuant to the MHWFA may be filed with the Maryland Commissioner of Labor and Industry.

Please see this manual’s chapter on the [Family Medical Leave Act](#) for additional information regarding qualifications and requirements for leave under D.C., Maryland, and federal law, as well as how to file a claim.

## **Anti-Discrimination Protections**

If the worker is engaged in an intimate relationship with a co-worker who engages in abusive behavior, discrimination laws may be implicated.

## Claims under Title VII

The Civil Rights Act of 1964 (Title VII) prohibits employers who employ more than 15 employees from discriminating against employees because of their sex. *See* 42 U.S.C. § 2000e-2(b). It applies to employers who employ 15 or more employees. *Id.* at § 2000e(b). If the co-worker perpetrator is the employee's supervisor or employer, the batterer's harassment, assault, or stalking at work may be in violation of Title VII or the D.C. Human Rights Act as sexual harassment. *See* 42 U.S.C. §2000e *et seq.*; D.C. Code § 2-1402.11.

In addition, employers violate Title VII when they treat battered women differently than similarly situated male employees on account of gender. *See Rohde v. Steel Casings, Inc.*, 649 F.2d 317 (5<sup>th</sup> Cir. 1981). For example, if an employer allows male employees time off from work to attend family court or child support proceedings, but refuses to allow female employees time off to seek protective orders from their batterers, the employer may be discriminating against the female employees because of their sex.

## D.C. Human Rights Act

In December 2018, the District of Columbia Council passed the Employment Protections for Victims of Domestic Violence, Sexual Offenses, and Stalking Amendment Act of 2018 (Employment Protections Act), which amended the D.C. Human Rights Act to add employment discrimination protections for victims, and their family members, of domestic violence, sexual offenses, or stalking (DVSOS). The law went into effect on October 1, 2019. Under this expansion, D.C. employers may not take an adverse employment action against an employee based wholly or partially on the fact that the employee attended, participated in, prepared for (or requested leave to attend, participate in, or prepare for) a criminal, civil, or administrative proceeding related to DVSOS offenses; or the employee sought physical or medical health treatment or counseling related to DVSOS offenses; or an individual caused a disruption at the employee's workplace or made a threat to the employee's employment, related to DVSOS offenses.

Employers are also required to provide reasonable accommodations to victims of or family members of victims of DVSOS offenses when it is necessary to ensure the employee's security and safety – unless the accommodation would cause the employer an undue hardship. Employers may not disclose any information related to an employee's status as a victim of or family member of a victim of DVSOS that was provided to the employer by the employee.

Please see this manual's chapters on [Sexual Harassment](#) and [Discrimination](#) for a more in-depth discussion of gender-based harassment and discrimination under D.C. and federal law.

## **Claims under the ADA**

Long-term mental or physical injuries caused by domestic violence, including, but not limited to, post-traumatic stress disorder or back and neck injuries, may be covered under the Americans with Disabilities Act (ADA) or the D.C. Human Rights Act if the injury qualifies as a disability under these laws. *See* 42 U.S.C. § 12102; D.C. Code §§ 2-1401.02(5A), 2-1411(a).

Under the ADA, a **disability is defined as a physical or mental impairment that substantially limits a major life activity**. A worker can establish that she has a disability by showing “a record of a substantially limiting impairment” or “[being] regarded as having such an impairment.” Major life activities include walking, sleeping, working, standing, thinking, lifting, and taking care of oneself.

In addition to being protected from discrimination, a disabled domestic violence victim may be entitled to a **reasonable accommodation**, such as a modified work schedule or a transfer to another position or site. *See* 42 U.S.C. § 12111(9); 29 C.F.R. § 1630.2(m); “EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act,” March 1, 1999).

Like Title VII, in order to be a **covered employer** subject to the ADA, an employer must employ at least 15 employees. *See* 42 U.S.C. § 12111(5)(A). An employer is prohibited from discriminating against a battered woman employee – like any other employee – with a qualified disability. *Id.* at § 12112.

Please review this manual’s chapter on [Discrimination](#) for more detailed information regarding the ADA and D.C. law.

## **Workers’ Compensation**

If the employee who is the target of the abuse is injured at work because of the assault or attack by the batterer at work, her injuries may be covered under the D.C. Workers’ Compensation Act. Under the D.C. Workers’ Compensation Act, an employee who suffers an injury at work is entitled to workers’ compensation. Physical and emotional illness and injuries are covered by workers’ compensation, though emotional injury claims are only allowed in certain narrow circumstances. *See* D.C. Code § 32-1501.

Please review this manual’s chapter on [Workers’ Compensation](#) before advising a domestic violence victim about filing for workers’ compensation.



## **Occupational Health and Safety**

Occupational safety and health laws require all employers to maintain a work environment that is safe and healthy for all workers. *See* 29 U.S.C. § 654(a)(1); D.C. Code § 32-1103(a)(1). A domestic violence victim who fears for her safety at work because her batterer has threatened to assault her there or has attacked her there previously may consider reporting this “workplace hazard” to her employer and may request that the employer address the danger consistent with OSHA. If the employer fails to address her safety concern, then the employee-victim may file a complaint with OSHA regarding the safety hazard.

In addition, under federal and D.C. law, an employer is prohibited from discriminating against or firing an employee for filing a complaint or exercising any right or duty afforded under occupational safety and health laws. *See* 29 U.S.C. § 660(c); D.C. Code § 32-1117(a). If a domestic violence victim has been terminated or otherwise discriminated against because she has filed a complaint or otherwise complained about her fear for her safety at work, this may be a violation of federal and D.C. occupational health and safety law. D.C. Code § 32-1117(a).

Please review this manual’s chapter on [\*Occupational Safety and Health\*](#) for additional information regarding D.C. and federal law.

## **Unemployment Compensation**

Unemployment insurance is a social insurance program that provides temporary income to workers who lose their jobs in certain circumstances. To receive unemployment compensation, a claimant must: (1) have earned enough wages to qualify; (2) be able and available to work; and (3) have lost or quit his or her job through no fault of his or her own. In the past, domestic violence victims who, for example, quit to flee a batterer or who are fired for attending to domestic violence proceedings were deemed ineligible to receive benefits.

Under D.C. law, however, domestic violence victims are entitled to unemployment compensation benefits if they lose their jobs as a result of the violence. In June 2004, the D.C. City Council passed legislation to expand unemployment compensation coverage to these workers. The “Unemployment Compensation and Domestic Violence Amendment Act of 2003” allows domestic violence victims to receive unemployment compensation if they establish that they quit or were fired because of domestic violence. For example, if an unemployment compensation claimant who is discharged for excessive absenteeism can prove that she was absent due to domestic violence problems, then she can overcome her employer’s proof that she was discharged for misconduct and still receive benefits.

## Domestic Violence as an Employment Issue

Under the 2004 act, to receive unemployment compensation, domestic violence victims must produce the same paperwork required of all other applicants for unemployment compensation. Additionally, domestic violence victims must offer some sort of proof that they are victims of domestic violence. Proof can include the following:

- (1) A police report or record;
- (2) A court record, such as a Temporary Protection Order or Civil Protection Order;
- (3) A governmental agency record such as a report from Child Services; or
- (4) A written statement affirming that the victim has sought services from a shelter official, social worker, counselor, therapist, attorney, medical doctor, or cleric.

The employer, however, will not be charged for the provision of benefits. Instead, the benefits will come from D.C.'s general funds.

### **D.C. Unemployment Compensation Reform Act of 2010**

The D.C. Unemployment Compensation Reform Act of 2010 expands eligibility for unemployment compensation to persons who leave their jobs due to compelling family reasons. Among the circumstances included in the statute as providing “good cause” for a voluntary separation from employment is when a worker leaves a job due to domestic violence against the worker **or against his or her immediate family member**. Thus, in addition to reinforcing the 2004 law, this law expands protection to a worker who must separate from his or her employment if an immediate family member is a victim of domestic violence.

Please review this manual's chapter on [Unemployment Compensation](#) for additional information.

### **Additional Resources for Domestic Violence Victims**

#### **Civil Protection Orders**

Apart from employment law protections, a domestic violence victim who has experienced abuse in the District of Columbia may obtain a civil protection order (CPO) against her batterer. To obtain a CPO under the D.C. Intrafamily Offenses Act, a petitioner must prove that she has an intrafamily relationship with the respondent and that there is “good cause to believe” that the respondent committed or threatened to commit an intrafamily offense against petitioner. *See* D.C. Code § 16-1001 *et seq.*

An **intrafamily relationship** is defined broadly by showing that the petitioner is related to the respondent by: blood (including parents, children, siblings, aunts, uncles, and grandparents), marriage (current or former) (including in-laws and step-siblings), legal

## Domestic Violence as an Employment Issue

custody, having a child in common, adoption or domestic partnership. *See* D.C. Code § 16-1001(5A)-(6D).

An **intrafamily offense** refers to interpersonal, intimate partner or intrafamily violence. *See* D.C. Code § 16-1001(8). This includes criminal assaults and threats, and stalking. Any criminal offense listed in the D.C. Code or any federal crime that occurs in the district may be sufficient to meet this requirement as long as the petitioner can show that it was committed on her person.

The Intrafamily Offenses Act enumerates specific forms of **relief** that may be granted by the court in both *ex parte* and permanent orders. *See* D.C. Code Ann. § 16-1005(c)(1)-(9). The act further authorizes the judge to award any additional relief that is “appropriate to the effective resolution of the matter.” D.C. Code Ann. § 16-1005(c)(11). This permits creative and innovative requests for relief, however, any requests should be very specific to avoid confusion. The court may direct the respondent not to assault, threaten, harass, stalk, or physically abuse the petitioner and/or petitioner’s children and may prohibit the respondent from contacting petitioner in any manner, directly or indirectly through a third party. *Id.* at § 16-1005(c)(1) & (2).

A domestic violence victim may work with someone who could be covered under a CPO; this may impact the nature of the legal advice she is offered regarding her employment. For example, the behavior the employee is experiencing may qualify her to obtain a CPO – the abusive relationship need not take place in the home. If a batterer is stalking or assaulting the employee at the workplace, that alone may be a sufficient basis for obtaining a CPO, as long as the intrafamily relationship exists and the stalking rises to the level of a criminal offense under the D.C. Code or federal law. The D.C. Code penalizes stalking and harassment as well as more physically brutal offenses:

- Whoever unlawfully assaults or threatens another in a menacing manner shall be fined not more than \$1,000 or be imprisoned not more than 180 days or both. D.C. Code Ann. § 22-404(a)(1).
- Whoever unlawfully assaults or threatens another in a menacing manner, and intentionally, knowingly or recklessly causes significant bodily injury to another shall be fined not more than \$3,000 or be imprisoned not more than three years or both. D.C. Code Ann. § 22-404(a)(2).

**Note:** D.C. Code Ann. § 22-404 defines “significant bodily injury” as an injury that requires hospitalization or immediate medical attention.

In addition, a CPO can extend to the workplace – prohibiting a respondent from threatening, harassing, stalking, or otherwise contacting the petitioner at her workplace, even if the respondent/batterer does not work at the same workplace. An employer is required by law to obey a CPO, so if it requires that the petitioner and respondent stay a specific distance from each other and they are at the same workplace, compliance with the

## Domestic Violence as an Employment Issue

order may require the employer to move the respondent to another shift or location in the building or another site.

If the worker does not already have a CPO, please refer her to one or more of the organizations listed in the next section and advise her to include the workplace in the scope of relief she seeks. Apart from the impact of domestic violence on employment, the legal, social, and practical implications of domestic violence are complex and outside the scope of the services that the Washington Lawyers' Committee offers. Legal advocates should take caution in providing advice regarding other domestic violence-related issues about which the practitioner lacks expertise, and instead provide appropriate referrals.

### Referral Organizations

There are several agencies in Washington, D.C., that provide assistance to domestic violence victims seeking a civil protection order, shelter, or counseling. For a woman in crisis who needs emergency assistance, encourage her to call the **National Domestic Violence Hotline** at 1-800-799-7233 or 1-800-787-3224 (TDD), or the local 24-hour hotline at **My Sister's Place** 1-844-443-5732.

Please refer a client with legal questions to one of the following: for clients with immigration issues or clients who speak Spanish, French, or another foreign language, **Ayuda**, 202-387-4848 (D.C.) or 703-444-7009 (VA); **American University College of Law, Gender Justice Clinic**, 202-274-4140; **Bread for the City**, 202-386-7616; **Columbus Community Legal Services, Family and the Law Clinic, Catholic University**, 202-319-6788, **Domestic Violence Clinic, The George Washington University Law School**, 202-994-7463; **Georgetown University Law Center, Domestic Violence Clinic**, 202-662-9640; or the **Domestic Violence Intake Center at D.C. Superior Court**, (800) 407-5048.

For shelters and counseling: **House of Ruth, D.C.**, 202-667-7001 ext. 515, or **My Sister's Place**, 1-844-443-5732 (this is a 24-hour hotline as well).

For assistance for Maryland residents: **Maryland Coalition Against Sexual Assault/ Sexual Assault Legal Institute**: 301-565-2277.

Victims of human/sex trafficking can also obtain free legal services through the Amara Legal Center at (240) 257-6492.

### **Maryland Law**

Exec. Order No. 01.01.1998.25 mandates that all Maryland state agencies adopt domestic violence model policies that increase awareness in the workplace for employees. These policies and procedures must instruct employees on how to offer assistance to domestic violence victims "in an expedient, meaningful and confidential manner." Exec.

## Domestic Violence as an Employment Issue

Order No. 01.01.1998.25(A)(2). Departments and agencies must post information about domestic violence and available resources in conspicuous spaces in the workplace. Exec. Order No. 01.01.1998.25(A)(3). Finally, the order mandates that each department and agency of the state provide domestic violence awareness training for employees. Exec. Order No. 01.01.1998.25(A)(4).

There are currently no Maryland laws on the books that address the issue of domestic violence with respect to employees in the private sector. However, domestic violence survivors should be encouraged to seek the same protections provided to D.C. residents. For example, she should be encouraged to apply for unemployment compensation benefits and to explain to the person accepting his or her claim that the violence she experienced resulted in his or her job separation.

## **Virginia Law**

In Virginia, no laws specifically cover domestic violence victims who lose their jobs or are otherwise treated differently in their workplaces as a result of the domestic violence. However, domestic violence survivors should be encouraged to seek the same protections provided to D.C. residents. For example, she should be encouraged to apply for unemployment compensation benefits and to explain to the person accepting his or her claim that the violence she experienced resulted in his or her job separation

# **IMMIGRATION**

## **and**

# **EMPLOYMENT**

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**An introductory note:** The Washington Lawyers' Committee does not provide legal advice regarding immigration issues. That said, many of our clients have employment-related legal issues that impact, or are impacted by, their legal status in the United States. This chapter is intended to provide an introduction to the cross-section of these areas of law and to facilitate the identification of immigration-related issues that need to be considered in developing an effective strategy for resolving a client's employment case. Immigration issues that arise may necessitate an appropriate referral.

### **Undocumented Employees**

Although undocumented workers are covered by many employment laws and are legally entitled to certain remedies, it's important for clients and their legal advisors or representatives to understand the very real risks involved in pursuing their legal rights (whether seeking employment claims or immigration relief). Additionally, it is extremely important for employment law attorneys representing undocumented workers to seek supplemental legal counseling from an immigration attorney, and to work closely with their client's immigration counsel. There are unique case strategy issues that come into play—including important implications in terms of discovery and rules of evidence—when an individual pursues his or her civil claims and immigration relief (either separately or simultaneously), thus it's very helpful to have a clear roadmap of your client's whole case before filing anything or contacting law enforcement. On this note, please consider following this suggested checklist when interviewing an undocumented worker for the first time:

#### **Case Screening Checklist**

- 1) What is the client's immigration status (and status of immediate family members)?
- 2) If they originally entered the United States on a visa, what kind of visa was it? Who was their visa sponsor? When did this visa expire?
- 3) What are the client's employment issue(s)? – assess the facts of the case under employment laws (e.g., W&H, UI, Title VII, NLRA, workers' compensation, etc.)
- 4) Get relevant dates to assess statute of limitations for employment claim(s) stated above.
- 5) Has the client experienced any of the U-visa Qualifying Criminal Activities ("QCA")?
- 6) What is the timeframe when the QCA took place?
- 7) What is the willingness of the client to speak with law enforcement about his or her immigration status?
- 8) What are the overall goals of the client?

As you complete the intake interview and think about the client's potential claims or forms of relief, here is a brief list of case strategy matters to keep in mind:



## Case Strategy

1. Which portion of the client's claims do you address first – immigration or employment matters? Is it possible to address them simultaneously?
2. Where do you file the claim?
3. What are the evidentiary issues?
4. Is it helpful or necessary to partner with an immigration attorney?

## Coverage

Undocumented employees are generally covered by employment laws, although as you will see in the next section, their remedies are sometimes limited by their undocumented status.

While many employment laws contain retaliation provisions, which are designed to protect workers who report and file claims, these provisions may not adequately protect undocumented workers. For example, an undocumented worker who is fired cannot force his or her employer to reinstate him or her if doing so would be illegal under the Immigration Reform and Control Act (IRCA). Similarly, if an employer threatens to report a worker to immigration authorities, the worker may decide that the risk of deportation is not worth the reward of vindicating the claim. Clients should be counseled about the possibility of retaliation from their employers, including firing them and/or reporting them to immigration authorities.

### Unemployment Compensation

The one major exception is unemployment compensation. Undocumented workers are not eligible for unemployment compensation and should not apply. D.C. Code §51-109(9)(A), Va. Code §60.2-617.

### Workers' Compensation

Undocumented workers are eligible to receive workers' compensation in D.C. and Maryland. *See* D.C. Code §32-1501(9); *see Asylum Co. v. D.C. Dep't. Of Emp. Serv.*, 10 A.3d 619 (D.C. 2010); *Design Kitchen & Baths v. Lagos*, 882 A.2d 817 (Md. 2005). Injured workers in VA who are undocumented are covered by workers' compensation for medical benefits, temporary or permanent total disability, and permanent impairments. However, Va. Code 65.2-502 states that workers **“not eligible for lawful employment” are not eligible for temporary partial disability**. If an undocumented worker is released to do any kind of work or has an injury classified as a “temporary partial disability,” she cannot receive any wage loss compensation; however, she is still entitled to medical treatment. The rationale

## Immigration and Employment

of the law is that the worker cannot work legally in Virginia, so she can only be compensated if she is completely unable to work or for a specific loss of an extremity, etc.

### **Discrimination**

Undocumented workers are generally covered by anti-discrimination laws; however, they are not protected from discrimination by employers on the basis of their status as undocumented workers.

### **Occupational Safety and Health (OSHA)**

Undocumented workers may make OSHA complaints. OSHA allows the identity of the complainant to remain confidential, and undocumented workers may wish to use this feature.

### **Remedies**

In the landmark case *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), the Supreme Court held that undocumented immigrants were not entitled to back pay from employers who fired them in retaliation for trying to organize a union under the National Labor Relations Act. Since 2002, courts have grappled with how the ruling in *Hoffman* affects the remedies available to undocumented workers under other employment statutes.

### **Fair Labor Standards Act**

After *Hoffman*, the Department of Labor (DOL) has continued to enforce the Fair Labor Standards Act (FLSA) regardless of an employee's immigration status. The DOL has noted that the decision in *Hoffman* applies only to the National Labor Relations Act (NLRA), which is a separate statute enforced by a separate agency. The DOL also noted the critical difference that "[i]n *Hoffman Plastics*, the NLRB sought back pay for time an employee *would* have worked if he had not been illegally discharged, under a law that permitted but did not require back pay as a remedy. Under the FLSA, the Department...seeks back pay for hours an employee has *actually worked*, under laws that require payment for such work."<sup>142</sup> See *Zirintusa v. Whitaker*, 2007 U.S. Dist. LEXIS 29 at \*5 (D.D.C. Jan. 3, 2007) (holding that employees' immigration status was irrelevant to their ability to bring claims under the FLSA and would actually "provide perverse incentives to employers" if undocumented workers were prevented from bringing such claims); *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 322 (D.N.J. 2005) (noting that the FLSA makes no mention of citizenship and upholding plaintiffs' claim for unpaid wages for work already performed).

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<sup>142</sup> Department of Labor Wage and Hour Division, Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of *Hoffman Plastics* decision on laws enforced by the Wage and Hour Division, revised July 2008, available at [www.dol.gov](http://www.dol.gov).

## **Discrimination Laws (Title VII, ADA, ADEA)**

The Equal Employment Opportunity Commission (EEOC) is the agency responsible for enforcing Title VII, the Americans with Disabilities Act (ADA), The Pregnancy Discrimination Act, and the Age Discrimination in Employment Act (ADEA). The EEOC has been very clear that *Hoffman* “in no way calls into question the settled principle that undocumented workers are covered by the federal employment discrimination statutes.”<sup>143</sup> The EEOC has stated that it will not, on its own initiative, ask about a person’s immigration status or consider a person’s immigration status when determining whether a claim has merit. However, in some courts, *Hoffman* may affect the remedies available to undocumented workers. Most courts have held that *Hoffman* should be interpreted narrowly, but this case law is still developing.

In this region, the prospects are currently dim that undocumented plaintiffs could actually obtain remedies under Title VII. In 2009 the D.C. federal district court acknowledged that an undocumented worker’s remedies under Title VII may be limited, though in what way was not elaborated upon, and has not been elaborated upon since. *Iweala v. Operational Technologies Services, Inc.*, 634 F. Supp. 2d 73, 80 (D.D.C. 2009). The Fourth Circuit, covering Maryland and Virginia, has stated repeatedly that plaintiffs bringing claims under federal anti-discrimination laws must show that they were qualified for employment at the time an employer took an adverse action against them. *Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184, 187 (4th Cir. 1998) (holding that undocumented workers are not protected by Title VII); *Chaudhry v. Mobil Oil Corp.*, 186 F.3d 502, 504 (4th Cir. 1999) (holding that undocumented workers are not protected by the ADA or Title VII); *Reyes-Gaona v. N. Carolina Growers Assn.*, 250 F.3d 861 (4th Cir. 2001) (holding that undocumented workers are not protected from age discrimination by the ADEA).

Surveying this question nationwide, it is clear that courts have been very—and justifiably—reluctant to definitively answer the question of undocumented workers’ entitlement to remedies under Title VII and other federal discrimination laws. *See U.S. EEOC v. Mar. Autowash, Inc.*, 820 F.3d 662, 667 (4th Cir. Md. 2016) (“[The question of] whether and to what extent Title VII covers undocumented aliens [] is a novel and complex problem especially ill-suited to a premature and absolute pronouncement.”). The only case where a federal judge was willing to consider awarding Title VII remedies to an undocumented worker was a 2014 unreported case, where a federal judge in Hawaii found no “binding caselaw interpreting *Hoffman* to preclude compensatory damages” available under Title VII. *United States EEOC v. Global Horizons, Inc.*, 2014 U.S. Dist. LEXIS 26342 \* (D. Haw. Feb. 28, 2014). Several state courts, though not yet in Maryland, Virginia, or D.C., have declined to extend *Hoffman*’s reasoning to state discrimination laws. *See Affordable Hous. Found., Inc. v. Silva*, 469 F.3d 219, 244 (2d Cir. N.Y. 2006).

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<sup>143</sup> “Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws,” EEOC Directive, (June 27, 2002), available at: [www.eeoc.gov](http://www.eeoc.gov).

## **Collecting on a Favorable Judgment**

After winning a favorable judgment, some undocumented clients worry about the tax ramifications if they do not have a valid Social Security number. In a settlement or court order for unpaid wages, both employees and employers have tax-reporting requirements. Employers have been known to use these tax-reporting obligations to delay or avoid paying workers, by claiming that the workers must provide a genuine Social Security number. However, to receive an award or settlement as part of a winning claim, an employee does not need a Social Security number; he or she only needs an Individual Taxpayer Identification Number (ITIN), issued by the IRS. See [“Fact Sheet for Workers: What is an ITIN?” National Employment Law Project](#), (November 2004).

An ITIN is a number issued by the IRS to process taxes. It was created for people who are not eligible for a Social Security number (SSN). The ITIN is a nine-digit number that looks like a SSN but it always begins with a 9 (SSNs do not) and the fourth digit is always a 7 or 8. It looks like this: 9XX-7X-XXXX or 9XX-8X-XXXX.<sup>144</sup> The ITIN does not provide work authorization, Social Security benefits, or an Earned Income Tax Credit. However, the ITIN will allow the worker to get a refund if too many taxes were withheld from his or her paycheck and may entitle them to a Child Tax Credit and to exemptions for dependents. Filing taxes also helps establish good character for future immigration applications. Most importantly for purposes of the Washington Lawyers’ Committee, the ITIN will allow taxes to be withheld from any judgments or settlements in court, allowing the employee to collect successfully.<sup>145</sup>

In simple cases where an employer has reached a settlement or been ordered by the court to pay an employee, the employer issues a check to the worker, along with two IRS forms (a 1099 and a W-2.) These forms request the employee’s Social Security number so an employer may try to use the lack of a valid SSN as an excuse not to move forward. The National Employment Law Project advises that if a worker filled out an I-9 form when he or she was hired, he or she should simply tell his or her employer to use the number provided on that form for tax-reporting purposes. If the employer refuses, the worker should apply for an ITIN.

To apply for an ITIN, you must fill out a Form W-7, “Application for IRS Individual Taxpayer Identification Number,” and attach a valid federal income tax return, and your original, notarized, or certified proof of identity and foreign status. More detailed instructions are available here: “Instructions for Form W-7” (revised January 2012), Department of the Treasury, Internal Revenue Service; available at <http://www.irs.gov/>.

## **Options Available to Undocumented Immigrants Filing in**

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<sup>144</sup> “Individual Taxpayer Identification Number (ITIN)” IRS website, available at [www.irs.gov](http://www.irs.gov).

<sup>145</sup> “Immigrant & Nonstandard Worker Project: Fact Sheet for Advocates,” [National Employment Law Project](#), (July 2005), available at [www.nelp.org](http://www.nelp.org).

## **Civil Court**

### **Protective Orders to Prevent Discovery of Immigration Status**

Although undocumented workers face some barriers to enforcing their rights that other workers do not, there are certain measures that can help mitigate these risks. For example, many courts have approved protective orders that prevent discovery regarding plaintiffs' immigration status. *See Montoya v. S.C.C.P. Painting Contractors, Inc.* 530 F.Supp.2d 746 (D.Md. 2008) (holding that "immigration status of a class representative is irrelevant in wage and hour cases, in light of FLSA's coverage of all workers—undocumented or not" where the employer had sought Social Security numbers and driver's license numbers during discovery); *Flores v. Amigon*, 233 F. Supp. 2d 462, 463-64 (E.D.N.Y. 2002) (holding that in situations where undocumented immigrants sought wages under the FLSA for work already performed, they were entitled to a protective order precluding discovery of their immigration status). Note, however, that at least one local federal court has allowed discovery on immigration status in a wage matter where, the court ruled, immigration status *was* relevant to determining hours worked, because the defendant-employer alleged that the employee-plaintiff resigned shortly after the employer's request for the employee's work authorization documents. *Cartagena v. Centerpoint Nine, Inc.*, 303 F.R.D. 109 (D.D.C. 2014).

### **Filing Anonymously**

In some rare cases, plaintiffs may be able to file anonymously if they can prove that the potential for retaliation is extraordinary in nature. In *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068-69 (9th Cir. 2000) a group of Chinese workers attempted to bring an FLSA collective action and were threatened by their employer with "various reprisals, including termination, blacklisting, deportation, and closing the factory." *Id.* at 1065. In that case the Ninth Circuit considered three factors—"(1) the severity of the threatened harm, (2) the reasonableness of the anonymous party's fears, and (3) the anonymous party's vulnerability to retaliation"—and concluded that the plaintiffs in the case were entitled to anonymity. The court also noted that fear of physical harm was not necessary where the retaliation was "extraordinary" and noted that "deportation, arrest, and imprisonment" all constituted extraordinary retaliation. *Id.* at 1071.

No D.C. court has held that threats of deportation justify filing anonymously; however, the D.C. Circuit has cited *Advanced Textile* for the proposition that plaintiffs may proceed anonymously (1) when identification creates a risk of retaliation, (2) when anonymity is necessary to preserve privacy in a sensitive personal matter, or (3) when the party seeking anonymity may be compelled to admit their intent to act illegally. *W. Coast Productions, Inc. v. Does 1-5829*, 275 F.R.D. 9, 13 (D.D.C. 2011). Although in that case the D.C. Circuit was dealing with the second issue of sensitive personal information rather than the issue of intimidation and retaliation, the case demonstrates that D.C. courts consider the risk of retaliation to be a possible ground for anonymity. *See also Guifu Li v. A Perfect Day Franchise, Inc.*, 270 F.R.D. 509, 517 (N.D. Cal. 2010) (holding that in FLSA suit by

## Immigration and Employment

Chinese workers who spoke little English, the threat of termination and of reducing hours did not constitute “extraordinary” retaliation to justify anonymity because such actions were “typical” forms of retaliation in the FLSA context); *4 Exotic Dancers v. Spearmint Rhino*, 2009 WL 250054 at \*2 (C.D.Cal., Jan. 29, 2009) (distinguishing threats of termination and blacklisting from threats of deportation and imprisonment because the former only affect economic interests and are therefore not “extraordinary” so as to justify anonymity); *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 190 (2d Cir. 2008) (holding that additional factors relevant to anonymity include whether possible prejudice to the defendant caused by allowing anonymity differs at any particular stage in the litigation and whether it can be mitigated by the court; whether the plaintiff’s identity has thus far been kept confidential; whether the public interest in the case is furthered or compromised by requiring the plaintiff to disclose their identity; and whether there are alternative ways to protect the plaintiff’s confidentiality).

## **Immigration Relief Available to Some Undocumented Workers**

### **Immigration Relief for Severely Exploited Immigrant Workers**

- 1) T-visa: Victims of Human Trafficking
- 2) U-visa: Victims of Crime
- 3) Continued Presence

In some special circumstances, workers may be eligible to have their undocumented status adjusted to grant them lawful residency in the United States. T-visas and U-visas were designed to aid undocumented victims of crimes who assist law enforcement to stay in the country legally.

### **T-Visas**

#### ***What constitutes “human trafficking”?***

The Trafficking Victims Protection Act (“TVPA”)<sup>146</sup>—the federal anti-trafficking statute—defines “severe forms of human trafficking” as:

“The recruitment, harboring, transportation, provision, or obtaining of a person for labor or services through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery;”

or

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<sup>146</sup> 22 USC § 7102

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“The *recruitment*<sup>147</sup>, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act where such act is induced by force, fraud, or coercion, or where the person induced to perform such act has not attained 18 years of age.<sup>148</sup>”

### ***What are the eligibility requirements for a T-visa?***

To establish eligibility for the T-visa, the individual must show that he or she:

- Is or has been a victim of a severe form of human trafficking as defined above;
- Is physically present in the United States on account of human trafficking;
- Has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking in persons (if he or she is older than 18; those younger than 18 do not need to meet this requirement); and
- Would suffer extreme hardship involving unusual and severe harm if removed from the United States.<sup>149</sup>

**Note:** It is recommended that a T-visa petitioner get law enforcement certification before applying for a T-visa, but such certification is *not* required, only a showing of cooperation with law enforcement is required. Likewise, actual prosecution by law enforcement is not required in order for a victim to succeed in his or her petition for a T-visa.

### ***Communicating with Law Enforcement***

Generally, an officer, agent, and/or prosecutor will want to interview your client. In most cases, when local law enforcement interviews a victim, the officer will write a report and issue an incident card. However, this is generally *not* the case with federal law enforcement agents (FBI and ICE).

After the interview, it may be requested that the officer or agent sign an affidavit or certification, and seeking Continued Presence may be requested as well. See more on Continued Presence below. The officer or agent will rarely agree to sign an affidavit or certification at that time, and will often want to investigate the case further before deciding whether to sign.

**Note: Anything shared with law enforcement (including memos considered to be privileged attorney work product) has to be turned over to a criminal defendant if the client's claim results in criminal prosecution. Think carefully before sending anything in writing.**

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<sup>147</sup> New language regarding labor recruiters was added to the TVPA when it was reauthorized in March, 2013, as of this writing we are still waiting for the implementing regs.

<sup>148</sup> 22 USC § 7102.

<sup>149</sup> TVPA 107(c), 8 CFR § 214.11(b).

### ***What benefits do T-visa recipients receive?***

- T-visa recipients get an Employment Authorization Document (*e.g.*, work permit).
- T-visa recipients can petition for their spouses and minor children to join them in the United States on derivative T-visas.
- T-visas are good for up to four years, and after three years one can petition to adjust status to a green card.
- Low-income T-visa recipients may also be eligible for housing, cash, and food assistance for a limited time, as well as Medicaid.

**Practice Tip:** Keep correspondence with the law enforcement officer or agent general enough that it does not matter that the defendant's attorney receives copies, but specific enough that you can use the correspondence as secondary evidence of cooperation. Sometimes, prior to this first interview, if law enforcement is amenable, it may be helpful if the legal advocate can proffer some facts and information. Sometimes just identifying names, players, and a short outline of the facts in a chronological order will give law enforcement a roadmap and allow them to interview your client in an effective and expeditious manner.

### **U-Visas**

The TVPA also created the "U-visa," a temporary non-immigrant status available to non-citizen victims of certain crimes (referred to as "Qualifying Criminal Activity" or "QCA"). Congress created the U-visa originally with victims of domestic violence in mind, but increasingly the U-visa is being leveraged by advocates of undocumented workers who are victims of workplace crimes.

### ***What constitutes a Qualifying Criminal Activity?***

U-visa regulations identify 30 categories of qualifying criminal activity (QCAs) and any other substantially similar criminal activity as eligible for certification. Advocates should identify violations of local, state, or federal statutes that may correspond to the qualifying criminal activity when seeking certification. Law enforcement agencies may also certify U-visa petitions for attempt, conspiracy, or solicitation of the qualifying criminal activity.

Qualifying crimes that constitute criminal activity include the following:



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Abduction Abusive Sexual Contact Blackmail Domestic Violence Extortion False Imprisonment Female Genital Mutilation Felony Assault Fraud in Foreign Labor Contracting	Hostage Incest Involuntary Servitude Kidnapping Manslaughter Murder Obstruction of Justice Peonage Perjury Prostitution	Rape Sexual Assault Sexual Exploitation Slave Trade Stalking Torture Trafficking Witness Tampering Unlawful Criminal Restraint Other Related Crimes
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### ***What are the eligibility requirements for a U-visa?***

In order to be eligible for a U-visa, an immigrant worker must:

- Have suffered substantial physical or mental abuse as a result of having been a victim of a qualifying criminal activity;
- Possess information concerning the qualifying criminal activity;
- Have been helpful, be helpful, or be likely to be helpful in the detection, investigation, or prosecution of the qualifying criminal activity—this does not have to have resulted in an actual prosecution;
- Show that the qualifying criminal activity violated a local, state, or federal law, or have occurred in the United States.
- Receive certification from law enforcement or a certifying agency such as the EEOC or DOL. ***\*This is the key difference between the T and the U-visa – for a U-visa, law enforcement certification is required; for a T-visa, it is only strongly encouraged.***

**IMPORTANT:** Please see [section above](#) regarding communicating with law enforcement!

### ***What benefits do U-visa recipients receive?***

- U-visa recipients get an Employment Authorization Document (*e.g.*, work permit).
- U-visa recipients can petition for their spouses and minor children to join them in the United States on derivative U-visas.
- U-visas are good for up to four years, and after three years one can petition to adjust status to a green card.
- Unlike recipients of the T-visa, U-visa recipients are not eligible for public benefits.

### ***Examples of Employment-Based Eligible Crimes***

Only some crimes are eligible for U-visas, but many of the eligible crimes occur in an employment context. For example, the crimes of involuntary servitude, peonage, or trafficking, can all qualify for U-visa protection where there are threats of physical, psychological, or financial harm (including threats to call immigration authorities), which are used by an employer to make an employee continue to work. Confiscation or withholding of passports, restricted contact with others, and fraudulent labor contracting or recruiting may also support these claims. Sexual crimes perpetrated by an employer or a co-worker may qualify. Also, obstruction of justice, perjury, and witness tampering can be employment-related where the employer commits visa fraud or forges wage and hour records; tells their employees to lie to law enforcement; and/or intimidates workers with illegal retaliation.<sup>150</sup>

### ***Certifying Agencies***

The Victims of Trafficking and Violence Prevention Act specifies certain agencies that can fill out the Supplement B form and certify U-visa applications. In addition to local law enforcement, agencies such as the Equal Employment Opportunity Commission, the NLRB, and Department of Labor (Wage and Hour Division), which have criminal investigative jurisdiction in their respective areas of expertise, can offer certifications. A federal judge may also certify a U-visa petition in the context of labor abuse. 8 C.F.R. § 214.14(a)(2); *See e.g., Garcia v. Audubon Cmty. Mgmt.*, 2008 WL 1774584 (E.D. La. Apr. 15, 2008). These agencies will determine whether you meet the criteria before they will certify an application.

- **The Department of Labor** has determined that it will only certify applications for the following eight crimes: involuntary servitude, peonage, trafficking, obstruction of justice, witness tampering, extortion, fraud in foreign labor contracting, or forced labor. The DOL has also stated that it will only certify U-visa applications in instances where these crimes were detected or reported as part of an investigation into crimes that the DOL actually enforces (such as minimum wage and overtime violations). Requests can be submitted to one of five regional U-visa coordinators.<sup>151</sup>
- **The NLRB** has noted in its “Updated Procedures in Addressing Immigration Status Issues that Arise During NLRB Proceedings” that “a number of crimes that may arise in the workplace, and which also constitute unfair labor practices in some cases, including ‘peonage; involuntary servitude; . . . unlawful criminal restraint; false imprisonment; blackmail; extortion; . . . felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit

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<sup>150</sup> Cho, Eunice and Rebecca Smith, The U-Visa: A Potential Immigration Remedy for Immigrant Workers Facing Labor Abuse, National Employment Law Project (November 2011), available at [www.nelp.org](http://www.nelp.org).

<sup>151</sup> For more, see [www.dol.gov/agencies/whd/immigration/u-t-visa](http://www.dol.gov/agencies/whd/immigration/u-t-visa).

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any of the above mentioned crimes” may be eligible for Supplement B certification by the agency.<sup>152</sup>

- **The EEOC** has determined that it will certify for any of the qualifying crimes listed in the statute so long as the crime is related to unlawful employment discrimination alleged in the charge or otherwise properly under investigation by the EEOC. The EEOC requires that all requests for Supplement B certification be submitted to the appointed Regional Attorney (RA), who will conduct an initial investigation into the merits. The certification process at the EEOC requires an in-person interview of the visa applicant. If the requirements for certification do not appear to be met, the RA can decline the request.
- **Diplomatic Security Service** of the U.S. Department of State – see the section below regarding A-3 and G-5 workers.

### **Continued Presence**

Another form of immigration relief established by the Trafficking Victims Protection Act (TVPA and TVPRA) is a remedy called “continued presence.”<sup>153</sup> Continued presence is *not* a visa and does not convey any immigration status or benefit apart from legalizing the individual’s continued physical presence in the United States during an ongoing or potential criminal investigation of the underlying trafficking crime. It can take the form of deferred action, parole, stay of a final removal order, or others. In practical terms, continued presence, or CP as it is commonly referred to, is issued for up to one year at a time and can be renewed at the discretion of law enforcement.

Once CP has been granted, the grant triggers the issuance of a “certification letter” from the federal Office for Refugee Resettlement (ORR). The certification letter certifies that the individual has been recognized to be a victim of a severe form of human trafficking and entitles the individual to apply for public benefits or a Match-Grant program.<sup>154</sup> In most instances, the grant of CP also makes the individual eligible for an employment authorization document (EAD, commonly referred to as a “work permit”).<sup>155</sup>

### ***Who Can File Requests for CP?***

Only law enforcement can submit a request for an individual’s continued presence and adjudication of these requests is performed by the U.S. Citizenship and Immigration

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<sup>152</sup> “Memorandum OM 11-62: Updated Procedures in Addressing Immigration Status Issues that Arise During NLRB Proceedings” Office of the General Counsel: (Jun. 7, 2011) available at:

<https://niwaplibrary.wcl.american.edu/pubs/nlrb-u-and-t-certs-and-addressing-immigration-status>.

<sup>153</sup> TVPA 107(C)(3) “Federal law enforcement officials may permit an alien individual’s continued presence in the United States, if, after an assessment, it is determined that such individual is a victim of a severe form of trafficking and a potential witness to such trafficking in order to effectuate prosecution of those responsible....” See also 28 CFR § 1100.35.

<sup>154</sup> The second route to obtaining a certification letter is by filing a successful T-visa application. If the T-visa application is approved by CIS, the approval triggers the issuance of the certification letter with its attendant benefits.

<sup>155</sup> 28 CFR § 1100.35 (b).

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Services (USCIS), Vermont Service Center, T Visa Unit. See [Continued Presence Brochure](#). Federal law enforcement officials who encounter alien victims of severe forms of trafficking in persons who are potential witnesses to that trafficking may request that the Department of Homeland Security (DHS) grant the continued presence of such aliens in the United States. All law enforcement requests for continued presence must be submitted to the Field Operations Directorate of USCIS (formerly known as the “INS, Headquarters Office of Field Operations”), in accordance with DHS procedures. Each federal law enforcement agency will designate a headquarters office to administer submissions and coordinate with the DHS on all requests for continued presence. The designated headquarters office will be responsible for meeting all reporting requirements contained in INS procedures for the processing and administering of the requests for continued presence in the United States of eligible aliens.<sup>156</sup>

Upon receiving a request, the DHS will determine the victim’s immigration status. When applicable and appropriate, the INS may then use a variety of statutory and administrative mechanisms to ensure the alien’s continued presence in the United States. The specific mechanism used will depend on the alien’s current status under the immigration laws and other relevant facts. These mechanisms may include parole, voluntary departure, stay of final order, section 107(c)(3)-based deferred action, or any other authorized form of continued presence, including applicable nonimmigrant visas.<sup>157</sup>

Although DHS and the requesting law enforcement agency will make every effort to reach a satisfactory agreement for the granting of continued presence, the DHS may deny a request for continued presence in the following instances:

- (i) Failure on the part of the requesting agency to provide necessary documentation or to adhere to established DHS procedures;
- (ii) Refusal to agree or comply with conditions or requirements instituted in accordance with paragraph (c)(1) of section § 1100.35;
- (iii) Failure on the part of the requesting agency to comply with past supervision or reporting requirements established as a condition of continued presence; or
- (iv) DHS determines that granting CP for the particular alien would create a significant risk to national security or public safety and that the risk cannot be eliminated or acceptably minimized by the establishment of agreeable conditions.<sup>158</sup>

In the case of a denial, the DHS shall promptly notify the designated office within the requesting agency. The DHS and the requesting agency will take all available steps to reach an acceptable resolution. In the event such resolution is not possible, DHS shall promptly forward the matter to the Deputy Attorney General, or his or her designee, for resolution.

In addition to meeting any conditions placed upon the granting of continued presence, the responsible official at the law enforcement agency requesting the victim’s

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<sup>156</sup> 28 CFR § 1100.35 (a).

<sup>157</sup> 28 CFR § 1100.35 (1)

<sup>158</sup> 28 CFR § 1100.35 (2)

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continued presence in the United States shall arrange for reasonable protection to any alien allowed to remain in the United States by the DHS. This protection shall be in accordance with 42 U.S.C. 10606 and shall include taking measures to protect trafficked persons and their family members from intimidation, threats of reprisals, and reprisals from traffickers and their associates in accordance with section 107(c)(3). Such protection shall take into account their status as victims of severe forms of trafficking in persons.

### ***Steps Attorneys Can Take to Request “CP” for Clients from Law Enforcement***

As discussed above, attorneys are not able to petition for CP on behalf of their clients; rather law enforcement requests CP for their “witnesses” in a present or ongoing criminal investigation. Typically the address on record for the CP request will be that of the law enforcement agency that is investigating the trafficking crime.<sup>159</sup> As such, there is no form to fill out in advance of your client’s first meeting with law enforcement. However, there are a few pieces of information that can be gathered or discussed with clients in advance of the meeting with law enforcement, to expedite the eventual CP request:

- 1) Two passport-sized photographs of the person(s) requesting CP.
- 2) Fingerprints of the person(s) requesting CP.

**Note:** *Electronic* fingerprints are required. The Diplomatic Security Service office in Rosslyn, Va., has a fingerprinting place onsite; thus if the client is interviewed at their office the fingerprints can be completed at the same time.

- 3) A completed and signed form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative*, in the event that law enforcement allows your office to be the address on record for the CP request. *See supra* note 5.

### ***Other Immigration Applications Connected with CP***

Once CP has been granted, law enforcement will typically forward the attorneys representing the trafficking victims a copy of the “certification letter” from ORR. If this is not received within approximately 2 weeks from the day of the request, it is good idea to contact law enforcement to inquire about the status of the CP request. Once the attorney

**Practice Tip:** Sometimes law enforcement will file the request for a replacement I-94 and/or the work permit at the same time that they request CP. To be prepared for this possibility, it is a good idea to bring client-signed, partially completed (*i.e.*, do not complete the mailing address portion) Form I-102 and Form I-765 with you when you meet with law enforcement. It is particularly helpful to get these forms signed by your client early in the process if you think that it may be awhile before you will meet with the client again.

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<sup>159</sup> Attorneys can request that their office address be used instead—and should bring a signed form G-28 to support this request—but most of the time, law enforcement will insist on using their address.

has a copy of the CP certification letter, they can immediately proceed with filing for a replacement I-94 and work permit on behalf of their client(s). It is generally best and easier to apply for the replacement I-94 card first, then the work permit.

## **Employees with Unique Forms of Immigration Status**

### **Domestic Employees on A-3 & G-5 Visas**

The U.S. government allows employees of foreign embassies and international organizations to bring household and childcare workers into the United States on special A-3 and G-5 visas. Each year, more than 3,000 A-3 and G-5 visas are issued. A-3 visas correspond to domestic workers who work for diplomats and G-5 visas correspond to domestic workers who are employed by people who work for international organizations. These visas are issued by the U.S. Department of State (DOS); thus, technically, DOS is supposed to be providing oversight and enforcement of the protections of A-3 and G-5 workers. Indeed, if you encounter an A-3 or G-5 employee with an employment matter, one of the first agencies to consider contacting is the Diplomatic Security Services (DSS) of DOS. Keep in mind, however, DSS is mostly concerned with human trafficking cases – they will do little to assist with exclusively wage-an-hour claims. See section above regarding T and U-visas.

Workers who enter the US on a G-5 or A-3 visa have certain rights:

- The worker must be paid state or federal minimum wage—whichever is higher—and deductions for food and lodging must be “reasonable.”
- The worker should also have a written contract with a copy both in English and the worker’s native language.
- The contract should include an agreement by the employer to abide by all U.S. laws, an agreement not to keep the worker’s passport, contract, or other property, a description of the worker’s duties and hours, and an explanation of how the worker will be compensated including vacation and sick time.<sup>160</sup>
- Also, pursuant to the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (Public Law 110-457) (reauthorized in 2013 as part of the Violence Against Women Act), all applicants for these visas should have received a pamphlet explaining these rights.

### **Protections**

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<sup>160</sup> Bureau of Consular Affairs, U.S. State Dept. “Rights and Protections for Temporary Workers” pamphlet, available at [www.travel.state.gov](http://www.travel.state.gov).

### ***Administrative Remedies***

As noted above, the Diplomatic Security Services (DSS) of DOS is responsible for providing oversight of the A-3 and G-5 program. If you encounter an A-3 or G-5 employee with an employment matter (particularly if you suspect she is a victim of labor trafficking), one of the first agencies to consider contacting is DSS. However, contacting DSS is akin to contacting law enforcement, thus it is best to consult with an immigration attorney before doing so. DSS can grant continued presence for your client and they can certify your client for a T or U-visa. For cases arising in the Washington metro area, the best person to contact at DSS is:

Ryan LaBranche  
Supervisory Special Agent | Bureau of Diplomatic Security  
Human Trafficking Investigations Coordinator | Criminal Fraud  
Investigations  
DS Cell: 202-439-2357 | Desk: 571-345-7987  
Email: [LaBrancheRG@state.gov](mailto:LaBrancheRG@state.gov)

Many of the international organizations whose employees are allowed to sponsor G-5 workers also have their own internal grievance procedures and codes of conduct with regards to the treatment of G-5 workers. Please see the [International Employees](#) chapter for further of discussion of this topic.

### ***Civil Remedies***

Section 203(c) of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 provides A-3 and G-5 visa holders some protection against deportation while they pursue civil legal claims against former employers. If an A-3 or G-5 visa holder files a civil action alleging a violation of any term of their employment contract, or a violation of any federal, state, or local law governing the terms and conditions of their employment, the Attorney General and Secretary of Homeland Security *must* defer action on deportation and permit that person to remain and work legally in the United States so that they can participate in the legal proceedings.

There are two major exceptions to this rule: (1) if the person is inadmissible or otherwise deportable under the Immigration and Nationality Act they can still be deported, and (2) if the Attorney General or Secretary of Homeland Security finds that the person has failed to exercise due diligence in pursuing their civil case or has needlessly dragged on the proceedings, they can still be deported.

### **Diplomatic Immunity**

A further complication is that if an employer has diplomatic status, the employee's claims may be stayed or dismissed due to claims of "diplomatic immunity." This possibility should not discourage the client from filing suit, as the case law on "diplomatic immunity"



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is constantly changing (largely in workers' favor).<sup>161</sup> Nonetheless, both client and attorney should understand at the outset that filing suit against a diplomat will mean many months of arguing over diplomatic status and the extent of that status, before reaching the merits of the primary case.

An employee can check with the DOS list to confirm whether the employer is a "registered" diplomat. DOS provides general information about diplomatic immunity at: [www.state.gov/privileges-and-immunities](http://www.state.gov/privileges-and-immunities). From this website one can find links to current and archived lists of registered diplomats, organized by country. If the employer's name does not appear on this list, the employer is likely not covered by any diplomatic immunity despite what he or she says or believes.

Even if the employer has diplomatic status, the employee may still refer to the contract of employment to attempt to make demands on the employer. If the employer's actions rise to the level of human trafficking, she may be entitled to protection under a T-visa or U-visa (see previous section). Any victim of abuse that rises to the level of human trafficking should call the National Hotline Human Trafficking Resource Center at 1-888-373-7888.

If the employer does not have diplomatic status or is an individual who works for an international organization (as in the case of G-5 visas) then the employer's vulnerability to legal action will need to be determined on a case-by-case basis, accounting for the laws, treaties, and other international agreements that govern that entity. Some international organizations will require employees to make use of internal tribunals to resolve conflicts, etc.

The act also provides for the suspension of A-3 and G-5 visa privileges for any mission or international organization whose members the State Department determines have abused or exploited an A-3 or G-5 visa holder, where the organization was found to have tolerated the mistreatment. To date, only Malawi has received a suspension. For additional technical assistance on this issue, contact the Human Trafficking Legal Center at: [info@htlegalcenter.org](mailto:info@htlegalcenter.org).

### **"Guest Workers" on H-1B, H-2B, H-2A, & J-1 Visas**

The term "guest worker" once almost exclusively referred to "farm workers," but now guest workers can be found in almost every industry in America. For example, in recent years, "guest worker" schoolteachers have been imported from the Philippines to teach in D.C. and Prince George's County public schools. Many guest workers toil in Maryland's crab industry and in local amusement parks, while others have worked in

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<sup>161</sup> See *Swarna v. Al Awadi*, 622 F.3d 123 (2d Cir. 2010).



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places as diverse as Hershey's warehouses in Pennsylvania and local nursing homes in Maryland and Virginia.

Such workers are often limited in their ability to affiliate with trade unions, and often their positions result in a carve-out or watering down of a pre-existing bargaining units. Most guest workers are also tied to their specific visa-sponsoring employers; thus, if they are fired or quit, they immediately lose their lawful immigration status. The latter reason is why handling employment claims of guest workers is such a delicate matter (and also why proportionally, guest workers face more employment-based violations than U.S. citizen workers). Nonetheless, all guest workers have a legal right to work in the United States (in the job or industry that their visa applies to), and all are covered by most federal and state employment laws.

The visa categories described below (H-1B, H-2B, H-2A, & J-1) are but a few of the myriad guest worker visa categories currently available. These categories were selected because they are the most common in the Washington, D.C., area.

### **H-1B**

The H-1B is a non-immigrant visa in the United States under the Immigration and Nationality Act, section 101(a)(15)(H). It allows U.S. employers to temporarily employ foreign workers in specialty occupations. The regulations define a "specialty occupation" as requiring theoretical and practical application of a body of highly specialized knowledge in a field of human endeavor<sup>162</sup> including but not limited to biotechnology, chemistry, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, law, accounting, business specialties, theology, and the arts, and requiring the attainment of a bachelor's degree or its equivalent as a minimum<sup>163</sup> (with the exception of fashion models, who must be "of distinguished merit and ability").<sup>164</sup> Likewise, the foreign worker must possess at least a bachelor's degree or its equivalent and state licensure, if required to practice in that field. H-1B work-authorization is strictly limited to employment by the sponsoring employer. In recent years, legal service organizations in the D.C. metro area have seen an increase in the number of H-1B workers in a wide range of occupations from nurses to public school teachers.

If a foreign worker in H-1B status quits or is dismissed from the sponsoring employer, the worker must either apply for and be granted a change of status to another non-immigrant status, find another employer (subject to application for adjustment of status and/or change of visa), or leave the United States. In other words, this visa *is transferrable!* It's very important for workers in the country on an H-1B visa to understand that they do not have to continue working for abusive employers. This is a unique quality of the H-1B visa. Many employers would have a worker believe that she is bound to the employer that sponsored the visa – this is not the case for an H-1B visa holder. If an H-1B

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<sup>162</sup> 8 U.S.C. 1184(i)(1)(A)

<sup>163</sup> 8 U.S.C. 1184(i)(1)(B)

<sup>164</sup> 8 U.S.C. 1101(a)(15)(H)(i)

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visa holder wants to leave a job, or is fired, she should consult with both an employment law attorney and an immigration attorney as soon as possible. Moreover, if the visa is still valid, she should not be compelled to return to his or her country of origin.

Furthermore, an employer can petition for a green card for an employee in the United States on an H-1B (it also does not have to be the original visa-sponsoring employer). This process can take a long time, however, so workers who are interested in this prospect should consult with an immigration attorney as soon as possible. Once the process is under way, however, the worker should not change jobs until the green card is granted (or the green card petition will be considered null and void).

### **H-2B**

The H-2B visa nonimmigrant program permits employers to hire foreign workers to come temporarily to the United States and perform temporary nonagricultural services or labor on a one-time, seasonal, peak load, or intermittent basis.

The H-2B visa classification requires the Secretary of Homeland Security to consult with appropriate agencies before admitting H-2B non-immigrants. Homeland Security regulations require that, except for Guam, the petitioning employer first apply for a temporary labor certification from the Secretary of Labor indicating that: (1) there are not sufficient U.S. workers who are capable of performing the temporary services or labor at the time of filing the petition for H-2B classification and at the place where the foreign worker is to perform the work; and (2) the employment of the foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers. The Department of Labor will review and process all H-2B applications on a first-in, first-out basis.

Employers seeking to employ temporary H-2B workers must apply for Temporary Employment Certification to the Chicago National Processing Center (NPC). An employer may submit a request for multiple unnamed foreign workers as long as each worker is to perform the same services or labor, on the same terms and conditions, in the same occupation, in the same area of intended employment during the same period of employment. Certification is issued to the employer, not the worker, and is ***not transferable*** from one employer to another or from one worker to another.

### **H-2A**

An H-2A visa allows a foreign national entry into the U.S. for temporary or seasonal agricultural work. There are several requirements of the employer in regards to this visa. The H-2A temporary agricultural program establishes a means for agricultural employers who anticipate a shortage of domestic workers to bring nonimmigrant foreign workers to the U.S. to perform agricultural labor or services of a temporary or seasonal nature. Currently in the United States there are about 30,000 temporary agricultural workers under this visa program. All of these workers are supposed to be covered by U.S. wage

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laws, workers' compensation and other standards, but covert debt bondage may be present.

The wage or rate of pay must be the same for U.S. workers and H-2A workers. The hourly rate must be at least as high as the applicable Adverse Effect Wage Rate (AEWR), federal or state minimum wage, or the applicable prevailing hourly wage rate, whichever is higher. The AEWR is established every year by the Department of Labor for every state except Alaska.

If a worker will be paid on a piece rate basis, the worker must be paid the prevailing piece as determined by the State Workers Agency (SWA). If the piece rate does not result in average hourly piece rate earnings during the pay period at least equal to the amount the worker would have earned had the worker been paid at the hourly rate, then the worker's pay must be supplemented to the equivalent hourly level. The piece rate offered must be no less than what is prevailing in the area for the same crop and/or activity.

### ***Hiring***

Hiring means an active effort, including newspaper and radio advertising in areas of expected labor supply. Such recruitment must be at least equivalent to that conducted by non-H-2A agricultural employers in the same or similar crops and area to secure U.S. workers. This must be an effort independent of and in addition to the efforts of the SWA for at least 15 days. In establishing worker qualifications and/or job specifications, the employer must designate only those qualifications and specifications that are essential to carrying out the job and that are normally required by other employers who do not hire foreign workers.

### ***Housing and meals***

The employer must provide free housing to all workers who are not reasonably able to return to their homes or residences the same day. Such housing must be inspected and approved according to appropriate standards. The housing provided by the employer must meet all of the Department of Labor Occupational Safety and Health Administration (OSHA) standards that were set forth at CFR 1910.142 or the full set of standards at 654.404-645.417. An alternative form of housing is rental housing, which has to meet local or state health and safety standards.

The employer must either provide three meals a day to each of the workers or furnish free and convenient cooking and kitchen for workers to prepare and cook their own meals. If the employer provides the meals, then the employer has the right to charge each worker a certain amount per day for the three meals.

### ***Transportation and tools***

There are several provisions on the transportation of workers. The amount of transportation payment shall be no less (and shall not be required to be more) than the most economical and reasonably similar to the transportation charges for the distances involved. The employer is responsible for several forms of transportation depending on the situation. After the worker completes at least half of the work contract period, the employer must reimburse the worker for the costs of transportation and subsistence from the place of recruitment to the place of work if these expenses were charged to the worker. The employer must provide free transportation to the worker between the employer's housing and the area of work. Upon completion of the work contract, the employer must pay the costs of a worker's subsistence and transportation back to the place of recruitment. Some special conditions apply when the worker does not return to the area of recruitment because they are moving to another job. If the employer compensates foreign workers for transportation costs then they must do so for U.S. workers as well. If the employer provides transportation for foreign workers, they must provide transportation to U.S. workers as well.

The employer must cover the cost of tools and supplies necessary to carry out the work at no cost to the worker, unless this is uncommon and the occupation calls for the worker to provide certain items.

### **J-1**

A J-1 visa is a non-immigrant visa issued by the United States to exchange visitors participating in programs that promote cultural exchange, especially to obtain medical or business training within the United States. All applicants must meet eligibility criteria and be sponsored either by a private sector or government program.

J-1 visitors may remain in the United States until the end of their exchange program, as specified on form DS-2019. Once a J-1 visitor's program ends, he or she may remain in the United States for an additional 30 days, often referred to as a "grace period," in order to prepare for departure from the country. If the visitor leaves the United States during these 30 days, the visitor may not re-enter with the J-1 visa.

The minimum and maximum duration of stay are determined by the specific J-1 category under which an exchange visitor is admitted into the United States.

As with other non-immigrant visas, a J-1 visa holder and his or her dependents are required to leave the United States at the end of the duration of stay.

Different categories exist within the J-1 program, each defining the purpose or type of exchange. While most J-1 categories are explicitly named in the federal regulations governing the J-1 program, others have been inferred from the regulatory language.

***Private sector J-1 programs:***

- Alien Physician
- Au pair and EduCare
- Camp Counselor (summer camp)
- Intern
- Student, secondary school
- Work/travel
- Teacher
- Trainee
- Flight training (J-1 privileges terminated effective June 1, 2010)

**Referral Organizations & Resources**

**American Immigration Lawyers Association (AILA)**

If you need to put a client in touch with an immigration attorney quickly (or, if you yourself want to consult with an immigration attorney briefly regarding a client), contact the American Immigration Lawyers Association (AILA). Use the “Find a Lawyer” search engine, available at [www.aialawyer.com](http://www.aialawyer.com). AILA is the largest, national association of more than 11,000 attorneys and law professors who practice and teach immigration law.

AILA's National Office  
Suite 300, 1331 G St. NW  
Washington, D.C. 20005-3142  
Phone: 202-507-7600 Fax: 202-783-7853  
[www.aiala.org](http://www.aiala.org)

**Resources in Washington, D.C.**

- Ayuda, DC Office: 1990 K Street NW, Suite 500, Washington, DC 20006. (202) 387-4848. [www.ayuda.com](http://www.ayuda.com)
- Central American Resource Center (CARECEN): 1460 Columbia Road NW, Suite C-1, Washington, D.C. 20009. (202) 328-9799. More information is available at: [www.carecendc.org](http://www.carecendc.org).
- Asian Pacific Legal Resource Center (APALRC): 1627 K Street NW #610, Washington, D.C. 20006, Phone: (202) 706-7150, Legal Assistance: (202) 393-3572. More information is available at [www.apalrc.org](http://www.apalrc.org).

## **Resources in Virginia**

- Hogar Hispano Immigration Services Project: Call 703-534-9805 for an appointment. The office is at 6201 Leesburg Pike, Suite 307, Falls Church, VA 22044. More information is available at [www.hogarimmigrantservices.org](http://www.hogarimmigrantservices.org).
- Just Neighbors: 7630 Little River Turnpike, #900, Annandale, VA 22003, (703) 979-1240, [www.justneighbors.org/clinics](http://www.justneighbors.org/clinics)
- Centro Hispano de Frederick: 5 Willowdale Drive, Suite 18, Frederick, MD 21720, (301) 668-6270, [www.centrohispanodefreesderick.org](http://www.centrohispanodefreesderick.org)
- Tahirih Justice Center: 6400 Arlington Blvd., Suite 400, Falls Church, VA 22042, (571) 282-6161, [www.tahirih.org](http://www.tahirih.org)

## **Resources in Maryland**

- CASA de Maryland Legal Program: <https://wearecasa.org/legal-services-md>
- Asian Pacific Legal Resource Center (APALRC) (see entry under Washington, D.C. referrals): [www.apalrc.org](http://www.apalrc.org)
- Centro de los Derechos del Migrantes, Inc./Center for Migrants Rights (CDM): [www.cdmigrante.org](http://www.cdmigrante.org)

# **ARREST AND CONVICTION RECORDS as a BARRIER to EMPLOYMENT**

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## Arrest and Conviction Records as a Barrier to Employment

For many workers, an arrest and conviction record can be a barrier to employment. Many employers conduct background checks or hire third-party vendors to do so on their behalf. At times, employer policies around hiring individuals with arrest and conviction records may be overly exclusionary and exclude job applicants and employees without business justification. In a growing number of jurisdictions, workers subject to a criminal background check are not required to disclose their record until they receive a job offer, and may be able to file an administrative “Ban the Box” complaint if they believe the employer has made an improper determination on the basis of the reported record. . On some occasions, workers can overcome barriers to employment by carefully reviewing the contents of a criminal record, correcting mistakes, and requesting record sealing or expungement. In some instances, workers may be able to mount a disparate impact challenge to an employer’s policy using discrimination theories.

### **Federal Law**

#### **Employers’ Use of Arrest and Conviction Records**

Generally, employers may request, and consider, an applicant or employee’s arrest and conviction record in making decisions related to hiring and firing. While the worker protections in this area are rapidly evolving, and have increased substantive and procedural protections for workers and job applicants, they are still relatively weak compared to worker protections in other areas, such as anti-discrimination law.

#### **Discrimination Theory – Preventing Employers from Considering Arrest and Conviction Records**

In 2012, the Equal Employment Opportunity Commission (EEOC) issued guidance based on the consideration of criminal records in its compliance manual. In summary, the EEOC suggested that the employment policy or practice of excluding persons from employment on the basis of a criminal record, without a business necessity for the policy, would likely have an adverse impact on African-Americans and Hispanics and, as such, violates Title VII of the Civil Rights Act of 1964.

First, an employee(s) must establish the disparate impact caused by an employer’s policies relating to arrest and conviction record. If an employer’s policies exclude a disproportionate number of Title VII-protected individuals from employment opportunities frequently, this is evidence of disparate impact. See [\*Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964\*](#), EEOC Enforcement Guidance § (V)(A)(2) 79 (April 25, 2012).

Once the employee has successfully established a *prima facie* case of disparate impact, the burden shifts to the employer, and it must make a showing that the policy is job-related for the position and consistent with business necessity. *Id.* at 81. In considering business necessity, the EEOC looks at (1) the nature and gravity of the offense; (2) the time

## Arrest and Conviction Records as a Barrier to Employment

that has passed since the conviction and completion of the sentence; and (3) the nature of the job held or sought. See [Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964](#), EEOC Enforcement Guidance § (V)(B)(1) 89-92 (April 25, 2012); *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290 (8th Cir. 1975).

The nature of the offense can be assessed by the type of harm caused by the crime (such as theft causing property loss) or the legal elements of the crime (such as theft involving deception). See [Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964](#), EEOC Enforcement Guidance § (V)(B)(6)(a) (April 25, 2012). Element two, the time passed since the conviction, or criminal conduct exclusions are typically addressed specifically in an employer's policies. *Id.* at 116-117. The court in *Green* did not specify a timeframe for criminal conduct exclusion; however, they noted that permanent exclusions from employment based on any or all offenses were not consistent with the business necessity standard. *Id.* at 116-117; *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290 (8th Cir. 1975). Lastly, when identifying the nature of the job sought, the court will look at the title of the position, the nature of the job duties, essential functions of the position, and the circumstances and environment in which the job is performed. See [Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964](#), EEOC Enforcement Guidance § (V)(B)(6)(c) (April 25, 2012). Linking the criminal conduct to the essential functions of the job can be beneficial for the employer when trying to demonstrate that its policy or practice is job-related and consistent with business necessity. *Id.* at 119.

If the employer is able to prove that its policy meets the business necessity standard, the plaintiff can still prevail if they can show there is an available alternative employment practice that has less disparate impact but also serves the employer's legitimate needs. 42 U.S.C. § 2000e-2(k)(1)(A)(i)(1982).

Job applicants and employees have been successful in challenging employer policies that unjustifiably exclude candidates based on arrest record. There is rarely (if ever) a business necessity for knowing whether someone was arrested, based on the understanding that individuals charged with crimes are innocent until proven guilty. *Id.* at 101. The arrest itself cannot be considered; however, the conduct underlying the arrest may be relevant for employment purposes. *Id.* at 101. Employers may make an employment decision based on the conduct underlying an arrest if the conduct makes the individual unfit for that particular position. *Id.* at 105.. Several courts have found that companies that rely on arrest records that did not lead to conviction in making employment decisions can be held liable for race discrimination under Title VII. See, e.g., *Gregory Litton Sys. Inc.*, 316 F. Supp. 401 (C.D. Cal. 1970), *modified on other grounds*, 472 F.2d 631 (9th Cir. 1972); *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971); *Dozier v. Chupka*, 395 F. Supp. 836 (S.D. Ohio 1975); cf. *Richardson v. Hotel Corp. of Am.*, 332 F. Supp. 519 (E.D. La. 1971) (no discrimination where arrest led to theft conviction and employees had access to hotel guests' valuables).

Job applicants have also prevailed, through court order or settlement, in challenging and reforming employer policies that unjustifiably exclude applicants based on conviction

## Arrest and Conviction Records as a Barrier to Employment

record. In these cases, plaintiffs have challenged the background check policies as overly broad, that is, excluding applicants in ways that are unjustified by a business need. This area of the law is constantly evolving and practitioners are encouraged to seek out updated case law in this area. *See, e.g., The Fortune Society, Inc. et al v. Macy's, Inc.*, No. 19-05961 (S.D.N.Y. Nov. 24, 2020), (settlement for African-American and Latino class members and revision of Macy's current criminal background check policies); *Little v. Wash. Metro. Area Transit Auth.*, 313 F. Supp. 3d 27 (D.D.C. 2018), (settlement after grant of class certification); *EEOC v. Dolgencorp, LLC*, 249 F. Supp. 3d 890 (N.D. Ill. 2017).

## Use of Records in Banking & Security Jobs

In some types of work, a conviction record may statutorily bar job-seekers with particular types of convictions.

A person cannot be hired or can be fired from a **bank or financial institution** if she has been convicted of or entered a pretrial diversion program for an offense involving dishonesty, breach of trust, or money laundering. *See* 12 U.S.C. §1829(a) (1) (A).

Under 18 U.S.C. § 922(g), the following classes of persons are prohibited from possessing or using a firearm. Thus, these same groups are statutorily barred from occupations that require the use and possession of a firearm, such as that of an **armed security guard or police officer**.

- A person who has been convicted of a felony;
- A person who is a fugitive from justice;
- A person who is an unlawful user of, or addicted to any controlled substances;
- A person who has been adjudicated as mentally ill, or who has been committed to a mental institute;
- A person who is illegally or unlawfully in the United States, or has been admitted to the United States under a non-immigrant (*e.g.*, student or tourist) visa;<sup>165</sup>
- A person who has been discharged from the Armed Forces under dishonorable conditions;
- A person who has renounced her U.S. citizenship;
- A person who is subject to certain<sup>166</sup> domestic violence-related restraining orders;
- A person who has been convicted of a misdemeanor crime of domestic violence.

## D.C. Law

### Fair Criminal Records Screening Act of 2014 (“Ban the

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<sup>165</sup> See 18 U.S.C. § 922(y)(2) for exceptions for certain diplomatic personnel.

<sup>166</sup> See 18 U.S.C. § 922(g)(8).

## **Box”) for Private D.C. Employers**

Under the Fair Criminal Records Screening Act of 2014, eligible D.C. employers are not permitted to ask about a job applicant’s criminal record until after the employer makes a contingent job offer to the applicant. D.C. Code § 32-1341 *et. seq.* Employers who maintain the “box” on a job application or otherwise inquire about an applicant’s criminal record before the appropriate time may be subject to fines by the D.C. Office of Human Rights, half of which are awarded to the complainant.

Certain employers are **exempt** under the Act:

- Employers with 10 or fewer employees in the District;
- Any facility or employer that provides programs, services, or direct care to minors or vulnerable adults;
- Positions where a federal or District law or regulation requires consideration of an applicant's criminal history;
- Positions designated by the employer as part of a federal or District program designed to encourage employment of those with criminal histories; and
- The District of Columbia courts.

If an employer makes a conditional job offer to the applicant, then asks the applicant about a criminal record or does a criminal records check, it can only rescind the conditional offer for a “legitimate business reason,” taking into account:

- The specific duties and responsibilities of the position;
- The bearing of the criminal offense on the applicant's fitness or ability to perform the job;
- The time that has elapsed since the offense;
- The age of the applicant at the time of the offense;
- The frequency and seriousness of the offense; and
- Any information provided by the applicant to show that she has been rehabilitated.

If an applicant believes that an employer has withdrawn a conditional job offer as a result of the applicant’s criminal record, the applicant can request that the employer produce, within 30 days of the request: (1) a copy of all records procured by the employer in consideration of the applicant, and (2) a notice advising the applicant of his or her opportunity to file an administrative complaint with the D.C. Office of Human Rights.

Job applicants who know or believe that a prospective employer violated this Act can contact the D.C. Office of Human Rights to file a claim. There is no private right of action currently. If the Office finds a violation, it can assess fines against the employer: \$1,000 for an employer with 1 to 30 employees, \$2,500 for an employer with 31 to 99 employees and \$5,000 for an employer of 100+ employees.

## **“Ban the Box” For D.C. Government**

In 2010, the District passed “ban the box” legislation for D.C. government employees. The Returning Citizen Public Employment Inclusion Amendment Act, A18-685, prohibits public employers from considering a prospective employee’s criminal history for certain positions until after the initial screening process. D.C. Code § 1-620.42(c). In addition, the act restricts the ability of government employers from taking adverse action against a current employee because of her criminal history. Before disqualifying an applicant for certain positions or taking adverse action against a current employee, the government employer must first consider the following factors: (1) the duties and responsibilities of the position, (2) the bearing, if any, the criminal background will have on the applicant or employee’s ability to fulfill those duties and responsibilities, (3) age of the crime, (4) the applicant or employee’s age when the crime occurred, (5) the frequency and seriousness of the crime, (6) information about subsequent rehabilitation or good conduct, and (7) the public policy that it is generally beneficial for formerly incarcerated individuals to obtain employment. D.C. Code § 1-620.43.

## **When D.C. Employers Must Consider Criminal Records**

Under D.C. law, background and criminal checks must be made of any non-licensed person before he or she can be employed at **certain health-care facilities**.<sup>167</sup> See D.C. Code §44-552(b). All criminal records received by a facility must be kept confidential. See D.C. Code §44-552(c). The following criminal convictions will bar a non-licensed person from employment in the covered health-care facilities: murder (which includes attempted murder and manslaughter), arson, assault, battery, assault with a dangerous weapon, mayhem or threats to do bodily harm, burglary, robbery, kidnapping, theft, fraud, extortion, forgery, blackmail, illegal use or possession of firearm, rape, child abuse or cruelty to children, sexual assault, sexual battery, sexual abuse, or unlawful distribution or possession with intent to distribute a controlled substance. See D.C. Code § 44-552(e).

With certain exceptions, **employees and applicants for employment (and volunteers who will be in unsupervised positions) at covered child or youth services providers** must submit to a criminal background check. See D.C. Code § 4-1501.03. D.C. government agencies must annually submit an updated list of positions at child or youth service providers that require criminal background checks. § 4-1501.06(b). Employees of the **Department of Corrections** must also undergo biennial criminal background checks. §24-211.41.

## **Treatment of Juvenile Criminal Records by D.C.**

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<sup>167</sup> Covered “facilities” include: hospitals, maternity centers, nursing homes, community residence facilities, group homes for mentally disabled persons, hospices, home health-care agencies, ambulatory surgical facilities, and renal dialysis facilities. See D.C. Code §§ 44-501, 44-552.

## Employers

Information about juvenile records may not be released when the request for information is related to an application for employment, license, bonding, or any civil right or privilege. *See* 18 U.S.C. 5038(a); D.C. Code § 16-2318. Moreover, most employment applications ask for convictions, and **there are no “convictions” in D.C.’s juvenile courts** – just consent decrees, orders of adjudication, and orders of disposition. D.C. law specifically states that these dispositions are *not* convictions of a crime and may not impose civil disability usually resulting from a conviction. *See* D.C. Code § 16-2318.

In addition, the law states that a juvenile’s records must remain confidential and can only be viewed by a limited group of people, including the juvenile, the juvenile’s attorney, his or her parents, the courts, treatment facilities, or a prosecutor to determine criminal charges for the same transaction or occurrence. *See* D.C. Code § 16-2331(b). The court may order release of certain information contained in the case record if the juvenile has: (1) escaped from detention and is likely to pose a danger or threat of bodily harm to another person; (2) release of the information is necessary to protect the public safety and welfare; and (3) the respondent has been charged with a crime of violence as defined by D.C. Code § 23-1331(4). D.C. Code § 16-2331(e). Confidentiality applies as long as the charge is not transferred for adult criminal prosecution; these same restrictions apply to juvenile fingerprint records. *See* D.C. Code § 16-2334.<sup>168</sup>

Upon motion, juvenile records held in D.C. will be sealed when “two years have elapsed since the final discharge of the person from legal custody or supervision, or since the entry or any other Division order not involving custody or supervision; and he has not been subsequently convicted of a crime, or adjudicated delinquent or in need of supervision prior to the filing of the motion, and no proceeding is pending seeking such conviction or adjudication.” D.C. Code §16-2335(a).

Juvenile records held in federal court are also confidential, but there are no “civil disability” protections for federal juvenile offenses as there are in the D.C. Code. In addition, **federal juvenile convictions are open to other courts, law enforcement agencies with a need to know, the directors of treatment centers, the victim or relatives of a deceased victim, and an employer for whom national security is a concern.** *See* 18 U.S.C. § 5038(a) (2001).

The federal code specifically states that if an employer inquires about a juvenile record, the court is to reply in the same manner as it replies when there is no juvenile record. *Id.* Nonetheless, juvenile records must be transmitted to the FBI for certain repeat offenders and for serious crimes.<sup>169</sup> If a juvenile’s record is submitted to the FBI, the

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<sup>168</sup> The D.C. Rules Governing Juvenile Proceedings also provide for the confidentiality of juvenile records and restrict records access to certain named persons or entities. *See* D.C. SCR Juvenile Rule 55.

<sup>169</sup> Juvenile records must be reported to the FBI if 1) the juvenile has two convictions of felony crimes of violence, or an offense described in section 401 of the *Controlled Substances Act* or section 1001(a), 1005, or

## Arrest and Conviction Records as a Barrier to Employment

offenses may appear as the result of an employer's criminal background check.

## Professional Licensing

Many occupations require professional licenses. In 2021, D.C. enacted the Removing Barriers to Occupational Licensing for Returning Citizens Amendment Act, which reformed D.C.'s previous standards governing the issuance of professional licenses to individuals with arrest and conviction records. In relevant part, the reforms repealed vague "good character" requirements and instead require that a conviction be relevant to the job in order to be disqualifying.

To obtain a license in the health-care field, an individual must not have been "convicted of an offense that **is related to the occupation** for which the license, registration, or certification is sought." D.C. Code § 3-1205.03(a) (1).

To obtain a license for a non-health related profession, an individual must not have been "convicted of an offense that is **directly related** to the occupation for which the license, registration, or certification is sought or held, pursuant to a determination made under subsection (c-1)(2) of this section." D.C. Code § 47-2853.17. The licensing board determines whether a conviction is "directly relevant" by assessing "whether the elements of the offense are directly related, by clear and convincing evidence, to the specific duties and responsibilities of the occupation." *Id.* Applicants may also present evidence concerning their rehabilitation and fitness to the licensing board. *Id.*

For further requirements governing licensing related to conviction record, *see* D.C. Code § 47-2853.17 *et seq* and D.C. Code § 3-1205.14 *et seq*.

## Employers Must Pay for Arrest Records

Under the D.C. Human Rights Act, it is unlawful to require the worker to pay for producing an arrest record, but not a conviction record. *See* D.C. Code § 2-1402.66; CD.C.R § 4-503.7. Arrest records are limited by the D.C. Human Rights Act to the last 10 years. *Id.* Criminal History Request forms at the Metropolitan Police Department have this statute written on them.

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1009 of the *Controlled Substances Import and Export Act*, or 2) the juvenile has a conviction after age 13 of an act which, if committed by an adult, would be an offense described in the second sentence of the fourth paragraph of 18 U.S.C. § 5032. 18 U.S.C. § 5038(f) (The sentence referred to is conditional to the first sentence and is regarding specific drug offenses.). The records of a juvenile may also be reported to the FBI if she is prosecuted as an adult. 18 U.S.C. § 5038(d).<sup>170</sup> In addition to expungement for first-time drug offenses, parental kidnapping may be an expungeable offense under certain limited circumstances. Also, pursuant to the Criminal Records Sealing Act of 2006, the offense of "failure to appear" is expungeable after a 10-year waiting period.

## **Finding Out What is in an Arrest and Conviction Record**

Employers use a variety of sources to check criminal records, so clients should request records from the FBI *and* from all states in which they have an arrest or conviction.

### **FBI Records**

Workers can obtain a copy of their FBI reports for personal use. FBI records include information on all arrests and convictions in all states. First, collect the following items: (1) a current set of fingerprints, which can be obtained from any local police station – the fingerprint card must contain your name, the date, and the place of your birth; (2) a short letter with your signature and mailing address explaining that you would like your FBI report for personal use or a completed **Applicant Information Form** (available at <https://forms.fbi.gov/identity-history-summary-checks-review>) indicating that the report is for personal use under “Reason for Request”; (3) a signed money order for \$18 made out to the U.S. Treasury. Client who cannot afford the \$18 fee may submit a *notarized* letter stating that they cannot afford the fee. Send all of these to the Special Correspondence Unit:

FBI - CJIS Division Record Request  
1000 Custer Hollow Road  
Clarksburg, WV 26306  
Phone: 304-625-3878  
Main phone number for Clarksburg facility: 304-625-2000

According to the FBI’s website, it may take five to six weeks to get the records.

### **D.C. Criminal Records from Metropolitan Police Department**

Criminal records from the D.C. Metropolitan Police Department are often called a “criminal history request,” “background check,” or “police clearance.” The record from MPD will reflect “convictions or forfeitures of collateral” for the past 10 years. The exception to this rule is when an individual has been incarcerated for any or all of the past 10 years. In that case, the record will reflect the conviction for which the person was incarcerated, even if it is more than 10 years old. The rule governing the dissemination of records by the MPD is the Duncan Ordinance, found at D.C. Mun. Reg. 1-1004.5.

To request a criminal record in person, visit the Criminal Records Section of the D.C. Metropolitan Police at 300 Indiana Ave. NW, Room 3055 (Judiciary Square/Red Line or National Archives/Green line Metro), Monday to Friday, 9 a.m. to 4:30 p.m. Bring a driver’s license or some form of government photo identification, or a birth certificate and a Social



## Arrest and Conviction Records as a Barrier to Employment

security card. The cost is \$7. Someone applying in person is supposed to be able to get a copy of his or her record within 40 minutes. There is no way to have the fee waived. **Be aware that outstanding arrest warrants appear on MPD criminal records, and individuals with outstanding warrants are often arrested as they wait in line for the results of their background checks.**

To request a clearance by mail, send (1) a notarized letter containing the full name, birth date, Social Security number, place of birth, race, and exact street address; (2) a self-addressed, stamped envelope and (3) a \$7 money order or personal check payable to the D.C. Treasurer to:

Metropolitan Police Department  
Arrest and Criminal History Section  
Attn: Police Clearances  
300 Indiana Ave. NW, Room 3055  
Washington, D.C. 20001  
Phone: 202-727-4245 and 4246.

## Criminal Records from D.C. Superior Court

Criminal records from the courts are public information. They show all arrests, convictions, and dispositions that passed through that court system. The D.C. Superior Court keeps criminal records on its computers from 1978 to the present, and has paper records for earlier dates. This is important to know because the increased use of internet background searches primarily relies on courthouse records rather than police department records. Thus, at least in D.C., more information about a person's criminal history is available through the courts than through MPD. Outstanding warrants and current Civil Protection Orders appear on Superior Court records as well, but warrants are less frequently executed at the court.

To get a copy of a criminal record in person, go to the Criminal Information Center of the D.C. Superior Court, located at 500 Indiana Ave. NW, Room 4001 (Judiciary Square/Red Line or National Archives/Green Line Metro). The Criminal Information Center is open Monday through Friday from 8:30 a.m. to 5 p.m. Getting records is easy. A worker can either use the computers set up along the left-hand wall of the office, or ask the clerk to print out the document for you. There is no charge to obtain a copy of your record, but you must bring a photo ID. To get a record use the (1) full name of the person, and (2) birth date. The Police Department Identification number (PDID) of the person can also be used to find the record.

To request a D.C. Superior Court record by mail, send the case number, full name, and birthdate of the person to:

D.C. Superior Court

## Arrest and Conviction Records as a Barrier to Employment

Moultrie Courthouse  
Criminal Division  
500 Indiana Ave. Rm. 4001  
Washington, D.C. 20001  
Phone: 202-879-1373

### **U.S. District Court Criminal Records**

Court records from the U.S. District Court are public. The system of researching records at District Court is not as easy or systematic as the Superior Court system, so the best way to examine federal charges is by requesting an FBI record. It is possible to go in person to examine records at the District courthouse located at 333 Constitution Ave. NW. (Judiciary Square/Red Line). The clerk's office is on the first floor.

The District Court organizes its records by case name (or docket number) rather than listing an individual's federal criminal record. For example, looking up the last name "Johnson" would turn up all cases titled "Johnson v. United States." Also, cases are only computerized from mid-1991. Anything older than that can be accessed on microfiche. Once a case has been identified, the clerk can pull the case jacket for inspection. If the case has been closed for some time, it might be necessary to go to the court's Suitland, Md., storage space to access the case jacket.

### **Correcting Mistakes on a Criminal Record**

Many conviction records contain at least one mistake, so checking the worker's record is important. When a worker gets a copy of his or her record, she should check for incomplete entries (a reported arrest without notation as to the final outcome of the arrest – like an acquittal), incorrect entries, duplicate entries, and other possible mistakes. If mistakes are identified, there are ways to correct them.

If there are errors in the criminal record, gather proof of the error and send it to the Criminal Records Section of MPD and the FBI at the addresses listed above. To prove the error, request the original criminal jacket at Superior Court or contact a public defender or attorney. Send in the correction using certified mail and call after two weeks to ensure the correction is processed.

To correct an error in a D.C. Superior Court record, notify the clerk that there is a mistake and ask to see the case jacket. If it is a clerical error and the clerk can verify this from looking at the jacket, she should be able to fix it then. If not, write a letter to the director of the Criminal Information Center at D.C. Superior Court.

Errors in federal court records must be addressed by filing a motion with the court

to change the record. A lawyer should assist with writing the motion.

## **Sealing & Expunging Criminal Records**

### **Sealing Adult Arrest Records**

An individual can move to seal the record of any arrest in the District of Columbia that did not lead to a conviction.

Prior to 1979, individuals whose cases were dismissed before trial were allowed an “amplification” procedure as remedy where a notation was placed on the arrest record to explain its dismissal. *See District of Columbia v. Sophia*, 306 A.2d 652 (D.C. 1973); *Spock v. District of Columbia*, 283 A.2d 14 (D.C. 1971).

In 1979, D.C. Superior Court developed a new equitable remedy for sealing records. *See District of Columbia v. Hudson*, 404 A.2d 175 (D.C. 1979), *rev’d in part*, 449 A.2d 294 (1982). In *Hudson*, the court ordered that arrest records be sealed and that an order be entered explaining the grounds for failure to prosecute in the following cases:

- The person was arrested for a murder that was discovered to have been a suicide;
- The person was arrested for the failure to attend driving school, which the person had in fact attended; and
- The person was arrested for carrying a pistol, but law enforcement officials conceded that they arrested the wrong person.

**The Criminal Records Sealing Act of 2006 substantially changed the law in this area.** *See* D.C. Code § 16-801 *et seq.* First, it lowered the standard for proving actual innocence from clear and convincing evidence to preponderance of the evidence, if the proceedings are begun within four years after the termination of prosecution. Second, it changed the window of time for filing a motion to seal an arrest record from 180 days (with the burden being on the government before 180 days and on the claimant after 180 days) to a waiting period of two years. If the worker has not had a disqualifying arrest or conviction during that time frame, she can move to seal and expunge his or her arrest that did not lead to conviction, and the prosecutor has the burden of proving by a preponderance of the evidence that it is in the interests of justice that the record not be sealed. The act goes on to define the interests of justice, taking into account all of the relevant factors regarding the offense, its alleged commission, law enforcement needs, and the needs of society at large, including the need for people to be gainfully employed.

In addition, expunging an arrest record is always appropriate where the prosecutor is unable to make any showing of probable cause for arrest. *See Washington Mobilization Comm. v Cullinane*, 566 F.2d 107 (D.C. Cir. 1977).

## Expunging Adult Convictions

Expunging a conviction may be warranted in appropriate cases. For example, if the conviction was illegal, it may be expunged. *See Tarlton v. Saxbe*, 507 F.2d 1116 (D.C. Cir. 1974); *Menard v. Saxbe*, 498 F.2d 1017 (D.C. Cir. 1974).

Under the Criminal Records Sealing Act of 2006, if the worker can prove that she is actually innocent of the crime, the worker can move to have his or her criminal record expunged. If the worker moves to do so within four years after the termination of the proceeding, the standard of proof will be a preponderance of the evidence.

## Expunging a First-Time Drug Misdemeanor Conviction

If a person is found guilty of possession and has not previously been discharged and had the proceedings dismissed, the court may defer further proceedings and place her on probation upon reasonable conditions, not to exceed one year. D.C. Code § 48-904.01(e)(1). The court may also dismiss the proceedings against the person and discharge him or her from probation before the expiration of the maximum period prescribed for probation. *Id.* Once probation is successfully completed, the person can apply to the court to expunge all official records related to the arrest, indictment, trial and conviction of the first-time drug misdemeanor. D.C. Code § 48-904.01(e)(2). If the court grants the expungement, then the person is returned to the status she occupied before the arrest or indictment.

**Note:** The person cannot be guilty of perjury or otherwise giving a false statement by failing to acknowledge the arrest, indictment or trial. *Id.*

Rule 32(g) of the D.C. Rules of Criminal Procedure spells out the process by which first-time drug misdemeanors may be expunged. D.C. SCR-Crim. Rule 32(g). Rule 32(g) only applies to misdemeanors for simple possession as defined in D.C. Code § 48-904.01(e)(2). *Id.* Thirty days before the expiration of probation, the Social Services Division of the court is supposed to notify the court that the probation is about to end. D.C. SCR – Criminal Rule 32(f)(1). A person who has been discharged from probation and against whom all charges have been dismissed may file with the court and prosecutor a *motion for expungement of records*. D.C. SCR-Crim. Rule 32(g)(2). The prosecutor may file an opposition within 10 days. *Id.* If the court finds that the person was discharged from probation and that the proceedings were dismissed under D.C. Code § 48-904.01(e)(1), then the court *must* order expungement of all official records. *Id.*<sup>170</sup>

**Note:** In cases involving codefendants, the records will first be sanitized and then expunged.

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<sup>170</sup> In addition to expungement for first-time drug offenses, parental kidnapping may be an expungeable offense under certain limited circumstances. Also, pursuant to the Criminal Records Sealing Act of 2006, the offense of “failure to appear” is expungeable after a 10-year waiting period.

## **Juvenile Criminal Records**

### **Sealing Juvenile Arrest Records**

D.C. Rule of Juvenile Procedure 118(a) discusses the procedures used for sealing juvenile arrest records. D.C. SCR-Juvenile Rule 118. If a juvenile is arrested, but no petition for delinquency is filed (*i.e.*, the prosecutor has “dropped the charges”), the juvenile can file a motion to seal the records within 120 days after the charges have been dismissed. *Id.* at 118(a)(1). Motions can be made within three years of the arrest for good cause and to prevent manifest injustice, or can be filed at any time after the arrest if the government does not object. The Attorney General (who prosecutes juvenile crimes) must inform the court within 30 days if it does not intend to oppose the motion. The court can grant or deny the motion, or set an evidentiary hearing. *Id.* at 118(a)(2).

The standard of proof for the motion and/or the hearing is a showing by clear and convincing evidence that the offense did not occur or that the juvenile is not guilty. D.C. SCR-Juvenile Rule 118(a)(5). Hearsay evidence is admissible. *Id.* If the court orders the arrest record sealed, it should be purged from the computers; however, the Attorney General and the police may maintain a record of the arrest so long as it does not identify the juvenile. D.C. SCR-Juvenile Rule 118(a)(6)(B)(i). If the motion to seal the arrest record is denied, it can be appealed from a final order under Rule 4(b) of the General Rules of the D.C. Court of Appeals. *Id.* at 118(a)(9).

### **Sealing Juvenile Convictions**

Juvenile court convictions **must** be sealed if (1) it has been at least two years since the final discharge from legal custody and (2) the child has no subsequent convictions. *See* D.C. Code § 16-2335(a). The client must petition the court to seal the records. *Id.* This is done by filing a Motion to Seal Records with the Family Division. *Id.*

**Note:** A sample motion can be found as Form 8 following the Rules Governing Juvenile Proceedings in the D.C. Superior Court Rules. After the motion is filed with the clerk’s office, the clerk must deliver copies to Attorney General, the D.C. authority which granted the juvenile’s original discharge (usually Court Social Services), the Metropolitan Police Department, and the juvenile’s parents or guardians. Each has 45 days to contest the sealing of the records. If no opposition is heard, the court will instruct the clerk to seal all criminal records concerning the child. Otherwise, a hearing will be scheduled, governed according to Superior Court Gen. Fam. Rule P (f).

### **Youth Rehabilitation Act**

The Youth Rehabilitation Act (YRA) was passed to provide young adults younger than 22 the opportunity to be sentenced so that they might have a fresh start after they

## Arrest and Conviction Records as a Barrier to Employment

complete their sentences. The YRA applies to young people convicted of misdemeanor offenses under D.C. law. Instead of receiving a regular criminal sentence, these young adults serve their sentence at facilities designed for their “treatment, care, education, vocational training, and rehabilitation.” See D.C. Code §§ 24-902, 24-903. Therefore, if someone was convicted of an offense and sentenced under the YRA, she may have his criminal conviction “set aside” upon a petition to the court. *Id.* at §§ 24-901- 907.

Before it was repealed on Oct. 12, 1984, federal records could be set aside (*i.e.*, expunged from public view, but not from the courts or law enforcement) under the Federal Youth Corrections Act, 18 U.S.C. § 5005 to 5020. Under this law, persons with records that should have been expunged but were not have a right to have them expunged even if the method for appeal has been closed. See generally *Barnett v. D.C. Department of Employment Services*, 491 A.2d 1156 (D.C. 1985). The District’s Youth Rehabilitation Act was passed to fill the void left by Congress’s repeal of both the FYCA and a similar district law.

When a youth is unconditionally discharged from confinement before the end of the maximum sentence, the Board of Parole *must* set aside the conviction and issue a certificate to that effect (which should be closely safeguarded). See D.C. Code § 24-906(a). If the youth is discharged after the maximum sentence has run, the Parole Commission *may* set aside the conviction. *Id.* at § 24-906(b). Youth with sentences shorter than one year or with back-to-back one-year sentences are eligible to have their convictions set aside under this provision. See *Lattimore v. United States*, 597 A.2d 362, 366 at n.9 (D.C. Circ. 1991). If the court cuts short the probation period, then the “conviction” must also be set aside and a certificate issued to that effect. See D.C. Code § 24--906(d). A conviction that has been set aside based on an unconditional discharge is intended to remove the “legal disabilities created by conviction”; however, even if the conviction has been set aside, it can still be used in court or by law enforcement for “legitimate purposes.” See *Lindsay v. United States*, 520 A.2d 1059, 1063 (D.C. 1987).

Most young people charged with crimes committed before they turned 18 (and in some cases before age 21) have their cases adjudicated in a special court called juvenile court. Records of these proceedings are generally sealed. Disclosure of juvenile records to employers is prohibited by law, but these records can show up in some computer systems. See D.C. Code § 16-2331, 16-2332; D.C. Mun. Reg 1-1000 (The Duncan Ordinance) (Juvenile offenses can occasionally be taken into account when an adult is sentenced.). Sealing juvenile records is one way to minimize the risk of disclosure. Be aware that young people are increasingly tried as adults. Children charged as adults in the regular criminal law system do not have the protection of confidentiality that juvenile courts give. (Note that the Youth Rehabilitation Act described above offers some degree of protection to some people who were arrested or convicted during their youth.)

## Immigrants’ Arrest and Conviction Records

An immigrant who has not yet become a U.S. citizen is usually required by U.S.

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Citizenship and Immigration Services (USCIS, formerly INS) to supply court records verifying the outcome of any arrest or criminal proceeding when the immigrant applies for naturalization or any other immigration benefits. USCIS fingerprints all applicants and checks for arrest records in the FBI's National Crime Information Center database. If sealing or expunging a record will restrict an immigrant worker's future ability to get a certified copy of the record from the court when the immigrant is applying for immigration or naturalization benefits, she should consider this and talk to an immigration attorney. Also, an immigrant worker should be aware that she will still be required to disclose certain facts relating to any arrest or detention on immigration applications even if the record is sealed or expunged; similarly, expunged or sealed records may still count as convictions for immigration purposes.

## **Maryland Law**

### **Treatment of Arrest and Conviction Records by Employers**

#### **Maryland State Law**

Maryland law prohibits employers with 15 or more full-time employees from requiring that applicants for employment disclose whether they have an arrest and conviction record or had a criminal accusation brought against them prior to the first in-person interview. [Md. Code Ann., Lab. & Empl. § 3-1501 et seq.](#) Certain employers are not prohibited from making a background check where they are required to do so or authorized by an applicable state or federal law, e.g. for positions in education, health care, information technology, or the financial sector. *Id.* Employers who violate this law can be subjected to civil fines. More information, including a complaint form can be found at: [www.dllr.state.md.us/labor/wages/esscrimscreen.shtml](http://www.dllr.state.md.us/labor/wages/esscrimscreen.shtml).

In Maryland, employers are prohibited from inquiring about arrests and convictions that have been expunged. *See* Md. Criminal Procedure Code Ann. § 10-109(a)(1)(i). Employers are also prohibited from inquiring about arrests that did not lead to conviction, and applicants and employees do not have to disclose arrests that did not lead to conviction. *Id.* at § 10-109(a)(2)(i). Employers cannot refuse to hire someone or fire someone because the worker refuses to answer questions about arrests that did not lead to conviction or expunged records. *Id.* at § 10-109(a)(3)(i).

When applying for licenses, licensing agencies are prohibited from inquiring about arrests and convictions that have been expunged Md. Criminal Procedure Code Ann. § 10-109(a)(1)(ii). Workers are not required to answer questions about arrests that did not lead to convictions when applying for licenses. *Id.* at § 10-109(a)(2)(i). Applications for licenses cannot be denied for an applicant's refusal to answer questions relating to expunged charges or arrests that did not lead to conviction. *Id.* at § 10-109(a)(3)(ii).

## Arrest and Conviction Records as a Barrier to Employment

The penalty for violating these rules is a misdemeanor charge, and the employer is subject to a fine of not more than \$1,000 or imprisonment for not more than one year, or both, for each violation. Md. Criminal Procedure Code Ann. § 10-109(b)(1). If the person is an official or employee of the state or any subdivision of the state, she shall, in addition to these penalties, be subject to removal or dismissal from public service on grounds of misconduct in office. *Id.* at § 10-109(b)(2).

### **Montgomery County Fair Criminal Records Screening Standards Act**

Montgomery County, like D.C., has a “ban the box” ordinance. Montgomery County Employment County Code Section 27-72.

[https://codelibrary.amlegal.com/codes/montgomerycounty/latest/montgomeryco\\_md/0-0-0-136452](https://codelibrary.amlegal.com/codes/montgomerycounty/latest/montgomeryco_md/0-0-0-136452).

Effective January 1, 2015, Montgomery County employers with 15 or more full-time employees are prohibited from asking applicants about their records prior to a conditional offer of employment. The law does apply to the County government, but other employers are exempt: (1) the state and federal government; (2) County police, fire/rescue, and corrections positions; (3) an employer that provides services or direct care to minors or vulnerable adults; and (4) where the position requires a federal security clearance.

Otherwise-eligible employers can still inquire about an applicant’s criminal record if the applicant voluntarily discloses details about the record. After giving a conditional offer of employment, employers may generally inquire into arrest and conviction record. However, they may never ask about arrests that did not lead to conviction; a first conviction of trespass or disturbance of the peace; or a misdemeanor if at least 3 years have passed since the date of the conviction or the date that any period of incarceration ended; or confidential or expunged records.

If, after inquiring about the applicant’s record after the first job interview, the employer chooses to rescind a job offer, the employer must notify the applicant of the discovery of the record and its intention to rescind the job offer after 7 days, during which time the applicant can correct any inaccuracies on the record.

Applicants seeking to file a claim about a violation of the ordinance can go to the County Office of Human Rights. If the case review board finds a violation, it may issue damages for humiliation and embarrassment, unreimbursed travel or other reasonable costs, attorneys’ fees, and civil penalties. Section 27-8.

### **Prince George’s County Fair Criminal Records Screening Standards Act**

Prince George’s County has a “ban the box” ordinance very similar to Montgomery County’s (above). Effective January 20, 2015, it prohibits most employers from inquiring



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about a job applicant's conviction record until the conclusion of a first job interview. It applies only to employers with 25 or more employees and, among other exceptions similar to those in Montgomery County, it exempts positions that, in the judgment of the County, have access to confidential or proprietary business or personal information, money or items of value, or involve emergency management. *See* Subd. 10, Div. 12, P.G. Cnty Code; *see also* Prince George's County Human Relations Commission Rules and Regulations, CR-6-2015.

Qualifying employers may ask about a record following the first interview, so long as they conduct an "individualized assessment" taking into account: (a) the specific offenses and their relation to the position (b) the time elapsed since the offenses; and (c) any evidence of inaccuracy in the record. Employers wishing to rescind a job offer following the discovery of a record must notify the applicant and allow the applicant at least 7 days to correct any inaccuracies on the record.

Applicants seeking to file a claim about an employer's possible violation must do so with the County Human Relations Commission. The Human Relations Commission may issue a cease and desist order to the employer; and order the payment of a civil fine, and travel costs and damages for humiliation and embarrassment to the complainant.

### **City of Baltimore Fair Criminal Records Screening Standards Act**

The City of Baltimore also has a "Ban the Box" ordinance. It prohibits employers with 10 or more full-time employees in Baltimore from inquiring into arrest and conviction record before a conditional offer of employment has been made to the job applicant. It also prohibits retaliation against individuals who exercise their rights to complain of violations. Baltimore City Code, Art. 11, § 15-1 *et seq.*

Job applicants may file complaints with the Baltimore Community Relations Commission, which may award backpay, reinstatement, compensatory damages, and attorneys' fees to the complainant. *Id.*

## **Expungement and Sealing**

### **Criminal Records – FBI & Maryland Records**

Maryland criminal records may be obtained through the following process: 1) go to any Maryland police station for fingerprints rolled on Form 015 (this costs \$5, check or money order; 2) mail the form to CJIS - Central Repository, P.O. Box 32708, Pikesville, MD 21282-2708 or overnight to CJIS, 6776 Reisterstown Road, Suite 102, Baltimore, MD 21215. Include a check or money order for \$18 as well. It will take two to three weeks to get records by mail. Fees cannot be waived for inability to pay.

**Note:** Even if a Maryland charge is expunged from an FBI report, it can remain on a

## Arrest and Conviction Records as a Barrier to Employment

Maryland record.

### **Expungement of Police Records When no Charge is Filed**

A person who was arrested or confined by a law enforcement unit prior to Oct. 1, 2007, for the suspected commission of a crime and then released without being charged with the commission of a crime **may request** the expungement of the police record. Md. Criminal Procedure Code § 10-103. A person who is arrested or confined by a law enforcement unit before or after October 1, 2007 for the suspected commission of a crime and then released without being charged with the commission of a crime **is entitled to** the expungement of the police record. Md. Criminal Procedure Code § 10-103.1.

Pre-Oct. 1, 2007, requests for expungement can be filed with the law enforcement unit that arrested or confined and released the person. A petition for expungement must be filed within eight years of the arrest. Md. Criminal Procedure Code § 10-103.

The current code provision contains no similar time limit; law enforcement units are required to automatically expunge persons with eligible records within 60 days after release. Md. Criminal Procedure Code § 10-103.1 If a law enforcement unit, booking facility or central repository fails to expunge the record, the person is entitled to seek redress by means of any appropriate legal remedy and to recover court costs. *Id.*

If a pre-2007 request is granted, the agency must expunge all records, Md. Criminal Procedure Code § 10-103, and if it is denied, the petitioner has 30 days to appeal. *Id.* If the law enforcement unit to which the person has sent a request finds that the person is not entitled to an expungement of the police record, the law enforcement unit, within 60 days after receipt of the request, shall advise the person in writing of: (1) the denial of the request for expungement; and (2) the reasons for the denial. Md. Criminal Procedure Code Ann. § 10-103(e).

If a request by the person for expungement of a police record is denied under subsection (e) of the MD Code of Criminal Procedure § 10-103, the person may apply for an order of expungement in the District Court that has proper venue against the law enforcement unit. Md. Criminal Procedure Code Ann. § 10-103(f)(1)(i). The person shall file the application within 30 days after the written notice of the denial is mailed or delivered to the person. Md. Criminal Procedure Code Ann. § 10-103(f)(1)(ii). A person who is entitled to expungement under this section may not be required to pay any fee or costs in connection with the expungement. Md. Criminal Procedure Code Ann. § 10-103(g).

Also, unless the state objects and shows cause why a record should not be expunged, if the state enters a *nolle prosequi* as to all charges in a criminal case within the jurisdiction of the District Court with which a defendant has not been served, the District Court may order expungement of each court record, police record, or other record that the state or a political subdivision of the state keeps as to the charges. *See*, Md. Criminal Procedure Code Ann. § 10-104(a).

## Arrest and Conviction Records as a Barrier to Employment

A person may also seek expungement of a police record, court record, or other record maintained by the state or a political subdivision of the state in the following scenarios: (1) the person is acquitted; (2) the charge is otherwise dismissed; (3) a probation before judgment is entered, unless the person is charged with a violation of § 21-902 of the Transportation Article or Title 2, Subtitle 5 or § 3-211 of the Criminal Law Article; (4) a *nolle prosequi* or *nolle prosequi* with the requirement of drug or alcohol treatment is entered; (5) the court indefinitely postpones trial of a criminal charge by marking the criminal charge “stet” or stet with the requirement of drug or alcohol abuse treatment on the docket; (6) the case is compromised under § 3-207 of the Criminal Law Article; (7) the charge was transferred to the juvenile court under § 4-202 of this article; (8) the person: (i) is convicted of only one criminal act, and that act is not a crime of violence; and (ii) is granted a full and unconditional pardon by the Governor; or (9) the person was convicted of a crime under any state or local law that prohibits: (i) urination or defecation in a public place; (ii) panhandling or soliciting money; (iii) drinking an alcoholic beverage in a public place; (iv) obstructing the free passage of another in a public place or a public conveyance; (v) sleeping on or in park structures, such as benches or doorways; (vi) loitering; (vii) vagrancy; (viii) riding a transit vehicle without paying the applicable fare or exhibiting proof of payment; or (ix) except for carrying or possessing an explosive, acid, concealed weapon, or other dangerous article as provided in § 7-705(b)(6) of the Transportation Article, any of the acts specified in § 7-705 of the Transportation Article. Md. Criminal Procedure Code Ann. § 10-105(a).

### **Expunging Court Records**

Convictions generally cannot be expunged unless the Governor of Maryland personally orders it by a pardon.

Criminal charges that resulted in acquittal (*i.e.*, found not guilty) or dismissal may be expunged. In most cases, three years must have passed since the sentence ordered has been fully served before a petition will be heard, and the worker’s record must be clear of any other convictions during that time.

The following other types of actions in criminal matters may also be expunged:

- Probation before judgment; the defendant pleads guilty or is found guilty, and is given probation but the judgment of guilt is not entered if the probationer successfully completes the term;
- *Nolle prosequi* charges – the voluntary withdrawal of the prosecuting attorney to present proceedings on a criminal charge;
- A case placed on “stet docket” and three years have passed since disposition;
- a case in which the petitioner was given a Governor’s pardon at least five years earlier; or
- A case transferred to juvenile court.

### **How to Petition for Expungement**

If the worker was acquitted or had probation before judgment, or if the worker's charges in the criminal case were dismissed or *nolle prosequi*, then the worker should wait three years from the termination of the proceeding or probation and then file a petition to expunge the record. Md. Criminal Procedure Code. Ann. 10-105(c). A form petition (Form D.C./CR 72) can be retrieved at any District Court location in Maryland. The worker will need to know the date of his or her arrest, citation, or summons; the law enforcement agency that took the action; the offense; and the date the case was disposed of by the agency or court. It also helps if the worker knows the case number. The process generally takes 90 days, unless the government objects, in which case a hearing will be held on the petition.

### **Treatment of Juvenile "Convictions"**

An adjudication of a child is not a criminal conviction for any purpose and does not impose any of the civil disabilities ordinarily imposed by criminal conviction. *See* Md. Code Ann., Cts. & Jud. Proc. § 3-8A-23(1) (2020). Such adjudication or disposition of a child shall not disqualify the child with respect to employment in the civil service of the state or in any subdivision of the state. *Id.* at 3-8A-23(d).

### **Confidentiality of Juvenile Records**

Police records concerning children are confidential and their contents may not be divulged, by subpoena or otherwise, except by order of the court upon good cause shown or as provided in §7-303 of the Education Article. *See* Md. Code Ann., Cts. & Jud. Proc. §3-8A-27(a)(1). In addition to being confidential, police records concerning children are kept separate from those of adults. *Id.* at §3-8A-27(a)(1). Court records are also confidential and may not be disclosed. *Id.*

### **Sealing Juvenile Records**

The court, on its own motion or on petition, and for good cause shown, may order the court records of a child sealed, and, upon petition or on its own motion, shall order them sealed after the child has reached 21 years of age. If sealed, the court records of a child may not be opened, for any purpose, except by order of the court upon good cause. *See* Md. Code Ann., Cts. and Jud. Proc. § 3-8A-27(c).

## **Expunging Criminal Charges Transferred to the Juvenile Court**

A petition for expungement of records may be filed under Md. Code Ann., Crim. Proc. § 10-106(b) when a criminal case is transferred to the juvenile court for adjudication. Proceedings for expungement are filed with the juvenile court pursuant to Md. Rule 11-506. Form 11-506.1 must be used to file an expungement petition.

## **Virginia Law**

### **“Ban the Box” for VA Executive Branch**

In 2015, Governor McAuliffe signed an executive order implementing “Ban the Box” hiring policies for executive branch hiring. The order applies to all agencies, boards, and commissions within the executive branch of Virginia state government. It prohibits questions about arrest and conviction record from job applications; and states that hiring decisions may not be made based on criminal history unless “demonstrably job-related and consistent with business necessity.” There are no new causes of action under the Executive Order. See [https://sgr.virginia.edu/sites/sgr.virginia.edu/files/E041\\_2015.pdf](https://sgr.virginia.edu/sites/sgr.virginia.edu/files/E041_2015.pdf).

### **Treatment of Arrest and Conviction Records by Employers**

**It is illegal for a Virginia employer to pursue inquiries about a worker’s expunged arrest or conviction, or an arrest or criminal charge that did not result in conviction.** See Va. Code Ann. § 19.2-392.4A. Any government agency or other licensing body may not inquire or expect an applicant to respond to questions about arrests or charges that have been expunged. *Id. at* § 19.2-392.4B. A violation of this rule can result in a class one misdemeanor charge. *Id. at* § 19.2-392.4C. The only exception is if the records are needed for employment in law enforcement or for a pending criminal investigation and that the investigation will be jeopardized or that life or property will be endangered without immediate access to the record. See Va. Code Ann. § 19.2-392.3B. In that case, the law enforcement party that needs access to the information can move the court to *view but not copy* the records without the individual’s knowledge or consent. *Id.*

### **Providers of In-home Care**

Va. Code Ann. § 19.2-392.02 allows businesses and organizations to conduct a national background check regarding employees or volunteers providing care to children, the elderly, and disabled. “Home-based services” are defined as services that include homemaker, companion, or chore services that will allow individuals to attain or maintain self-care and are likely to prevent or reduce dependency. Va. Code Ann. § 63.2-1600.

The statute outlines the procedure:

## Arrest and Conviction Records as a Barrier to Employment

Each local board shall obtain, in accordance with regulations adopted by the board, criminal history record information from the Central Criminal Records Exchange of any individual the local board is considering approving as a provider of home-based services pursuant to § 63.2-1600 or adult foster care pursuant to § 63.2-1601. The local board may also obtain such a criminal records search on all adult household members residing in the home of the individual with whom the adult is to be placed. The local board shall not hire for compensated employment any persons who have been convicted of an offense as defined in § 63.2-1719. Va. Code Ann. § 63.2-1601.1 (A).

In emergency circumstances, each local board may obtain from a criminal law agency the criminal history record information from the Central Criminal Records Exchange for the records search authorized by this section. The provision of home-based services shall be immediately terminated or the adult shall be removed from the home immediately, if any adult resident has been convicted of a barrier crime. Va. Code Ann. § 63.2-1601.1(B).<sup>171</sup>

**Barrier crimes** include convictions of murder, malicious wounding by mob, abduction, abduction for immoral purposes, assault and bodily wounding, robbery, carjacking, extortion by threat, felony stalking violation, sexual assault, arson, burglary, felony violation relating to possession or distribution of drugs, drive-by shooting, use of a machine gun in a crime of violence, aggressive use of a machine gun, use of a sawed-off shotgun in a crime of violence, pandering, crimes against nature involving children, incest, taking indecent liberties with children, abuse and neglect of children, failure to secure medical attention for an injured child, obscenity offenses, possession of child pornography, electronic facilitation of pornography, abuse and neglect of incapacitated adults, employing or permitting a minor to assist in an act constituting an offense, delivery of drugs to prisoners, escape from jail, felonies by prisoners, or an equivalent offense in another state; (ii) convicted of any other felony in the five years prior to the application date for employment; or (iii) the subject of a founded complaint of child abuse or neglect within or outside the Commonwealth. A conviction shall include prior adult convictions and juvenile convictions and adjudications of delinquency based on an offense that would have been at

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<sup>171</sup> The petition with a copy of the warrant or indictment if reasonably available shall be filed in the circuit court of the county or city in which the case was disposed of by acquittal or being otherwise dismissed and shall contain, except where not reasonably available, the date of arrest and the name of the arresting agency. Where this information is not reasonably available, the petition shall state the reason for such unavailability. The petition shall further state the specific criminal charge to be expunged, the date of final disposition of the charge as set forth in the petition, the petitioner's date of birth, and the full name used by the petitioner at the time of arrest. Va. Code Ann. § 19.2-392.2(C).

A copy of the petition shall be served on the attorney for the Commonwealth of the city or county in which the petition is filed. The attorney for the Commonwealth may file an objection or answer to the petition within 21 days after it is served on him or her. The petitioner shall obtain from a law-enforcement agency one complete set of the petitioner's fingerprints and shall provide that agency with a copy of the petition for expungement. The law enforcement agency shall submit the set of fingerprints to the Central Criminal Records Exchange (CCRE) with a copy of the petition for expungement attached. The CCRE shall forward under seal to the court a copy of the petitioner's criminal history, a copy of the source documents that resulted in the CCRE entry that the petitioner wishes to expunge, and the set of fingerprints. Upon completion of the hearing, the court shall return the fingerprint card to the petitioner. Va. Code Ann. § 63.2-1601.1(D).

## Arrest and Conviction Records as a Barrier to Employment

the time of conviction a felony conviction if committed by an adult within or outside the Commonwealth. *See* Va. Code Ann § 63.2-1719.

## **Expungement & Sealing**

### **Expunging Adult Records**

As for adult records, any individual charged with a crime and (a) acquitted; (b) granted a *nolle prosequi* (the prosecutor dismissed the charges before trial or the individual had his or her charge otherwise dismissed); or (c) granted an absolute pardon, may have his or her record expunged. Va. Code Ann § 19.2-392.2(A).

To expunge a record, the worker must file a petition “setting forth the relevant facts and requesting the police records and the court records relating to the charge.” Va. Code Ann. §19.2-392.2. The petition must be filed in the court that disposed of the charge, with a copy of the arrest warrant or indictment if possible. Include the date of arrest, date of disposition, the specific charge(s) to be expunged, the name of the arresting agency, and the petitioner’s full name and date of birth. The petitioner must also submit a set of rolled fingerprints to the agency (court or law enforcement agency).

A copy must be provided to the Commonwealth’s Attorney for that county or city. The Commonwealth’s Attorney has 21 days to respond. The court will then conduct a hearing on the matter. Va. Code Ann. §19.2-392.2(D).

### **Expunging Juvenile Records**

A juvenile record may be expunged (1) when an individual reaches the age of 19, and (2) five years have elapsed since the date of the last hearing in any case of the juvenile. Va. Code Ann. § 16.1-306(A). On Jan. 2 of each year, the Court destroys its files, papers, and records in connection with juveniles whose records have been previously found to be expungeable. *Id.* However, if any of those crimes would have been a felony if committed by an adult, the entire record will be preserved indefinitely. *Id.* Serious traffic violations are preserved until the Jan. 2 following the individual’s 29th birthday. *Id.*

### **Juvenile Dispositions are not “Convictions”**

Most employment applications ask about convictions. Virginia law specifically states that juvenile dispositions, including those relating to delinquency, are not convictions, and may not impose any civil disability usually associated with convictions. *See* Va. Code Ann. §16.1-308. In addition, no juvenile dispositions may be used to disqualify someone for employment by a state or local agency. *Id.*

### **Confidentiality of Records**

## Arrest and Conviction Records as a Barrier to Employment

Juvenile records are confidential and may not be released to an employer. *See* Va. Code Ann. §16.1-301, 305 (A)(2001). These same restrictions apply to juvenile fingerprint records. *Id.* at §16.1-299 (2001).

There are two employment related exceptions to this rule. First, if a juvenile is charged with delinquency in connection with an offense that would be a felony if committed by an adult, all records of the proceedings, regardless of the outcome, are public. Va. Code Ann. §16.1-301, 305(B)(1). Second, employers providing care to children, the elderly, and the disabled may obtain juvenile records relating to an extensive list of serious offenses laid out in Va. Code Ann. §19.2-392.02, regardless of outcome.

## **Contact Numbers for D.C., Maryland, and Virginia**

- FBI:
  - Washington, D.C., Field Office: 202-278-2000
  - Baltimore, Md., Field Office: 410-265-8080
  - Richmond, Va., Field Office: 804-261-1044
  - Norfolk, Va., Field Office: 757-455-0100
- U.S. Pardon Attorney: 202-616-6070
- Metropolitan Police Department Records Division: 202-727-4245; 202-715-7539
- D.C. Superior Court, Criminal Division: 202-879-1373
- District Court for D.C. Clerk's office: 202-354-3120
- D.C. Public Defender Service: 202-628-1200
- D.C. Public Defender Service Community Re-entry Program, 202-824-2801; 1-800-341-2582, Ext. 2835; reentry@pds.DC.org
- Montgomery County, Md., Circuit Court, Clerk's Office: 240-777-9400
- Montgomery County, Md., District Court Criminal Division: 301-563-8800; 301-563-8800
- Montgomery County, Md., Public Defender: 301-563-8900; Rockville Office: 301-563-8900; Silver Spring Office: 301-563-8701
- Prince George's County, Md., Circuit Court Records Management: 301-952-5214; Clerk of the Court: 301-952-3768; Manager, Supervised Records Management Division: 301-952-3318
- Prince George's County, Md., Circuit Court, Criminal Division 301-952-3344
- Prince George's County, Md., District Court Information line: 301-298-4200 (Hyattsville), 301-298-4000 (Upper Marlboro)
- Prince George's County, Md., Public Defender: 301-952-2159 (Main Office); 301-952-9078 (Upper Marlboro); 301-699-2760 (Hyattsville)
- Arlington County, Circuit Court, Criminal Division: 703-228-4399
- Arlington County, General District Court: 703-228-7900
- Arlington County Public Defender: 703-875-1111
- Fairfax County, Circuit Court Services, Criminal Division: 703-246-3305, TTY 711



## Arrest and Conviction Records as a Barrier to Employment

- Fairfax County Public Defender: 703-934-5600
- City of Alexandria, Circuit Court: 703-838-4044
- City of Alexandria, General District Court, Criminal Division: 703-838-4030
- City of Alexandria Public Defender: (703) 746-4477

# **EMPLOYMENT** **LAW STATUTES** **OF LIMITATIONS** **REFERENCE**

## **ORGANIZED BY NAME OF LAW**

<b>LAW</b>	<b>JURIS-DICTION</b>	<b>SOL</b>	<b>CITE</b>
ADA (federal)	All	300 days	42 U.S.C. §12117
ADEA (federal)	All	300 days	29 U.S.C. § 626
Breach of contract (including failure to pay wages)	D.C.	3 years 12 years if “under seal”	D.C. Code § 12-301
Breach of contract (including failure to pay wages)	MD	3 years 12 years if “under seal”	Md. Code Ann., Cts. & Jud. Proc. §§ 5-101, 5-102
Breach of contract (including failure to pay wages)	VA	3 years (unwritten or implied) 5 years (signed contract)	Va. Code Ann. § 8.01-246
Discrimination – 42 U.S.C. § 1981 (federal)	DC and MD	3 years (failure to hire claims) 4 years (all other)	Gen'l statute of limitations 28 U.S.C. 1658
Discrimination – 42 U.S.C. § 1981 (federal)	VA	2 years (failure to hire claims) 4 years (all other)	Gen'l statute of limitations 28 U.S.C. 1658
Discrimination - 42 U.S.C. §1983 (federal)	DC and MD	3 years	Gen'l statute of limitations for jurisdiction sued in applies
Discrimination - 42 U.S.C. §1983 (federal)	VA	2 years	Gen'l statute of limitations for jurisdiction sued in applies
Discrimination - D.C. Human Rights Act (D.C. Gov't)	D.C. Gov't Workers	180 days	4 D.C.M.R. § 105.1
Discrimination - D.C. Human Rights Act (Private Employees)	D.C.	1 year	D.C. Code §§ 2-1403.04, 2-1403.16
Discrimination - IRCA (National Origin Discrimination) (federal)	All	180 days	8 U.S.C. §1324(d)(3)
Discrimination – MD Human Rights Act	MD	300 days	Md. Code Ann., Art. §20-1004(c)

## Employment Law Statutes of Limitations

Discrimination - Rehabilitation Act (disability)	Federal workers	45 calendar days	29 C.F.R. Part 1614.105, 1614.106
Discrimination - Title VII (federal)	All	300 days	42 U.S.C. §2000e-5
Discrimination - Title VII (federal)	WMATA employees	180 days	42 U.S.C. §2000e-5
Discrimination – All EEO	Federal workers	45 days to EEO Counselor	20 C.F.R. § 1614.105
Discrimination - VA Human Rights Act	VA	180 days	VA. Code Ann. § 2.2-2636
Discrimination - Virginians with Disabilities Act	VA	180 days	VA. Code Ann. §51.5-46(B)
Equal Pay Act (federal)	All	2 years (non-willful) 3 years (willful)	29 U.S.C. § 216; 29 U.S.C. §255
FMLA	D.C.	1 year	D.C. Code § 32-509
FMLA	All	2 years (not willful) 3 years (willful)	29 U.S.C. § 2617
OSHA	D.C.	60 days	D.C. Code §36-1216
OSHA (federal)	All	30 days	29 C.F.R. § 1977.15(d) (1991)
OSHA	MD	6 months Retaliation - 30 days	Md. Code Ann., Lab. & Empl. §5-604(c)(2)
Tort (including wrongful discharge)	D.C.	1 year (libel, slander, assault, battery) 3 years	D.C. Code § 12-301
Tort (including wrongful discharge)	MD	1 year (assault or defamation) 3 years (most all other)	Md. Code Ann., Cts. & Jud. Proc. § 5-105; § 5-101
Tort (including wrongful discharge)	VA	2 years (injury to person) 5 years (injury to property)	Va. Code Ann. § 8.01-243
Minimum Wage & Overtime	D.C.	3 years	D.C. Code § 32-1308
Minimum Wage & Overtime (federal)	All	2 years 3 years (willful)	29 U.S.C. §§ 216, 255
Minimum Wage & Overtime	MD	3 years	Md. Code, Cts. & Jud. Proc. § 5-101 (catch-all provision)
Wage & Hour (D.C. Govt)	D.C. gov't workers	Follow grievance procedures in collective bargaining agreement. If non-union, check w/ Agency Personnel Office.	
Worker's Compensation	Federal workers	3 years; if not filed within 3 years, compensation is still allowed if notice of injury was given within 30 days	20 C.F.R. § 10.100(b)(1)
Worker's Compensation	MD	10 days to notify Death - 30 days 2 years to file claim	MD Code Ann., Lab. & Empl. § 9-704
Worker's Compensation	VA	60 days to notify 2 years to file claim	Code of VA §§ 65.2-600 - 601
Worker's Compensation (D.C. government employees)	D.C. gov't workers	30 days to notify 3 years to file claim	D.C. Code §§ 1-623.19 - 22

## Employment Law Statutes of Limitations

Worker's Compensation (private)	D.C.	30 days to notify 1 year to file claim	D.C. Code §§ 32-1513, 1514 7 DCMR § 206
Wrongful Termination Suspensions of more than 15 days, Demotions, Loss in Pay or Reduction in Force (RIF)	Federal workers	7 days to answer agency action; 30 days to appeal to MSPB; if worker chooses to use collective bargaining agreement, then follow deadlines in collective bargaining agreement.	5 U.S.C. §§ 7530, 1201.22
Wrongful Termination, Suspensions of more than 15 days, Demotions, Loss in Pay or Reduction in Force (RIF)	D.C. gov't workers	30 days	D.C. Code §1-606.03

# **D.C.** **EMPLOYMENT** **LAW REFERRALS**

## **General Help**

Washington Lawyers' Committee, Workers' Rights Clinic ..... (202) 319-1000, ext. 118  
D.C. Bar Legal Help Line.....(202) 626-3499  
    *press 1 for English, then 5, then 1, then 3 for employment*  
    *marque 2 para Español, entonces 5, entonces 1, entonces 3 para empleo*  
Bar Association of D.C. Lawyer Referral, M-F, 9 a.m. to 5 p.m.  
    *\$40 for a 30 minute consultation*.....202-223-6600  
D.C. Government Main Number..... 311  
A Better Balance ..... 1-833-633-3222  
D.C. Department of Employment Services (DOES) Main Number .....(202) 724-7000  
    *4058 Minnesota Ave., NE.*  
    *Washington, D.C. 20019*  
Rising for Justice..... (202) 638-4798  
Equal Rights Advocates Advice Line  
    *does not operate during all hours, but callers can leave a message* 1-(800) 839-4372  
Internet ..... [www.washlaw.org](http://www.washlaw.org), [www.lawhelp.org](http://www.lawhelp.org), or [www.mwela.org](http://www.mwela.org)  
Legal Aid Society ..... (202) 628-1161  
    *NW: 1331 H Street NW Suite 350;*  
    *SW: 900 Delaware Ave., SW;*  
    *SE: 2041 Martin Luther King, Jr., Ave., SE Suite LL-1;*  
Legal Counsel for the Elderly..... 202-434-2120  
Neighborhood Legal Services.....202-832-6577  
D.C. Superior Court Small Claims Court Resource Center  
    *D.C. Superior Court*  
    *Building B, Rm. 208*  
    *510 4th Street, N.W.*  
    *Washington, D.C. 20001*  
    *Hours: Thursdays 9:15 a.m. – 12 p.m.*  
Washington Legal Clinic for the Homeless..... (202) 328-5500

## **Civil Rights Organizations**

Washington Lawyers Committee for Civil Rights

## D.C. Employment Law Referrals

English .....(202) 319-1000  
Spanish .....(202) 319-1000 x8001  
ACLU of DC .....(202) 457-0800

### **Disability Accommodation**

*See Discrimination Offices Below.*

Job Accommodation Network (*Suggested Accommodations*) ..... 1-(800) 526-7234;  
..... TTY : (877) 781-9403

### **Discrimination - Race, Sex, Religion, Disability etc.**

EEOC, 131 M St. NE, Suite 4NW02F ..... 1-(800) 669-4000  
Federal Employees, EEOC ..... 202-921-2544  
D.C. Office of Human Rights.....(202) 727-4559  
441 4th St. NW, Suite 570N  
Washington, D.C. 20001  
Office of Special Counsel, Immigration-Related Unfair Employment Practices,  
U.S. Department of Justice ..... 1-(800) 255-7688  
950 Pennsylvania Avenue, NW  
Washington, D.C. 20530 <http://www.justice.gov/crt/oscsec.php>

### **Family and Medical Leave**

U.S. Department of Labor, Wage and Hour, Baltimore (*D.C. claims*) .....(410) 962-6211  
*General Information Number* ..... 1-866-4US-WAGE  
D.C. Office of Human Rights.....(202) 727-4559  
General Questions, U.S. Dept. of Labor.....(202) 693-0066; 1-866-487-2365  
U.S. Department of Labor Women's Bureau, *M-F 11.00-4.30*..... 1-(800) 827-5335  
National Partnership for Women & Families .....(202) 986-2600  
First Shift Justice Project ..... (202)-644-9043

### **Federal (U.S. Government) Employees**

OPM Oversight Division for Problems with  
Federal Human Resource Departments.....(202) 606-1800  
Retirement information - *Spanish & English* ..... 1-(888) 767-6738

### **Immigration Services**

Ayuda ..... (202) 387-4848  
Capital Area Immigrant Rights Coalition (CAIR) ..... (202) 331-3320  
Catholic Charities Immigration Legal Services- D.C. .... 1618 Monroe St. (202) 939-2420  
..... G St. (202) 772-4354  
Center for Applied Legal Studies – Georgetown ..... (202) 662-9565  
Central American Resource Center (CARECEN) ..... (202) 328-9799  
George Washington University Immigration Clinic..... (202) 994-7463  
Human Rights First..... (202) 547-5692  
International Human Rights Law Clinic (AU WCL) ..... (202) 274-4147  
*Press 7 for Clinical Program*

## D.C. Employment Law Referrals

Justice for Our Neighbors BWC..... (703) 766-0442  
Washington Lawyers' Committee for Civil Rights and Urban Affairs..... (202) 319-1000  
Amara Legal Services (services for victims of sex trafficking) .....(240) 257-6492

### **Safety & Health**

OSHA Imminent Dangers ..... 1-(800) 321-OSHA  
Federal OSHA, Health Standards Office .....(202) 693-1950  
Federal OSHA, Washington Area/Baltimore Office .....(410) 865-2055  
D.C. Occupational Safety & Health .....(202) 671-1800  
    *D.C. government employees contact Office of Risk Management* .....(202) 727-8600  
National Institute for Occupational Safety & Health Info Line ..... 1- (800) CDC-INFO

### **Taxes**

Earned Income Tax Credit & other federal tax questions..... 1- (800) 829-1040  
No W-2 by Valentine's Day ..... Call or write the employer  
D.C. Taxes, *941 N. Capitol St.* .....(202) 727-4829

### **Wage & Hour, Overtime, Unpaid Wages**

D.C. Dept. of Employment Services, Office of Wage-Hour .....(202) 671-1880  
    *4058 Minnesota Ave., NE*  
    *Washington, D.C. 20019*  
U.S. Department of Labor, Wage & Hour Division, General Info ..... 1-(866) 487-9243  
U.S. Department of Labor, Wage & Hour Division, Field Office .....(410) 962-6211  
    *Baltimore District Office*  
    *2 Hopkins Plaza, Room 601*  
    *Baltimore, MD 21201*  
Federal Employees ..... file grievance, contact Payroll or OPM  
    OPM Oversight Division for Pay & Leave .....(202) 606-2858  
    OPM Oversight Division for Overtime Classification .....(202) 606-1800  
D.C. Employees..... file grievance or contact Payroll

### **Unemployment Compensation**

Free Help with Appeals, AFL-CIO Claimant Advocacy Program..... (202) 974-8159 (or 49)  
    *888 16th St. NW, Suite 520, 20006 (no walk-ins - call for an appointment)*  
D.C. Dept. of Employment Services, Unemployment Main.....(202) 724-7000  
    *Check Inquiries and other information*  
Local Unemployment Offices *call for an appointment*  
    American Job Center – Northwest  
    *Frank D. Reeves Municipal Center*  
    *2000 14th Street, NW, 3rd Floor*..... (202) 442-4577  
    American Job Center – Northeast  
    *CCDC - Bertie Backus Campus*  
    *5171 South Dakota Avenue, N.E., 2nd Floor* .....(202) 576-3092  
    American Job Center – Southeast  
    *3720 Martin Luther King, Jr. Avenue, S.E.* ..... (202) 741-7747

## D.C. Employment Law Referrals

Interstate Claims (work in Virginia or Maryland).....(202) 724-7000  
Office of Administrative Hearings .....(202) 442-9091  
*441 4th St. NW, Suite 450*  
*Washington, D.C. 20001*

### **Unions**

AFL-CIO Metropolitan Washington Council .....(202) 974-8150  
National Labor Relations Board, Washington Office.....(202) 208-3000  
*complaints about unfair labor practices (private companies and the*  
*U.S. Postal Service in D.C., Maryland and Virginia)*  
Public Employee Relations Board (*D.C. government unions*) .....(202) 727-1822  
Federal Labor Relations Authority (*Federal government unions*).....(202) 218-7770

### **Welfare to Work**

D.C. Department of Human Services.....(202) 671-4200  
*1 for English, 2 para Español*  
Literacy Helpline (*information on GED/adult literacy*) .....(202) 727-2431; (202) 727-1616

### **Whistleblowers**

Government Accountability Project.....(202) 457-0034  
*1612 K St. NW #1100*  
*Washington, D.C. 20006*  
National Whistleblower Center .....(202) 342-1903  
*Legal Defense and Education Fund P.O. Box 25090*  
*Washington, D.C. 20027*  
*Facsimile (202) 342-1904*

### **Workers Compensation (On the job injury)**

D.C. Office of Workers Compensation (private sector employees) .....(202) 671-1000  
*4058 Minnesota Ave., NE 3<sup>rd</sup> Floor*  
*Washington, D.C. 20019*  
Dept. of Employment Servs. Office of Hearings & Adjudication .....(202) 671-2233  
*4058 Minnesota Ave., NE Suite 4400*  
*Washington, D.C. 20019*  
Dept. of Employment Servs. Compensation Review Board .....(202) 671-1394  
*4058 Minnesota Ave., NE 4th Floor*  
*Washington, D.C. 20019*  
U.S. Office of Workers' Compensation, National Information ..... 1-(866) 692-7487  
D.C. Office of Risk Management (Dis. Comp. Program for D.C. Govt. emp.)...(202) 727-8600  
*D.C. Office of Risk Management*  
*441 4<sup>th</sup> Street, NW, Suite 800 South*  
*Washington, D.C. 20001*

### **Resources for Job Seekers**

One City-One Hire Locations



## D.C. Employment Law Referrals

American Job Center – Northwest  
*Frank D. Reeves Municipal Center*  
*2000 14th Street, NW, 3rd Floor*..... (202) 442-4577  
American Job Center – Northeast  
*CCD.C. - Bertie Backus Campus*  
*5171 South Dakota Avenue, N.E., 2nd Floor* .....(202) 576-3092  
American Job Center – Southeast  
*3720 Martin Luther King, Jr. Avenue, S.E.* .....(202) 741-7747  
Jobs Have Priority (Jobs for Homeless People) .....(202) 594-3574  
Jubilee Jobs .....(202) 667-8970  
.....(202) 758-3710  
Streetwise Partners.....(202) 454-2022

# **MARYLAND**

# **EMPLOYMENT**

# **LAW REFERRALS**

## **General Help**

Legal Aid Bureau, Metropolitan Maryland Office

*8401 Corporate Drive #200*

*North Englewood, MD 20785*

*accepts unemployment and wage-hour cases, call T/Th 2-4 p.m. .... (301) 560-2100*

*..... fax (301) 927-4258*

*9to5 – Job Survival Hotline, Mondays from 5 to 7 p.m. EST and Wednesdays from 2-4 p.m. EST*

*..... 1-(800) 522-0925*

District Court Self-Help Resource Center (Prince George's County District Court)

District Court Bourne Wing, Room 069B

14735 Main Street

Upper Marlboro, MD 20772

(assistance with filing small claims of \$5,000 or less)

*..... (410) 260-1392*

Pro Bono (Montgomery County).....(301) 424-7651

Bar Association of Montgomery County Lawyer Referral Service.....(301) 279-9100

Prince George's County Bar Association Lawyer Referral Service .....(301) 952-1440

**Clients who consult a lawyer via a referral service are usually charged**

**\$30-\$40 for the first half-hour. They do not have Spanish services.**

Community Legal Services.....(301) 864-8353

American University Washington College of Law – International Human Rights Clinic

*4801 Massachusetts Avenue, NW*

*Washington, D.C. 20016..... (202) 274-4147*

Internet .....[www.washlaw.org](http://www.washlaw.org), [www.lawhelp.org](http://www.lawhelp.org), or [www.mwela.org](http://www.mwela.org)

## Maryland Employment Law Referrals

### **Civil Rights Organizations**

Washington Lawyers Committee for Civil Rights .....(202) 319-1000  
ACLU of DC.....(202) 457-0800

### **Disability Accommodation**

*See Discrimination Offices Below.*

Job Accommodation Network (*Suggested Accommodations*) ..... 1-(800) 526-7234  
ADA Information ..... 1-(800) ADA-WORK

### **Discrimination**

EEOC, Baltimore ..... 1-(800) 669-4000  
Maryland Commission on Human Relations .....(410) 767-8600  
*From within Maryland* .....(800) 637-6247  
Montgomery County Office of Human Rights.....(240) 777-8450  
Prince George's County Human Relations Commission.....(301) 883-6170

### **Family and Medical Leave**

U.S. Department of Labor, Wage & Hour Division (*complaint*) .....(301) 436-6767  
General Questions, U.S. Dept. of Labor.....1-866-487-9243  
U.S. Department of Labor Women's Bureau, *M-F 11:00-4:30*..... 1-(800) 827-5335  
.....(202) 693-6710  
National Partnership for Women & Families .....(202) 986-2600

### **Federal (U.S. Government) Employees**

OPM Oversight Division for Problems with  
Federal Human Resource Departments.....(202) 606-1800  
Retirement information..... 1-(888) 767-0500

### **Immigrant Services**

Boat People SOS Service Center ..... (703) 538-2190  
Catholic Charities Immigration Legal Services –Baltimore.....(410) 347-7970  
Maryland Vietnamese Mutual Association..... (301) 588-6862  
Multi-Ethnic Domestic Violence Project..... (410) 396-3294  
Maryland Coalition Against Sexual Assault- Sexual Assault Legal Institute...(301) 565-2277  
Spanish Catholic Center ..... (301) 417-9113  
Amara Legal Services (services for victims of sex trafficking).....(240) 257-6492

### **Safety & Health**

U.S. OSHA, Imminent Dangers ..... 1-(800) 321-OSHA  
U.S. OSHA, Linthicum Office, *1099 Winterson Rd., Suite 140*.....(410) 865-2055/6  
Maryland Occupational Safety & Health (MOSH) .....(410) 527-4499  
Free Legal Assistance  
CASA de Maryland, Legal Office, *primarily for day laborers,*  
*domestic workers and landscape workers, Spanish services available.*.....(301) 431-4185

## Maryland Employment Law Referrals

### **Taxes**

Earned Income Tax Credit & other federal tax questions 1-(800) 829-1040  
No W-2 by Valentine's Day ..... Call or write the employer  
TESS Center .....(301) 565-7675

### **Unemployment**

To apply, *must call from within Maryland*..... 1-(800) 827-4839  
Montgomery County Office .....(301) 313-8000  
Prince Georges' County Office .....(301) 313-8000  
or toll free (*calling from Maryland but outside of the Baltimore area*)... 1-(800) 827-4839  
Free Legal Assistance  
Legal Aid Bureau, Metropolitan Maryland Office  
6811 Kenilworth Ave., Suite 500  
Riverdale, MD 20737 .....(301) 560-2100

### **Unions**

AFL-CIO Metropolitan Washington Council .....(202) 974-8150  
National Labor Relations Board, Washington Office.....(202) 208-3000  
*complaints about unfair labor practices (private companies and the U.S.  
Postal Service in D.C., MD and VA)*

### **Wage & Hour**

Maryland Labor & Industry.....(410) 767-2992  
For Spanish.....(410) 527-2069  
  
U.S. Department of Labor, Wage & Hour Division, General Info..... 1-(866) 487-9243  
  
U.S. Department of Labor, Wage & Hour Division, Field Office .....(410) 962-6211  
*Wage and Hour Division  
2 Hopkins Plaza, Room 601  
Baltimore, MD 21201*  
Federal Employees ..... file grievance or contact Payroll  
OPM Oversight Division for Pay & Leave.....(202) 606-2858  
OPM Oversight Division for Overtime Classification .....(202) 606-1800  
Legal Aid Bureau, Metropolitan Maryland Office  
6811 Kenilworth Ave., Suite 500  
Riverdale, MD 20737 .....(301) 927-6800

### **Whistleblowers**

Government Accountability Project.....(202) 457-0034  
*1612 K St. NW #1100  
Washington, D.C. 20006*  
National Whistleblower Center .....(202) 342-1903  
*Legal Defense and Education Fund*

Maryland Employment Law Referrals

*P.O. Box 25090  
Washington, D.C. 20027  
(202) 342-1904 (Fax)*

**Workers Compensation (on the job injury)**

Maryland Workers' Compensation Commission  
10 East Baltimore St, Baltimore, MD 21202-1641 .....(410) 864-5100  
in Maryland ..... 1-(800) 492-0479  
fax.....(410) 864-5101  
U.S. Office of Workers' Compensation, National Information ..... 1-(866) 692-7487

# **VIRGINIA**

# **EMPLOYMENT**

# **LAW REFERRALS**

## **General Help**

9to5 – Job Survival Hotline, Mondays from 5 to 7 p.m. EST and Wednesdays from 2-4 p.m.

EST ..... 1-(800) 522-0925

Legal Services of Northern Virginia, *must be low-income* ..... (703) 778-6800

Legal Aid Justice Center<sup>172</sup>..... (703) 778-3450

*Immigrant laborers' employment law project of Northern Virginia. They can help  
undocumented and documented workers. Wage cases only.*

Fairfax Bar Association Lawyer Referral Service ..... (703) 246-3780

or ..... 1-(800) 552-7977

Alexandria Lawyer Referral Service ..... (703) 548-1106

Arlington Bar Association Lawyer Referral Service ..... (703) 228-3390

*Clients who consult with a lawyer via a lawyer referral service are usually charged  
\$30-\$50 for the first half-hour. They do not speak Spanish in the office, but may be able  
to refer clients to Spanish-speaking lawyers.*

Internet ..... [www.washlaw.org](http://www.washlaw.org), [www.lawhelp.org](http://www.lawhelp.org), or [www.mwela.org](http://www.mwela.org)

## **Civil Rights Organizations**

Washington Lawyers Committee for Civil Rights & Urban Affairs ..... (202) 319-1000

ACLU of DC ..... (202) 457-0800

## **Disability Accommodation**

*See Discrimination Offices Below.*

Job Accommodation Network (*Suggested Accommodations*) ..... 1-(800) 526-7234

ADA Information ..... 1-(800) ADA-WORK

## **Discrimination**

EEOC (file Northern VA claims with Washington Office)

131 M Street NE, Fourth Floor, Suite 4NW02F ..... 1-(800) 669-4000

Human Rights Council Virginia (*statewide*) ..... (804) 225-2292

Alexandria, VA Human Rights ..... (703) 746-3140

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<sup>172</sup> This telephone number is for the Falls Church branch of LAJC. There are other branches in Charlottesville, Petersburg, and Richmond. For further information on these centers please visit <http://www.justice4all.org/contact/>

## Virginia Employment Law Referrals

Arlington, VA Human Rights .....(703) 228-3929  
Fairfax County, VA Human Rights and Equity Programs .....(703) 324-2953

### **Family and Medical Leave**

U.S. Department of Labor .....(703) 235-1182  
General Questions, U.S. Dept. of Labor.....(202) 693-0066  
U.S. Department of Labor Women's Bureau, *M-F 11.00-4.30* 1-(800) 827-5335  
.....(202)-693-6710  
National Partnership for Women & Families .....(202) 986-2600

### **Federal (U.S. Government) Employees**

OPM Oversight Division for Problems with  
Federal Human Resource Departments.....(202) 606-1800  
Retirement information..... 1-(888) 767-6738

### **Immigrant Services**

Boat People SOS Service Center ..... (703) 538-2190  
BPSOS- Domestic Violence and Trafficking Program..... (703) 538-2190  
Catholic Charities – Hogar Hispano ..... (703) 534-9805  
Just Neighbors ..... (703) 979-1240  
Lutheran Social Services of the National Capital Area..... (202) 723-3000  
Progreso Hispano..... (703) 799-8830  
Tahirih Justice Center..... (571) 282-6161

### **Safety & Health**

OSHA Imminent Dangers ..... 1-(800) 321-OSHA  
Federal OSHA, Norfolk Office .....(757) 441-3820  
*200 Granby Street, Room 614*  
*Norfolk, VA 23510*  
Virginia Dept of Labor & Industry OSH .....(703) 392-0900  
Virginia OSH Health Compliance.....(804) 786-0574  
Virginia OSH Safety Compliance.....(804) 371-3104

### **Taxes**

Earned Income Tax Credit & other federal tax questions ..... 1-(800) 829-1040  
No W-2 by Valentine's Day ..... Call or write the employer

### **Unemployment Compensation**

Virginia Employment Commission (*to apply*)  
*13370 Minnieville Road*  
*Woodbridge 22192*.....(703) 897-0407  
Legal Services of Northern Virginia, *help with appeals* .....(703) 788- 6800

### **Unions**

AFL-CIO Metropolitan Washington Council .....(202) 974-8150  
National Labor Relations Board, Washington Office.....(202) 208-3000

## Virginia Employment Law Referrals

*complaints about unfair labor practices (private companies and the U.S.  
Postal Service in D.C., MD and VA)*

### **Wage & Hour**

U.S. Department of Labor, Northern Virginia.....(703) 235-1182  
Virginia Department of Labor & Industry .....(703) 392-0900 x 4  
    *10515 Battleview Parkway*  
    *Manassas, VA 20109*  
Federal Employees -- *file grievance or contact Payroll*  
OPM Oversight Division for Pay & Leave.....(202) 606-2858  
    OPM Oversight Division for Overtime Classification .....(202) 606-1800  
Legal Aid Justice Center  
    *6400 Arlington Blvd., Suite 600*  
    *Falls Church, VA 22042*.....(703) 778-3450

### **Whistleblowers**

Government Accountability Project.....(202) 457-0034  
    *1612 K St. NW #400*  
    *Washington, .DC. 20006*  
National Whistleblower Center .....(202) 342-1903  
    *Legal Defense and Education Fund*  
    *P.O. Box 25090*  
    *Washington, D.C. 20027*  
    *(202) 342-1904 (Fax)*

### **Workers' Compensation**

Virginia Workers' Compensation Commission, Main Office .....(877) 664-2566  
U.S. Office of Workers' Compensation (Fed Govt Employees), Main .....(866) 692-7487